11-2008

Standardization and Pluralism in Property Law

Nestor M. Davidson

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Property Law and Real Estate Commons

Recommended Citation

Available at: https://scholarship.law.vanderbilt.edu/vlr/vol61/iss6/1

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.
Standardization and Pluralism in Property Law

Nestor M. Davidson*

INTRODUCTION ........................................................................................................ 1598
I. STANDARDIZATION AND THE FORMS OF PROPERTY ............. 1603
   A. The Numerus Clausus Principle ..................... 1604
      1. Property in Standard Forms ................. 1604
      2. Dynamism in Standardization .......... 1610
         a. Dynamism in the List ............... 1610
         b. Dynamism in Mandatory Content ... 1612
         c. Dynamism in Private Latitude .... 1615
      3. The Institutions of Standardization .... 1616
   B. The Problem of Standardization .................. 1618
      1. The Many Lives of Property ......... 1619
      2. Specialization and Efficiency ........ 1622
      3. Standardization, Identity, and Autonomy ... 1622
II. THE CONUNDRUM CONSIDERED .................... 1624
   A. Structural Efficiency Accounts ........ 1624

### INTRODUCTION

At the heart of contemporary property theory stands an intriguing puzzle. Unlike the relatively unconstrained freedom that contract law provides for private ordering, property law recognizes only a limited and standard list of mandatory forms.¹ This standardization—known as the *numerus clausus* from the civil law concept that the “number is closed”²—poses a basic conundrum: what can explain a persistent feature of the law that seems, at first glance,

---

1. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *Yale L.J.* 1, 23 (2000) (“[t]he *numerus clausus* exerts a powerful hold on the system of property rights . . . [and] from the perspective of the practicing lawyer, the entire system presents the picture of a fixed menu of options from which deviations will not be permitted.”). As discussed below, see infra Part I.A.1, the *numerus clausus* principle is embodied in contemporary property law in the palette of estates in land, servitudes, security interests in property, and in intellectual property, as well as in emerging forms of property.

so clearly to restrict the autonomy and efficiency gains conventionally associated with private property?

This puzzle has garnered significant scholarly attention in recent years. Some scholars have argued that standardization, although paternalistic, in fact enhances efficiency. These accounts emphasize the potential of standardization to facilitate alienation, scale property interests appropriately for productive use, and reduce information-cost externalities. Another group of scholars has argued that the *numerus clausus* embodies inherent categories of meaning. Under these perspectives, the *numerus clausus* reflects the normative coherence of existing social patterns, the objective well-being of interest holders, or underlying democratic values.

Although these attempts to explain standardization in property law offer significant insights, they suffer from two interlocking limitations. Efficiency perspectives focus on the meta-structure of standardization, largely ignoring what the rich and interesting content of the individual forms reveals about the phenomenon. Conversely, approaches to standardization that focus on content have much to say about that substance, but essentially shunt aside persistent structural aspects of the phenomenon. Any comprehensive theory must thus account for what these attempts to explain

---


4. See infra Part II.A.

5. See infra Part II.B.
standardization leave out—that structure and content together are important to unraveling the problem of the *numerus clausus*.

To begin with structure, standardization is a feature of property law that transcends context. Versions of the *numerus clausus* are found in Roman law and recur throughout the history of feudal and post-feudal English common law.\(^6\) Likewise, some form of a standard list appears in disparate modern civil law and common law systems throughout the world.\(^7\) Belying any account of the phenomenon grounded in specific patterns of social relations or normative coherence, this transcendence suggests that there must be some overriding structural reason why property interests almost always coalesce around forms defined by the state.

Turning next to content, although standardization is a stable feature of property law, the particular list of forms and their internal substance have always been dynamic. Legal systems add and prune forms, tinkering with what the forms require while balancing mandatory rules with permissible private specialization. This management of standardization yields wonderful variety in the content of the list and in the substance of the forms at any given time and legal culture. Existing accounts of the *numerus clausus* either ignore this dynamic aspect or treat the content of the forms primarily as the artifact of private ordering.

These core features—foundationalism and dynamism—bring to the fore a particular species of pluralism evident in the forms. Pluralism in property theory eschews singular narratives in understanding property law, focusing instead on the varied and often competing normative and instrumental concerns embodied in the institution.\(^8\) Pluralism recognizes property in all of its variety: as a

---

7. *Id.*
8. As discussed below, pluralism has been deployed in property theory to describe the ways in which property embodies multiple, often conflicting, justifications as well as how property reflects multiple pragmatic priorities. *See infra* Part III.A. Pluralism, of course, arises as a conceptual frame in a variety of contexts beyond these property specific invocations, both inside and outside legal discourse. Legal pluralism, for example, more generally engages with the nature of multiple sources of formal and informal legal norms and sanctions. *See* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1169–79 (2007) (discussing legal pluralism and its growing importance to our modern, globalized society). In political theory, pluralism is identified with a focus on competing social and political forces. *See*, e.g., ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961) (outlining a theory of political pluralism); AVIGAIL I. EISENBERG, *RECONSTRUCTING POLITICAL PLURALISM* 1 (1995) (discussing the “legacy of political pluralism”). Religious pluralism similarly emphasizes the variety and comparative values of multiple faiths. Pluralism arises as a conceptual tool in a variety of other fields, including sociology, ethics, and cultural theory. *See* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 872 (1988) (discussing the concept of legal pluralism).
tool for resource allocation, as a foundation for individual identity, and as a bulwark against the state, among other functions. In property law, these roles and the values they reflect are as often in tension as in harmony. From a pluralist perspective, then, any given form represents the resolution of the competition between the multiple and often clashing ends that property serves.

It may seem counterintuitive to link standardization—a jurispathic force in property law—to pluralism, a perspective that emphasizes the accommodation of conflict and variation. But the myriad crosscurrents and competing norms evident in the *numerus clausus* hold the key to understanding its function. A pluralist account of standardization approaches the *numerus clausus* as a mechanism for structuring the preconditions for ownership. The *numerus clausus* principle is a near-universal feature of property not because standardization necessarily enhances efficiency or because the forms tend to represent coherent categories of meaning. Rather, legal systems standardize property law because regulating the variety of allowable forms provides platforms onto which property law's competing social and political goals can be engrafted onto private ordering. Put another way, standardization is a near-universal feature of property systems because the phenomenon facilitates the use of property law to define, control, and regulate the public aspects of private legal relations with respect to things—the foundational top-down element of property law.10

Recognizing this central regulatory function provides a new way to resolve concerns about autonomy and efficiency that are

---


10. Carol Rose used the bottom-up/top-down framework to describe competing approaches to the relationship between property and the state. Carol Rose, What Government Can Do for Property (and Vice Versa), in THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 210–11 (Nicholas Mercuro & Warren J. Samuels eds., 1999). As Rose pointed out, the distinction between bottom-up and top-down aspects of property reflects the long-standing debate about property as a pre- or post-political institution. Id. at 209–10. This debate has surprising modern salience. See infra Part III.B. Katrina Wyman recently elaborated on classifying theoretical approaches to property law as either bottom-up or top-down in the context of economic explanations for the evolution of property systems. Katrina Miriam Wyman, From Fur to Fish: Reconsidering the Evolution of Private Property, 80 N.Y.U. L. REV. 117, 119–20 (2005). Wyman argued that bottom-up theories of changes in property regimes assume that "demand generates its own supply," while top-down accounts recognize "the political character of the process through which private property typically is established." Id. at 121, 124.
staples of the current debate on the *numerus clausus*. Any given form reduces the range of potential choices the holder of a property interest might make with respect to that property, but the content of the *numerus clausus* represents inevitable tradeoffs between those choices and the effects those choices have on others. Understanding the *numerus clausus* as the mechanism through which legal systems determine the conditions for legal relations to be recognized as property underscores the proposition that property, while amenable to private ordering, is and has always been a public institution in its basic constitution. Accordingly, standardization is only puzzling for visions of property that privilege narrow conceptions of private ordering and underappreciate property's social consequences.

This understanding of standardization, moreover, sheds light on some broader controversies in contemporary property theory. There has been much renewed interest recently, for example, in the institutional and social forces that drive the development of property rights.\(^\text{11}\) Competing stories of the formation of property recapitulate hoary debates about property as a pre- or post-political institution.\(^\text{12}\) Any specific property interest reflects many inputs, including the nature of the resource, the effect on subsequent holders of the resource, and the impact on third parties. Yet highlighting the regulatory function of the *numerus clausus* underscores public aspects of the institution of property. Contract as the realm of private agreement cannot persist without some apparatus for enforcement, but property at a more basic level cannot exist without the state. Appreciating the *numerus clausus* as the common framework through which legal systems define and mediate property interests underscores the post-political aspects of property rights.

Approaching standardization as a regulatory platform also provides a way to reframe an important assumption underlying the current discourse about the relationship between intellectual property and more traditional forms of property.\(^\text{13}\) That assumption, often implicit, is that forms of property in land and chattels are somehow

---

11. *See infra* Part IV.A.


13. *See infra* Part IV.B.
not subject to the same dynamic state definition and control as modern intellectual property. Traditional forms of property in this discourse stand, for better or worse, as a proxy for some realm of private entitlement and natural ordering against which the state role in intellectual property is compared. The regulatory function of the *numerus clausus*, however, underscores that all property is subject to the same ongoing adjustment and balancing that characterizes intellectual property, even though the particular policy goals and tradeoffs vary for any given resource.

Finally, this account of the *numerus clausus* has implications for intractable debates about constitutional limitations on the regulation of property, particularly in the context of regulatory takings. If the structure of property law found in the *numerus clausus* begins as a public institution—not just “off-the-rack entitlements,” but state-defined preconditions of ownership—then the purported tension between private expectation and public control may be overstated. Legal ordering appropriately reflects private expectation, but more as a regulatory choice than as a matter of ineluctable right.

This Article proceeds in four parts. Part I describes the *numerus clausus* principle and the problems that standardization poses to prevailing conceptions of property as a tool of resource allocation and as an expression of individual autonomy and identity. Part II then examines the flurry of recent attempts to explain why standardization persists despite these concerns. These accounts, while illuminating individual aspects of the *numerus clausus*, still leave much about the phenomenon unexplained. Part III accordingly presents a pluralist perspective on the *numerus clausus* grounded in the principle’s underlying regulatory function. This pluralist account of standardization as a regulatory platform better explains both the structural function that standardization plays and the nature of the tradeoffs instantiated in the content of the standard forms. Finally, as explained in Part IV, this account sheds light on larger debates in property theory, ultimately providing a richer understanding of this core phenomenon in property law.

**I. STANDARDIZATION AND THE FORMS OF PROPERTY**

The *numerus clausus* is well recognized as a basic structural element of property law in almost every common law and civil law

---

14. *See infra* Part IV.C.
system. This Part describes the contours of the phenomenon—its historical roots, how it manifests in modern law, and its institutional context—and then explains the challenges that standardization poses to prevailing accounts of the role and function of private property.

A. The Numerus Clausus Principle

1. Property in Standard Forms

To understand the limitations law places on the forms of property, it is necessary to begin with a working definition of property itself, which requires entering territory that remains surprisingly contested. It has become commonplace, even rote, to conceptualize property as a disaggregated set of interpersonal relations. Property at times can appear as an unstable aggregate of individual relations that disintegrates into incoherence at an extreme. The malleability

16. See Merrill & Smith, supra note 1, at 4 (stating that the numerus clausus "appears to be a universal feature of all modern property systems"); Munzer, supra note 3, at 156; Rudden, supra note 3, at 241 ("In all 'non-feudal' systems with which I am familiar (whether earlier, as at Rome, or later), the pattern is (in very general terms) similar: there are less than a dozen sorts of property entitlement."). For a sample of international discussions of the numerus clausus principle in other jurisdictions, see, for example, Brendan Edgeworth, The Numerus Clausus Principle in Contemporary Australian Property Law, 32 MONASH U. L. REV. 387, 387 (2006) (discussing the numerus clausus principle in Australian law); Andrea Fusaro, The Numerus Clausus of Property Rights, in MODERN STUDIES IN PROPERTY LAW 309, 309 (Elizabeth Cooke ed., 2003) (comparing and contrasting the numerus clausus principle in civil and common law systems); Milo, supra note 2, at 593–600 (discussing the numerus clausus principle in German law).

17. See LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 11–15 (2003) (examining a variety of conceptual approaches to the meaning of "property"); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 26 (1988) (stating that "many writers have argued that it is, in fact, impossible to define private property—that the concept itself defies definition").


19. Thomas Grey has argued that property rights have disintegrated to the point that they no longer form a coherent or necessary conceptual category. Thomas C. Grey, The Disintegration of Property, in PROPERTY: NOMOS XXII 69, 82 (J. Roland Pennock & John Chapman eds., 1980). Grey is right that the boundaries of property have been seriously and thoughtfully challenged, but property remains a central and productive conceptual framework in our legal system. See J.E. PENNER, THE IDEA OF PROPERTY IN LAW 2 (1997) (discussing "how vital this idea [property] is to the way we think about the world in moral and legal terms"); Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 YALE L.J. 357, 398 (2001) (arguing that "the refined problems of concern in advanced economies exist at the apex of a pyramid, the base of which consists of the security of property rights"); cf. Emily Sherwin, Two-and Three-Dimensional Property Rights, 29 ARIZ. ST. L.J. 1075, 1075 (1997) (arguing that
of this disaggregated bundle-of-rights image, however, obscures the fact that property—in whatever particular guise—retains an underlying conceptual grounding in the effect that property rights have to those on whom obligations are imposed without consent.20

As a working definition, then, property rights can be characterized by the classic notion of rights in rem, binding or operative on the world as a whole.21 This contrasts with rights in personam, which apply to and bind only specific persons.22 Property can therefore be defined as a set of rights that are hypothetically “good against the world.” 23

At a general level, in turn, the *numerus clausus* principle polices the boundary between property rights and contracts or other obligations predicated on individual consent. Parties may tailor their duties and immunities with respect to some “thing” with great specificity and relatively few constraints as a matter of contract law. Property law, however, generally limits acceptable interests to a prescribed universe of standard bundles.24 These bundles retain great flexibility, but are nonetheless standardized.

although property “is a very difficult idea, and one that is susceptible to several interpretations ... it is not a meaningless word”).


21. This working definition necessarily obscures other equally fundamental approaches to defining “property” in legal theory and economics. See Grey, supra note 19, at 71–72; STEPHEN R. MUNZER, A THEORY OF PROPERTY 16–17 (1990) (discussing “the “popular conception” and “the “sophisticated conception” of property). Definitions of property that attend to one or another specific normative purpose can be set to the side for purposes of this discussion. Cf. Grey, supra note 19, at 71–73 (cataloguing a broad array of “present usages of the term property in law, legal theory, and economics”). Likewise the “layman’s” socialized sense of property as “things” that are normally mine or yours can be set aside. See BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 97–100 (1977) (describing the socialized, middle class, “Layman” definition of property). For purposes of discussing the *numerus clausus*, it is appropriate to begin with the in rem nature of property rights, tempered with the recognition—critical to any discussion of standardization—that any given in rem right is always specialized. See infra note 25.

22. See Merrill & Smith, supra note 19, at 360–66 (discussing in rem and in personam approaches). Thus the key feature of what constitutes property for present purposes is that it binds and has effect on third parties, meaning individuals and entities not subject to consensual agreement.

23. This starting assumption will be explored in greater depth below, see infra Part III.B. For now, it is a useful placeholder.

24. Merrill & Smith, supra note 1, at 4; Rudden, supra note 3, at 241. In this regard, the *numerus clausus* serves a distinctly different function than standardization in contract law. Contract law generally provides default rules where parties have not, or where it is less efficient to have, completed the terms of their agreement. See, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87, 92–93 (1989) (discussing “the sources of contractual incompleteness”). This is true at the structural level of contract law, and it is also an important part of the practical negotiation of contracts. See Robert B. Ahdieh, The Strategy of Boilerplate, 104 MICH. L. REV. 1033, 1036–37 (2006); see also Henry E. Smith, Modularity in Contracts: Boilerplate and Information Flow, 104 MICH. L. REV.
Because these standard forms of property are familiar and well rehearsed in the literature, they warrant only brief review. In broad terms, the forms confer possession, provide non-possessory rights, or grant security interests. Behind this generalization lies important variation, and forms both in their premodern and modern manifestations include some unusual alignments of interests.

In contemporary American law, possessory interests generally include the fee simple, the life estate, and the lease. Possession can be absolute or defeasible. Possession can also be divided concurrently—as with tenancies in common, joint tenancies, tenancies by the entirety, and condominium or cooperative ownership—or divided over time, as with future interests and timeshares.
Depending upon how strictly one defines the "forms" of property, it is also possible to include several other variations on possessory interests. The trust—splitting legal title and beneficial ownership—is a traditional form, perhaps most notable in this context for the fact that while it exists in common law systems, it is generally unknown to Continental civil law. The tenancy in partnership has been surpassed largely by statutory forms, but instances of stable divisions of ownership and control also include common business entities such as corporations and limited liability companies.

Non-possessory interests—servitudes—include licenses, easements, covenants, equitable servitudes, and profits. Although the law of servitudes has undergone significant change in the past half century, these interests still fall into recognizable patterns similar to the estates. Other emerging additions to the list of servitudes are the

31. As discussed below, see infra Part I.A.3, a threshold question in debates about the *numerus clausus* in common law jurisdictions is whether the principle relates only to those restrictions recognized as a matter of judicial self-restraint, as Merrill and Smith have argued. Given that the civil law conception of the *numerus clausus* is explicitly grounded in legislative supremacy, and the historical fact that many forms clearly in the modern "list" were originally legislatively created, it is appropriate to consider forms created by courts and by legislatures in the same conceptual universe.

32. Henry Hansmann & Ugo Mattei, *The Function of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 434-35 (1998); see also Merryman, *supra* note 3, at 224 ("In Italy, as in other European jurisdictions whose private law is based on Roman notions, there is no property institution like our trust ....").

33. Berle and Means notwithstanding, see ADOLPH BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 3-10 (1932), one must be cautious about stretching the concept of standard forms in property law too far. Most scholars would agree that the trust should be included in the modern *numerus clausus*, although whether the trust is a form of property or contract, or some other type of legal entity, is subject to debate. Compare Hansmann & Mattei, *supra* note 32, at 434 (emphasizing the non-contractual aspects of trust law), with John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 628 (1995) (arguing that the trust is a "prevailing contractarian institution"). The historical form of partnership is likewise a relatively uncontroversial inhabitant of the taxonomy. Modern entities, however, are harder to characterize as a form of tenure, infused as they are with the enabling approach of contract. Still, there are aspects of entity ownership and the ownership of entities that are undeniably grounded in the law of property as used in this context, particularly in binding strangers. Cf. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000) ("[T]he essential role of all forms of organizational law is to provide for the creation of a pattern of creditors' rights—a form of 'asset partitioning'—that could not practically be established otherwise.").


35. *Id.* at 226. Building on the blocks of early servitudes law, modern servitudes have flowered into complex mechanisms for private land use arrangements. See Susan French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1263-64 (1982) [hereinafter French, *Reweaving*] (stating that "servitudes are used today to effectuate private land use arrangements ranging from simple driveway easements to elaborate shopping center regimes"). Common interest communities governed by elaborate covenants,
conservation easement, an important tool for achieving environmental preservation and biodiversity goals with respect to land, and the environmental covenant, which seeks to set the conditions under which remediation of contaminated property will occur.

Security interests in property likewise coalesce into generally recognized categories. The law of security interests for real property contains a handful of standard forms, primarily the mortgage and the deed of trust. Personal property security interests are similarly governed by a regime of defined forms, largely through the Uniform Commercial Code in modern practice.

Intellectual property is another area that yields a limited universe of clearly recognized forms. Patents and copyright are the primary forms, with trademarks and trade secrets having a somewhat uncomfortable place in the menagerie. Less common forms appear as well, including a property-like doctrine of misappropriation of information; the "right of publicity" now found in about half the states; and the droit de suite, a form of resale royalty right recognized in California.

conditions and restrictions are now ubiquitous in residential development, and similar arrangements are increasingly important in commercial real estate as well. See Michael Heller, Common Interest Developments at the Crossroads of Legal Theory, 37 URB. LAW. 329, 333 (2005) (discussing the growth of the common interest development legal form).


37. Kurt Strasser, The Uniform Environmental Covenants Act: Why, How and Whether, 34 B.C. ENVTL. AFF. L. REV. 533, 533 (2007). Another innovation—and one clearly driven by top-down pragmatic policymaking—is the avigation easement. The traditional rule of ad coelum, proverbially granting owners property rights from the center of the earth to the heavens, has yielded over the course of the past century to a generally recognized right for aircraft and the like to invade this airspace. POWELL ON REAL PROPERTY § 34.11[2] (Michael Allan Wolf ed., 1997).


40. See Merrill & Smith, supra note 1, at 19–20 (tracing the doctrine to the Supreme Court’s decision in International News Service v. Associated Press, 248 U.S. 215 (1918)).

41. Id. at 20.

Finally, a property form curiously overlooked in most descriptions of the *numerus clausus*, despite its growing importance, is what Carol Rose has labeled “hybrid property.” Prominent examples of this form include tradable emission rights, fishing quotas, and allocations of radio spectrum. This type of property begins, as do many property regimes, with what would otherwise generally be a common resource subject to the risk of overuse by multiple claimants. These regimes then create private exclusionary rights to the resource as a matter of regulatory design. These devices are established by the state and, as with the traditional common law forms of property, grant a specified set of entitlements and carry specified limitations and obligations. Although our legal system

---

43. Rose, *supra* note 10, at 216.


47. This is the classic “tragedy of the commons.” *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968).


49. Rose, *supra* note 10, at 216. The pull of standardization may extend to even more emergent property regimes. Scholars have recently begun to explore the application of the *numerus clausus* to “virtual” property. This kind of property can refer generally to important resources in the online world (such as e-mail accounts and domain names) and also to entitlements that arise in increasingly popular online environments such as Second Life. *See* Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1050 (2005) (*discussing* the contemporary landscape of “virtual” property rights); Moringiello, *supra* note 26, at 3 (*discussing* virtual property in online environments). Moringiello argues that because the contracts that create online entitlements—virtual “land” or “gold” or the like—are confusing, an information cost minimization rationale supports standardizing these entitlements. Moringiello, *supra* note 26, at 5.
attaches the label of property to other interests, 50 most of what we consider property can be found in a core of standard forms. 51

2. Dynamism in Standardization

If property at a structural level seems almost always to coalesce into standard entitlements, that standardization is dynamic in practice. 52 This dynamism has three dimensions: in the list itself, in the mandatory limits imposed on each given form, and in the permissible range of variation allowed to private parties in altering the forms.

a. Dynamism in the List

To begin, forms historically have been added and removed from the universe of recognized property types. The contemporary “list” is a product of significant contestation. As the legal system transformed feudal forms into the estates familiar in modern law, servitudes came into wide use, and intellectual property flourished. 53 Many familiar (and not so familiar) denizens of the estates system were added as the system developed. 54 Likewise, Anglo-American legal history has

50. The American legal system attaches the label “property” to some interests that only tangentially figure in the discourse about the numerus clausus. In constitutional property, for example, the Court at times (although increasingly less so) has found interests to be “property” that would not cleanly map onto traditional categories. See Thomas W. Merrill, The Landscape of Constitutional Property, 86 VA. L. REV. 885, 917–22 (2000) (discussing Board of Regents v. Roth, 408 U.S. 564 (1972), and its implications for constitutional property). Likewise, courts and legislatures at times invoke the label of “property” to interests that only fleetingly relate to the categories captured in the numerus clausus—professional degrees in divorce, for example. Cf. 9A AM. JUR. 2D Bankruptcy § 1279 (2008) (noting that professional degrees are excluded from the bankruptcy estate despite state law decisions that define them the same as property for purposes of a divorce decree). Nonetheless, most interests that our legal system recognizes as property tend to coalesce into the standard forms discussed in this Section.

51. The instinct to employ standard forms can also be seen when scholars make creative arguments about novel property arrangements, which often appropriately involve calls for the creation of new “forms” of property. See, e.g., Michael A. Heller & Rick Hills, Land Assembly Districts, 121 HARV. L. REV. 1465, 1467 (2008) (proposing legislative creation of “land assembly districts,” condominium-like legal structures that facilitate community bargaining for a portion of the “assembly value” of land held in fragmented ownership).


54. For example, in 1285 Parliament established the fee tail with the Statute De Donis Conditionalibus. See 4 THOMPSON ON REAL PROPERTY § 35.04 (David A. Thomas ed., 2d ed. 2004). The “list” in intellectual property, to cite another example, expanded in the nineteenth
witnessed the excision of a number of forms. The estate in coparceny, for example, and the fee tail have been removed almost entirely from the legal landscape. Other examples of the elimination of once-important forms are strewn throughout the historical record.

The list, moreover, continues to fluctuate in modern law. Some scholars have argued that the universe of interests is now closed. However, even a cursory glance at the generative capacity of property law over the past fifty years—a period that has seen the recognition of forms such as the timeshare, significant upheaval in the law of servitudes, and the creation of the droit de suite, to name a few examples—belyes the notion that the list has ceased developing.

Like marvels that emerge from the fossil record, long lost legal forms that once walked the earth would be quite surprising to most modern audiences. An older and fascinating example of a form of property unknown in modern law might be jurisdiction. According to Nicholas Szabo, medieval and Renaissance English law recognized jurisdiction as a franchise protected by the law of property. Nicholas J. Szabo, Jurisdiction as Property: Franchise Jurisdiction from Henry III to James 1 (George Wash. Univ. Law Sch., 2006), available at http://ssrn.com/abstract=936314. These franchises had physical territory, title determined by seisin, and could be defended by actions in trespass. Id.

One of the most recent innovations in the forms of property is arguably the chattel servitude as it is emerging in the context of digital property. See Glen O. Robinson, Personal Property Servitudes, 71 U. Chi. L. Rev. 1449, 1516–21 (2004) (discussing the increasing popularity of digital rights management tools, which are self-enforcing restriction mechanisms that are hardwired into products). See generally Molly Shaffer Van Houweling, The New Servitudes, 96 GEO. L.J. 885 (2008) (discussing the relationship between concerns that animated judicial skepticism in the context of traditional servitudes and the emerging law of intangibles such as computer programs and digital music).
The *numerus clausus* is perhaps more importantly dynamic in the changing internal content and meaning that the law imposes on any given form. Public definition of the mandatory content of the forms is an ongoing process, so that even the same nominal form can have significantly different content over time and across jurisdictions.

The development of the fee simple absolute—often cited as the most pristine and absolute form of property—shows this contingency of internal content. In its earliest common law incarnation, the fee simple was neither heritable nor likely alienable. It took the rise of the nobility to secure hereditability, at least by primogeniture. And it took the Statute Quia Emptores in 1290 to make the fee simple alienable without the consent of the fee-holder's lord. This development continued in American law, as autonomy and marketability concerns led to significant reforms of restrictions on the fee simple. Thus, the nominal form of the fee simple persisted, but the most important characteristics of the conceptual category changed by active regulatory intervention.

A similar transformation occurred with the tenancy by the entirety in nineteenth-century American jurisprudence. This common law form of marital estate traditionally involved the husband and wife "seised of the entirety," each with a right of survivorship. Rights of use as well as control of rents and profits were granted to the

---

63. Indeed, even a form as apparently uniform as the fee simple absolute carries variations between jurisdictions. If one element of a form involves conditions of transfer, for example, because the rules of inheritance vary from state to state, the nature of the form consequently varies. And if the right to exclude is taken—rightly or wrongly—to be a defining quality of property, then even that right varies from state to state. See Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 558–60 (2004) (noting that the majority of U.S. states require affirmative posting in order to exclude hunters from certain types of private land).

64. 4 THOMPSON, *supra* note 54, § 4.06(a).

65. Id.

66. Id.


68. See 4 THOMPSON, *supra* note 54, § 34.01:

The fee simple estate has endured in the common-law system of property rights even though the various property rights to which it pertains have altered over time. The fee simple of the thirteenth century was unlike the modern fee simple. The medieval estate consisted of only a set of feudal dues and responsibilities, which all related to and burdened the land, whereas the modern fee is simply full ownership subject to a less onerous set of sovereign prerogatives.

husband, and vulnerability to the husband's creditors followed. Today, the tenancy by the entirety still exists in about half the states but has been significantly transformed. All states that retain the tenancy passed versions of Married Women's Property Acts, along with a variety of other legislative changes to the nature of property held by married women. The interpretation of these statutes, however, has yielded significant variation in the actual content of the contemporary tenancy, particularly with respect to creditors' rights. As a result, although modern law recognizes a "form" of property called the "tenancy by the entirety," that form has a very different social and practical meaning than it did in early modernity and varies from jurisdiction to jurisdiction today.

The more recent "revolution" in landlord-tenant law in the late 1960s and early 1970s provides another paradigmatic example of how the standard forms embody legal change. As courts and legislatures reformed many of the most enduring features of the traditional leasehold estate and the landlord-tenant relationship, particularly in the residential context, these institutions generally acknowledged the common framework of the relevant form. Thus, the meaning of the

70. Id. at 40–41.
71. See 4 THOMPSON, supra note 54, § 33.06(e) (discussing state variation concerning the creation and contours of a tenancy by the entirety).
72. See, e.g., ALEXANDER, supra note 53, at 168–76 (describing the progression of legal reforms to married women's property rights through the course of the nineteenth century, and the political and economic rationales underpinning those reforms); DUKEMINIER ET AL., supra note 53, at 312 (noting that by the end of the nineteenth century "all common law property states had ... enacted Married Women's Property Acts").
73. In some states, creditors can reach the entireties property of either spouse; in some states, the entireties property of both spouses is immune from the interests of creditors of one spouse. See DUKEMINIER ET AL., supra note 53, at 312–20 (reviewing caselaw on different interpretations of creditor's rights held by those states retaining the tenancy by the entirety).
74. See Orth, supra note 69, at 40–49 (delineating the substantial practical and symbolic "evolution" of tenancy by the entirety, the social, political, and legal forces that occasioned such changes, and the doctrinal variation that resulted).
76. See, e.g., Rabin, supra note 75, at 521 (describing the significant and widespread alteration of the meaning imposed on the lease as a form of property).
“lease” with respect to its property elements came to represent vastly different rights and obligations than the same legal form had represented at common law traditionally. And, as with modern tenancies by the entirety, there is now significant variation in what a leasehold estate means from state to state—whether in terms of tort liability for landlords, the nature of the implied warranty of habitability, the respective rights and obligations of landlords and tenants facing holdovers, or other aspects of the estate.

Likewise, intellectual property provides rich examples of stability in form coupled with dynamism in content. As noted, the primary forms of intellectual property evince tremendous continuity at a general level. Congress and the courts, however, have engaged for more than two centuries in a constant process of tweaking the nature and incidents of the forms. To hold a “copyright” today means

77. One aspect of the revolution in landlord-tenant law was the importation of contract concepts into what had traditionally been a predominantly property-based relationship. This can be seen, for example, in the erosion of the concept of independent covenants—the idea that the tenant's obligation to pay rent was not tied to the landlord's obligation to ensure possession, see Smith, supra note 24, at 1189—and landlord mitigation duties in the case of tenant breach, see Stephanie G. Flynn, Duty to Mitigate Damages upon a Tenant's Abandonment, 34 REAL PROP. PROB. & TR. J. 721, 784 (2000). Notwithstanding these contract-like mechanisms, much of the revolution in landlord-tenant law was still aimed at modifying the lease as a form of property. Cf. Rabin, supra note 75, at 531-40 (discussing changes in landlord-tenant law, including limitations on discriminatory disposition of property, possessory rights in tenants even after the expiration of a lease, and the landlord duty to place tenants in actual possession rather than merely transferring legal right to take possession).

78. Other notable aspects of the transformation of the “lease” include modification of traditional common law rules on delivery of possession, obligations for upkeep and habitability, and landlord tort liability. See Rabin, supra note 75, at 520-40 (outlining each of these alterations as among those representative of the “revolution” in landlord-tenant law).


80. See supra Part I.A.1.

something quite different than holding a copyright a century ago, as Congress has repeatedly extended the copyright's term and altered its scope. Similarly, the scope and meaning of patentability have expanded steadily over time, and trademark protections have seen significant change in the determinants and subject matter of protection.

These are far from isolated examples. Throughout the law of property, forms persist with nominal stability at the same time that the default content of those forms changes, at times incrementally, and at times radically. Additions and eliminations from the list are an important part of the history of the numerus clausus, yet internal dynamism is arguably an even more central aspect of standardization.

c. Dynamism in Private Latitude

Finally, there is an aspect of dynamism in the scope of private modification to the standard forms. Continental civil law scholars distinguish between limitations on rights that may be created and limitations on private latitude to vary those rights. This private latitude is also present in common law jurisdictions, allowing modifications to many of the practical aspects of holding property, such as the number of owners (for some interests); the length of time an interest exists (within defined constraints); and the physical

---


83. See Friedman, supra note 56, at 325–28 (discussing the “remarkable” nineteenth century expansion of the scope of patent, copyright, and trademark); Fisher, supra note 81, at 4–7 (discussing nineteenth and twentieth century extensions of “patent law”); Bracha, supra note 81, at 401–518 (surveying transformations in the regime of patent law in early American history).

84. See Milo, supra note 2, at 594 (discussing the distinction between mandatory elements (“Typenzwang”) and allowable modifications in continental civil law (“Typenfixierung”)).

85. The estates in land distinguish between single and divided ownership, but once a division occurs, there is no limitation on the number of co-owners, co-renters, etc., that are allowed. See, e.g., Dukeminier et al., supra note 53, at 275–80 (discussing concurrent property interests).

86. This constraint on time is perhaps most evident in the limited rights granted in the forms of intellectual property, but plays out in the common law estates in land as well. Cf. id. at 240–51 (discussing, among other duration restrictions, the Rule Against Perpetuities).
dimensions of property where that is an issue. Thus, any given example of a property form represents a balance between mandatory components and private variation.

3. The Institutions of Standardization

While the list and the content of the extant forms change, it would be inaccurate to state that the numerus clausus naturally "evolves." There is no inherently progressive or determinative course to the changes evident in property forms. The forms in existence at any given time reflect a combination of legislative intervention, common law accretion, private ordering, and a dose of path dependence. Thus, the limits and the content of the standard forms represent a pragmatic accommodation to changing political, social, and economic conditions.

Thomas Merrill and Henry Smith characterize the numerus clausus in common law jurisdictions as a "norm of judicial self-governance." They describe the phenomenon this way to characterize the relatively silent treatment that the numerus clausus has traditionally received in common law, in what might be described as a "weak-form" numerus clausus. Civil law jurisdictions, by contrast, recognize what might be called a "strong-form" numerus clausus, predicated on an explicit recognition of the exclusive province of the legislature to determine acceptable property interests.

Institutionally, the establishment and modification of the standard forms in our common law system has always been a dialogue between legislatures and courts. This dialogue has been at times competitive, at times collaborative, but has often simply proceeded in


88. Merrill & Smith, supra note 1, at 9-12. Contra Hansmann & Kraakman, supra note 3, at 374 (disputing Merrill and Smith's description of the institutions of the numerus clausus). Merrill and Smith argue that, as between courts and legislatures, the latter are superior institutions through which to modify standard property forms, for reasons of "clarity, universality, comprehensiveness, stability, prospectivity, and implicit compensation." Merrill & Smith, supra note 1, at 61.

89. A number of older English common law decisions explicitly mention a limitation on legal innovation, see Fusaro, supra note 16, at 314-15, but the numerus clausus phenomenon is more submerged in American law, see Merrill & Smith, supra note 1, at 9-12.

90. In practice, courts in civil law jurisdictions innovate in the interstices of code-based restrictions. See Milo, supra note 2, at 597-98 (explaining that although "[i]n civil law jurisdictions the courts do not commonly create new real rights," courts nonetheless sometimes acknowledge characteristics of property forms not explicitly stated in legislative codes).
parallel.\textsuperscript{91} If any pattern is discernable, it is that legislative change has predominated, but courts do, at times, innovate.\textsuperscript{92}

Carol Rose has described a dynamic of conflict and resistance with respect to specificity and open-ended approaches in the history of property law, what she calls crystals and mud.\textsuperscript{93} The law of property often begins with clear rules; courts introduce flexibility (historically as a matter of equity), which private parties then try to contract around to provide clarity, leading to more judicial fuzziness.\textsuperscript{94} The \textit{numerus clausus} reflects this dynamic.\textsuperscript{95} One might think the \textit{numerus clausus} to be situated firmly in the realm of crystalline rules—as most efficiency-oriented accounts would suggest.\textsuperscript{96} But the dynamism evident in the standard forms is in many ways a constant process of “muddying,” as competing goals play out in the composition of the list and in the content of the forms themselves. Eventually, a given form tends to achieve something like crystal status, but that stasis is generally temporary; it is only a question of time before the process continues.\textsuperscript{97}

In the contemporary American context, federalism adds a dimension to this general institutional description of the \textit{numerus clausus} as legislative and judicial dialogue.\textsuperscript{98} Property law in the United States is largely a creature of state law and is thus subject to interstate legal competition akin to that in other areas such as corporate law.\textsuperscript{99} Abraham Bell and Gideon Parchomovsky have argued that interstate competition in property forms reinforces efficient

\begin{itemize}
\item \textsuperscript{91} Cf. ALEXANDER, supra note 53, at 104–24 (discussing the early nineteenth century property codification movement).
\item \textsuperscript{92} Merrill and Smith cite the equitable servitude as an example of a relatively modern innovation in the \textit{numerus clausus} initiated by judges. Merrill & Smith, supra note 1, at 16–17. Personal property servitudes are another area of even more recent judicial innovation. \textit{See} Robinson, supra note 62, at 1455–58 (describing cases in which equitable servitudes were held applicable to chattels).
\item \textsuperscript{93} \textit{See} Carol Rose, \textit{Crystals and Mud in Property Law}, 40 STAN. L. REV. 577, 580–90 (1986) (providing several examples for the hypothesis that property rules across time evince a conflict between specified forms and piece-by-piece rules).
\item \textsuperscript{94} \textit{See id.} at 585 (using mortgage law as an example of cycles in property law between clear rules and more elastic standards).
\item \textsuperscript{95} \textit{See supra} Part I.A.2.
\item \textsuperscript{96} \textit{See infra} Part II.A.
\item \textsuperscript{97} Cf. Rose, supra note 93, at 581–83 (describing more generally the cyclical process of drives for clearly defined rules followed by drives in the direction of equitable flexibility).
\item \textsuperscript{98} Cf. FRIEDMAN, supra note 56, at 173 (reasoning that the variation between doctrines different states have applied in similar property contexts stems in part from differing traditions, economic needs, political climates, geography, and the like).
\item \textsuperscript{99} \textit{See} Bell & Parchomovsky, supra note 3, at 92–101.
\end{itemize}
tendencies and mitigates the risk of capture. This competitive interjurisdictional story seems evident in practice, as jurisdictions modify the incidents of the forms to appeal to out-of-state interests. Bell and Parchomovsky’s emphasis on market forces may obscure important cultural and social influences on the development of the forms, but their basic account of the political role in managing standardization is compelling.

It is unnecessary to rely on any one account of the nature of legal change to understand the institutional context of the numerus clausus. The history of significant turning points in the development of the modern forms reflects the pluralism inherent in standardization, as different forms have emerged at different times and in response to different social and economic pressures—pushing the forms toward alienability, toward constraints on prior entitlements, and toward other pragmatic and normative goals. No singular narrative of legal change emerges. What is evident, however, is the active and direct role of the state in defining the acceptable bounds of property.

B. The Problem of Standardization

Although the recent flowering of scholarship on the numerus clausus has done much to domesticate the phenomenon,
standardization has long proven challenging to predominant accounts of property. As Merrill and Smith note, the *numerus clausus* principle has been decried as "outmoded formalism," surviving as a relic of premodern (and often manifestly hierarchical) regimes and as a "trap for the unwary." Setting aside for the moment these formalist critiques, two more fundamental concerns have emerged in the literature. The first is the tendency of standardization to undermine the efficient allocation of resources, and the second is the tension between standardization and autonomy. To understand these concerns, it is first necessary to detour briefly and review the primary accounts of the nature and function of property.

1. The Many Lives of Property

Property is an institution with many lives. Property plays a foundational role in incentivizing investment and allocating scarce resources. As an institution, property is therefore central to commerce and the private ordering that flows from transactions that yield the highest and best use of a given resource. To oversimplify, property serves this role primarily by granting exclusive rights that then serve as the basis for free exchange. When economists discuss property, this is the vision of property they often have in mind. This

103. See infra Part III.A for discussion of crosscurrents in pluralism as applied to property. For now, it is sufficient to note that standardization has been identified as problematic for multiple conceptions of property.

104. Merrill & Smith, supra note 1, at 6–7.

105. See ALEXANDER, supra note 53, at 1–2 (describing the theoretical underpinnings of property as a personal, social, and economic institution that have competed throughout American history); UNDERKUFFLER, supra note 17, at 11 (finding multiple conceptions of property bound up in the term and explaining that they are part of the reason property as a concept can be used for competing viewpoints on virtually any social issue); Sherwin, supra note 19, at 1080–84 (charting the logical, legal, and moral tradeoffs behind several conceptions of the ends property serves that have prevailed at different historical junctures and among different groups of thinkers).

106. See, e.g., Sherwin, supra note 19, at 1082–83 (describing multiple "instrumental" economic roles played by property).

107. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 31 (7th ed. 2007) (defining common law property rights as "exclusive use of valuable resources" and contract law as "concerned with facilitating the voluntary movement of property rights into the hands of those who value them most").

108. See Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 347–50 (1967). As discussed below, see infra Part IV.A, Demsetz argued that private property allows owners to internalize most costs and benefits and reduces the costs of interactions around property. In this view, property serves to reduce the negative externalities associated with an unrestricted commons.

109. See Merrill & Smith, supra note 19, at 375–76 (arguing that diverse schools of economists all view property as essentially an allocation of use rights); see also Carol Rose,
view, moreover, has normative implications (however contestable) associated with the collective maximization of welfare thought to be facilitated by the cascade of favorable transactions that security of title enables.¹¹⁰

Property, however, is equally important to individual identity.¹¹¹ One strand of property theory highlights the intersection between, in Hegel’s terms, “freedom of person and of things.”¹¹² Property in this view is less a problem of scarcity than of how individuals interact with the material world. Hegel argued that property supplies a tool for ethical development, providing objects through which individual will might be realized, with appropriation representing the imposition of that will on the world.¹¹³ In the modern discourse, Margaret Radin has offered the best account of the role of property in fostering personhood, shifting from Hegel’s concern with self-actualization to focus more on property’s role in promoting human

---

¹¹⁰. See Friedrich A. Hayek, The Road to Serfdom 36–39 (1944) (arguing that private ownership of property, as a prerequisite for competition, renders all members of society better off in the aggregate than in socialist systems in which externalities are collectively assumed); see also Milton Friedman, Capitalism and Freedom 26–27 (1962) (describing the necessity of exclusive property rights in a maximally efficient economic system). This idea goes all the way back, in essence, to Smith’s invisible hand. See Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations 423 (Edwin Cannan ed., 1937) (1776).


¹¹². Rudden, supra note 3, at 250.

¹¹³. G.W.F. Hegel, Philosophy of Right §§ 40–53 (T.M. Knox trans., 1942) (1821); see also Waldron, supra note 17, at 351–60, 373–74 (discussing the basic tenets of Hegel’s conception of property and their implications for notions of freedom, individual personhood, and the exercise of individual will in the external world). Hegel viewed the numerus clausus as a tool to resist feudal encumbrances in order to facilitate individual freedom through the medium of property. See Rudden, supra note 3, at 251 (describing Hegel’s thesis and its continental legal impact); see also Francesco Parisi, The Fall and Rise of Functional Property, in Property Rights Dynamics: A Law and Economic Perspective 25 (Donatella Porrini & Giovanni Ramello eds., 2007) (discussing Hegel’s view of property standardization). Merrill and Smith note the irony of critiquing the normative role that the numerus clausus plays by reference to formalism’s connection to feudalism given that many scholars have identified the numerus clausus as a conscious reaction to that very feudalism. See Merrill & Smith, supra note 1, at 7 n.15 (discussing the historical association in post-revolutionary France between the numerus clausus and anti-feudal reform of fragmented ownership); see also Milo, supra note 2, at 588–89 (discussing the strictness-mitigating effects of courts of equity in common law countries as akin to civil law’s anti-feudal orientation and perhaps derived from it).
flourishing. Radin argued for considering property along a spectrum. At one end is personal property, that which is most constitutive of the self; at the other end is property that is held more instrumentally, which Radin called fungible property. Prescriptively, this would bolster a preferential position for property rights that reinforce personhood.

Beyond allocation and identity, property is frequently associated with political ordering, albeit in often diametrically opposed directions. On one side, property is associated with certain strains of individual freedom, even if the precise connection between ownership and liberty is often misunderstood. John Locke argued famously that the state arose to protect property, and this vision of the supposed sanctity of private property has been influential in our legal culture from the outset. This classical liberal view of property as the realm of individualism has, however, always had a counterpart in American political thought in civic-republican conceptions of property—property as the locus of mutual obligation. This conception of the interconnectedness of property has modern resonance in the idea that property systems recognize expectations that arise from property’s inextricable linkage to social relations.

114. See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 968, 971–78 (1982) (arguing the logical further steps of Hegelian property theory view property as central to not only the expression, but the growth of human personality).

115. Id. at 959–60.

116. See id. at 1009–10 ("The result of this rough weighing is that fungible property rights should yield to others' personhood claims.").

117. Thus private property is often seen as providing a sphere of individual free will, apart from the demands of society. See Charles A. Reich, The New Property, 73 YALE L.J. 733, 733 (1964).

118. See ALEXANDER, supra note 53, at 2–3 (contending traditional notions of property as essential to liberty are misconceived). See generally ROBERT HALE, FREEDOM THROUGH LAW (1952) (exploring tensions within conceptions of economic liberty associated with property).


120. See generally ALEXANDER, supra note 53, at 4–17 (discussing the enduring “proprietarian tradition” in the American history of private property—the idea of “property as the foundation for the proper social order”); William H. Simon, Social Republican Property, 38 UCLA L. REV. 1335, 1337–45 (1991) (outlining a “social-republican” model, wherein private property owners undertake civic and welfare obligations as a consequence of property ownership and are limited in their use of property by regulatory measures designed for collective social good).

121. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 134–39 (2000) (arguing property laws are shaped in formation, development, and practice by the degree to which they mirror the contours of common social relationships).
Each of these myriad perspectives on the nature and function of property potentially stands in tension—greater or lesser—with the fact of standardization.

2. Specialization and Efficiency

To begin, one concern that the mandatory nature of standardization in property law has raised for scholars in recent years is the tendency of the *numerus clausus* to frustrate specialization. If property functions as a tool to allocate scarce resources, the law presumably should give full expression to what market actors determine to be the optimal configuration of interests.

Finding the highest and best use for property—that specific set of characteristics in the proverbial bundle of rights that represents the most appropriate method through which to allocate the resource—arguably requires the kind of unfettered ability to specialize found in contract law (and other areas of law that generally enable private ordering). In this account, the *numerus clausus* imposes a direct cost on legal entrepreneurship. Merrill and Smith label these constraints on private ordering “frustration costs,” and these costs can be seen as symptomatic of a larger phenomenon in the tension between private ordering and state control.

3. Standardization, Identity, and Autonomy

The *numerus clausus* poses a slightly different, although not entirely unrelated, challenge to conceptions of property that privilege autonomy and property-as-negative-liberty. By regulating and limiting the acceptable bounds of individual choice, the *numerus clausus* principle raises tensions for conceptions of property that place individual development and personhood at center. John Henry

---

122. See Merrill & Smith, *supra* note 1, at 35 (“Mandatory rules sometimes prevent the parties from achieving a legitimate goal cost-effectively.”).

123. See id. at 5 (“The principle that property forms are fixed and limited in number represents an extremely important qualification to the principle of freedom of contact—a principle widely regarded by law-and-economics scholars as promoting the efficient allocation of resources.”).

124. See Rudden, *supra* note 3, at 239 (arguing that the limited scope of things in which property rights might inhere and the availability of other legal forms, specifically contract, suggest that economic theories of property as the basis of exchange do not match reality).

125. Merrill & Smith, *supra* note 1, at 35.


127. Jedediah Purdy has recently elaborated on what he describes as a “freedom-promoting” approach to property that echoes certain strains of the autonomy-enhancing view of property. See
Merryman, for example, noted that as applied to the problem of dead-hand control, the *numerus clausus* sacrifices the autonomy of present interest holders in favor of vindicating the autonomy of future interest holders.\(^{128}\) This is especially true in terms of fostering alienability,\(^{129}\) but Merryman highlighted the inevitability of competing claims of autonomy any time property interests are channeled and divided.\(^{130}\)

This tension—property as a tool to restrain autonomy—is endemic throughout the *numerus clausus*. At a sufficiently high level of generality, the array of interests available at any given time represents common patterns of property holding: possessory rights, non-possessory rights, and security interests.\(^{131}\) Yet in their particulars, these interests are clearly channeled and controlled, restraining autonomy and imposing some version of collective will on the individual freedom associated with property.\(^{132}\) As with efficiency concerns, the question again arises as to why property law is not more open to unfettered individual or even community choice.\(^{133}\)

In sum, standardization challenges a number of prevailing conceptions about property. The long-standing existence of the *numerus clausus* rarely engenders debate among contemporary legal scholars, but why property law retains this deep structural feature remains contested.

---

Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1242–45 (2005) (positing a historical tradition of property as a fundamental building block of individual freedom). Purdy links property to the full flowering of human potential, extending themes evident in Hegel and Radin, among others. See id. at 1298 (contending that property rules set the “terms of social and economic cooperation” by which persons can transform “potential into actual capabilities”). For the same reason that standardization can be seen to frustrate individual autonomy, it can be seen to impose limits on individual capacities on which Purdy focuses.


129. See *infra* Part II.A.1.


131. See Hansmann & Kraakman, *supra* note 3, at 379 (discussing the contours of “standardized forms with those attributes commonly desired and standardized names for those forms”).

132. See Singer, *supra* note 3, at 16–17 (stating as a defining factor of property law the existence of limitations that are both “technical and intrusive”).

133. See *id*. "standardization and pluralism"
II. THE CONUNDRUM CONSIDERED

In many ways, Bernard Rudden set the terms of the contemporary debate two decades ago in his exegesis of the *numerus clausus* problem. Systematically canvassing and critiquing a range of plausible explanations for standardization in property law, Rudden could only conclude by essentially throwing up his hands and declaring the phenomenon a mystery. ¹³⁴

In recent years, a number of scholars have revisited the rubble strewn across Rudden's landscape. Mirroring divisions in contemporary property theory, recent attempts to explain the *numerus clausus* have fallen into two general categories. One group of scholars has attempted to explain the *numerus clausus* as a structural phenomenon, focusing on standardization's potential efficiency benefits. ¹³⁵ A second group sees in the persistence of standard forms a reflection of underlying social relations, objective meaning, or democratic values—what can be described as ideal-type accounts. ¹³⁶ As this Section explains, however, these accounts together cannot fully explain the basic conundrum that Rudden identified.

A. Structural Efficiency Accounts

One collection of explanations for standardization in property law focuses on how the structure of standardization promotes efficient exchange and productive use of property—in alienation, reducing fragmentation, and managing third-party information costs.

1. Facilitating Alienation

Perhaps the longest-standing justification for the *numerus clausus* is the proposition that standardization facilitates alienation. ¹³⁸ The *numerus clausus* directly protects against undue

---

¹³⁴. As Rudden put it, "Answers abound... but they all leave me in doubt." Rudden, supra note 3, at 239.
¹³⁵. See infra Part II.A.
¹³⁶. See infra Part II.B.
¹³⁷. See WALDRON, supra note 17, at 44–46 (discussing ideal types in property discourse); cf. MAX WEBER, 1 ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 9 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., University of California Press 1978) (1925) (discussing ideal types as an analytical tool).
¹³⁸. See Merrill & Smith, supra note 1, at 24 (citing, for example, JESSE DUKEMINIER & JAMES KRIER, PROPERTY 204 (4th. ed. 1998) ("Once the estates system developed, judges decided that standardization of estates furthered alienability by facilitating subsequent transactions in the same resource."); Rose, supra note 10, at 213–14 (describing the importance of the recording system and government-created standard form interests in land and property arrangements in
restraints on alienation by limiting parties' freedom to condition the ability of future holders to alienate property.\(^{139}\) The *numerus clausus* is also said to facilitate alienability because allowing specialized property rights creates the possibility that successors in interest will continue to innovate, leaving property "encrusted with layers of obligations."\(^{140}\) Finally, standardization is seen to lower information costs in transactions by creating a market for easily identifiable interests.\(^{141}\)

Henry Hansmann and Reinier Kraakman recently elaborated on this final alienability rationale.\(^{142}\) Dividing property rights, they argue, requires coordination (a common understanding of respective rights) and enforcement (protection against opportunistic behavior).\(^{143}\) Coordination and enforcement problems lead to underutilization of resources because parties must overinvest in protecting their rights.\(^{144}\) The solution, they argue, depends on establishing adequate means of verification: a third-party enforcer must verify the parties' understanding of their rights.\(^{145}\) In contract law, the contract itself provides the means of verification.\(^{146}\) Verification is more difficult with property rights because holders may not be in privity of contract.\(^{147}\) To Hansmann and Kraakman, then, by limiting the menu of possible understandings, the *numerus clausus* consequently minimizes problems that nonstandard property rights impose on subsequent transferees.\(^{148}\)

Rudden, however, dismissed these alienability arguments fairly summarily. The *numerus clausus* can provide the building blocks for almost any conveyance, albeit with less convenience than

---

facilitating alienation, especially among strangers); see also Herbert Hovenkamp, *Private Property and the State*, in *The Fundamental Interrelationships Between Government and Property*, supra note 10, at 109, 115 (describing the limitations on forms in property law as a response to ambiguities over ownership creating transaction costs).

139. See Merrill & Smith, supra note 1, at 24.

140. Rudden, supra note 3, at 248.

141. See DUKEMINIER ET AL., supra note 53, at 185–86 (quoting Merrill & Smith, supra note 1, for the proposition that "[s]tandardization of property rights reduces these measurement costs"); Rose, supra note 10, at 213 (discussing "off-the-rack property" entitlements that reduce transaction costs).

142. Hansmann & Kraakman, supra note 3, at 374.

143. Id. at 382–85.

144. See id. (suggesting that "transactions that would otherwise take place may not occur" because of the increased costs associated with poor coordination and enforcement).

145. Id. at 383.

146. Id.

147. Id.

148. See id. at 384 ("There is a strong relationship between verification rules and types of property rights—or rather, the forms of ownership—that the law is prepared to recognize.").
specialization would allow.\textsuperscript{149} With respect to the concern with "encrusting," there is no compelling reason why the legal system should react to an impediment to transacting that seems eminently capable of internalization in the market price of an interest.\textsuperscript{150} Similarly, such price should reflect the cost of specialization, and there is little reason to privilege legal constraints over the judgment of those transacting in novel legal forms. Limiting the forms of property would thus seem to be a particularly inefficient (and ineffective) way of promoting alienability.\textsuperscript{151}

2. Productive Scale and Fragmentation

Some scholars have identified the \textit{numerus clausus} as part of a deeper boundary principle in property law that resists the excessive splitting of interests in order to properly scale the efficient use of resources.\textsuperscript{152} This explanation, elaborated most forcefully by Michael Heller in his work on the anticommons,\textsuperscript{153} focuses on the risk that

\textsuperscript{149} See Rudden, \textit{supra} note 3, at 260 (arguing that limitations on conveyance merely prevent owners from creating the desired interests "simply and cheaply" because they can "almost always achieve [their] aims at some cost by the use of devices"); \textit{see also} Merrill & Smith, \textit{supra} note 1, at 24 ("The problem with [the argument that \textit{numerus clausus} effectively limits undue restraints on alienation] is that the system of estates in land is sufficiently flexible that one can nearly always find a way to effectuate a complicated conveyance.").

\textsuperscript{150} See Rudden, \textit{supra} note 3, at 253–54, 256 (arguing that similar obligations may be included as a matter of contract and that any such obligations would likely be reflected in pricing).

\textsuperscript{151} One must distinguish between the individual purpose or effect of a given form in the \textit{numerus clausus} and the overarching effect of mandatory standardization as such. It is relatively well established (although not entirely beyond question) that many changes in the list and content of the \textit{numerus clausus} as the common law moved from feudalism to mercantilism to modern industrial relations were focused on enhancing the alienability of land. \textit{See infra} text accompanying notes 218–219. Most commentators also would likely agree that restrictions on "dead hand control" are focused on allowing future generations to exchange property to put the resource to its best use. These propositions, however, are quite different from an argument that the \textit{numerus clausus} itself is directed at enhancing alienability. Many other restrictions on property rights reflected in the \textit{numerus clausus}—such as the limitations on permissible forms of servitudes and mandatory limitations on leaseholds—are arguably incompatible with alienability as a purpose.

\textsuperscript{152} See Heller, \textit{supra} note 3, at 1166 (discussing boundaries drawn in well-functioning property regimes); Parisi, \textit{supra} note 113, at 26 (discussing the \textit{numerus clausus} as an antifragmentation device). Rudden similarly noted (more skeptically) that the \textit{numerus clausus} might be explained by antifragmentation concerns. See Rudden, \textit{supra} note 3, at 259 ("Perhaps, then, there is sense in limiting the occasions for any of these expensive situations by restricting, ere their birth, the class of real rights. If this be a good reason, it is strange that so little of the standard doctrine and case law spells it out.").

\textsuperscript{153} Heller has led a significant wave of scholarship on the anticommons, a concept originally identified by Frank Michelman. \textit{See} Frank Michelman, \textit{Ethics, Economics and the Law of Property}, in \textit{ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV} 3, 6 (J. Roland Pennock & John
certain types of strategic behavior—primarily holding-out and free-riding—can cause an asymmetrical spiral of fragmentation, leaving property interests scaled too narrowly for productive use.\textsuperscript{154} Heller argues that property law accordingly limits the fragmentation of legal interests to police against the overutilization of resources through a tragedy of the commons and, particularly, underutilization through a tragedy of the anticommons.\textsuperscript{155}

Heller's insights about the anticommons problem have proven remarkably, and appropriately, fruitful.\textsuperscript{156} There is a mismatch, however, between the problem of fragmentation and the solution offered by the \textit{numerus clausus}.\textsuperscript{157} Standardization in property law may limit types of interests, but standardization does not meaningfully reduce the number of interest holders or the subdivision of physical property, which are the primary triggers for the cycle of the anticommons.\textsuperscript{158} Moreover, a variety of other legal mechanisms more directly address the perils of fragmentation.\textsuperscript{159}

3. Information-Cost Externalities

Rudden speculated that one justification for the \textit{numerus clausus} might be the problem that purchasers would face in evaluating novel property forms.\textsuperscript{160} Merrill and Smith built on this insight (without Rudden's skepticism) to frame an account of

\begin{itemize}
  \item \textsuperscript{154} See Heller, supra note 3, at 1165–66 (discussing the dangers of high transaction costs, strategic behavior, and cognitive biases associated with fragmentation).
  \item \textsuperscript{155} Id. at 1166.
  \item \textsuperscript{156} Id. at 1166.
  \item \textsuperscript{157} See Lee Ann Fennell, \textit{Common-Interest Tragedies}, 98 NW. U. L. REV. 907, 908 (2004) (describing the recent focus on the problem of the anticommons as "constructive and revitalizing").
  \item \textsuperscript{158} See Merrill & Smith, supra note 1, at 51–54 (noting that the \textit{numerus clausus} does little to limit excessive fragmentation because it limits only the types of interests rather than the number of interest holders); Munzer, supra note 3, at 156 (recognizing that the law of contracts often allows parties to get beyond the limitations of the \textit{numerus clausus}).
  \item \textsuperscript{159} See Merrill & Smith, supra note 1, at 52 ("[W]hen it comes to division of the [property] among co-owners, the law does not prevent an anticommons but rather leaves it up to the parties to choose the degree of fragmentation they wish, and to bear the costs of any mistakes they might make."); Munzer, supra note 3, at 156 (arguing that the doctrine does not limit the number of right-holders or the size of the parcels, which are central to the anticommons analysis).
  \item \textsuperscript{160} See Rudden, supra note 3, at 246 (describing this problem as one of the main reasons given for the \textit{numerus clausus} of real rights).
\end{itemize}
standardization based on its potential to reduce information costs to market participants and other third parties interacting with property.\textsuperscript{161}

With property rights, Merrill and Smith argued,

[Third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders. The existence of unusual property rights increases the cost of processing information about all property rights. Those creating or transferring idiosyncratic property rights cannot always be expected to take these increases in measurement costs fully into account, making them a true externality.\textsuperscript{162}]

As a result, the legal system balances the need to reduce this information externality—by standardizing the forms of property—against the frustration costs inherent in that standardization.\textsuperscript{163} This balancing yields a formula for seeking “optimal” standardization.\textsuperscript{164}

Standardization as a reaction to third-party information costs, however, has limits as an explanation for the \textit{numerus clausus}. Problems arising from increases in the menu of forms may be solved by notice—providing clear labels and definitions for the most popular forms.\textsuperscript{165} The marginal confusion caused by relatively obscure novel forms is unlikely to undermine the market for property in the way that Merrill and Smith hypothesize.\textsuperscript{166}

\begin{itemize}
  \item \textsuperscript{161} In a related vein, Rudden discussed whether standardization may reflect the fact that property law imposes obligations on third parties without their consent. Rudden, \textit{supra} note 3, at 247–48. As Rudden noted however, consent is rarely an issue in many areas of the law that bind third parties, such as torts. \textit{Id.} at 247. Consent, moreover, might be a reason for controlling whether an interest binds third parties, but standardization standing alone is both an over- and under-inclusive tool to moderate third party effects.
  \item \textsuperscript{162} Merrill & Smith, \textit{supra} note 1, at 8. In Merrill and Smith’s account, there are three relevant categories of individuals potentially affected by the creation of idiosyncratic property rights: the original creator, potential successors in interest, and other market participants, including third parties who may incur liability in violating property rights. \textit{Id.} at 27–28.
  \item \textsuperscript{163} See \textit{supra} text accompanying notes 122–125.
  \item \textsuperscript{164} Merrill & Smith, \textit{supra} note 1, at 38–40.
  \item \textsuperscript{165} See Hansmann & Kraakman, \textit{supra} note 3, at 380–82. As Rudden pointed out, moreover, no matter how standardized the form of property in a transaction, the allowable modifications by contract are (relatively) unlimited. See Rudden, \textit{supra} note 3, at 255–56. Any resistance in the legal regime to property specialization that can be attributed to negotiation and information costs (and associated externalities imposed on the market for property) must have an answer for the inevitable specialization that occurs through contract.
  \item Stephen Munzer has also noted that balancing frustration costs and information benefits requires not only a limited menu of forms, but also “that the types be individually well crafted and that they hang together well as a whole.” Munzer, \textit{supra} note 3, at 157.
  \item \textsuperscript{166} See Munzer, \textit{supra} note 3, at 157 (discussing Merrill and Smith); see also Robinson, \textit{supra} note 62, at 1486–87 (critiquing the information cost hypothesis for the \textit{numerus clausus}); Singer, \textit{supra} note 3, at 16–17 (noting the significant informational complexity that remains despite the estates system).
\end{itemize}
The information-cost account also fails to account for the fact that the *numerus clausus* in common law jurisdictions has seen not only additions but eliminations from the list as well.\(^{167}\) Any account of standardization predicated on balancing information against frustration costs (or, for that matter, on verification costs) stands in tension with this process of eliminating forms that clash with changing policy goals. Whatever externalities might be represented by the addition of new forms or overly loose authority to specialize would not apply to *existing* forms. The law would thus have no need to perform what would otherwise presumably be a housekeeping function best left to personal choice and the marketplace.\(^{168}\)

Finally, if standardization is concerned with notice or the information effects of property interests on third parties, one would expect that changes in technology should lift the strictures of the *numerus clausus*. New forms accordingly should be entering the legal landscape at an increasing pace as information-cost burdens drop.\(^{169}\) Indeed, there have been numerous technological and policy changes in the past half century that have lowered information costs relating to property transactions.\(^{170}\) Despite these significant changes, however, the pace of innovation in the *numerus clausus* does not appear to be rapidly changing.\(^{171}\) New forms continue to emerge,\(^{172}\) but at a pace

---


168. A similar argument could apply to the legislative creation of novel forms.

169. Merrill & Smith, supra note 1, at 40–42. As Merrill and Smith argue, "[j]ust as the rise of land registers allowed some loosening of the *numerus clausus*, so too technology that lowers information costs can be expected to weaken the *numerus clausus* further." *Id.* at 42.


171. There is likely more "give" at the margins in the application of the *numerus clausus* principle in common law systems than in the civil law systems where the phenomenon is more explicitly recognized. See Merrill & Smith, supra note 1, at 69 (noting that courts in common law countries are more likely to "tinker[] with established legal doctrines"); Milo, supra note 2, at
that does not seem commensurate with what might be expected from information-cost explanations.

Considering what unites these efficiency-oriented accounts, there is much wisdom to be gleaned. They provide an important reminder that any explanation for standardization in property law must reflect the essentially structural nature of the phenomenon and must divine some enduring function from the persistent tendency of property to align in standard packets. From a functional perspective, these accounts appropriately emphasize property's central role in allocating scarce resources and facilitating exchange.

Collectively, however, these accounts have little to say about what the standard forms themselves contain. These structural accounts likewise fail to account for the dynamic aspect of the internal content of the standard forms; they overlook the peculiar pattern of mandatory elements and private ordering that each form evinces. Where these approaches lose force, then, is in their implicit rejection of the variability represented by the forms themselves and the active nature of state intervention in the mandatory content of the forms. Theories predicated on the reduction in information-cost externalities or the verification of property rights thus leave much of the function of the *numerus clausus* unexplored.

**B. Ideal-Type Accounts**

Turning from structure to content, several accounts of the *numerus clausus* have emerged that explain standardization not in terms of transaction-cost economics, but instead with a focus on what the individual forms themselves reveal.

1. Standardization and Social Relations

Rudden noted that one explanation for existing patterns of property forms is that they might simply represent "all that is required," and therefore the legal system need not innovate.173 Building a much more nuanced version of this observation, Hanoch Dagan has argued that the forms of property offer "a tentative suggestion to parse the social world into distinct categories of human

594–96 (discussing the flexibility in allowing atypical property rights in both common law and civil law systems).

172. See supra Part I.A.1.

173. Rudden, *supra* note 3, at 245. Rudden called this the "absence of demand" explanation for the *numerus clausus*. Id.
To Dagan, the forms should be understood as "important default frameworks of interpersonal interaction" that represent "unifying normative ideals for core categories of interpersonal relationships," subject to "ongoing normative (and properly contextual) reevaluation and possible reconfiguration."

Dagan is right to assert that the forms in the *numerus clausus* involve meaning beyond the purely instrumental, and his approach fruitfully aligns with the Legal Realist project of challenging the formalism of extant legal categories. Despite the self-professed Realist nature of his analysis, however, Dagan underemphasizes the contested nature of the content of the existing forms, placing great weight on the connection between social categories and property categories. Indeed, one distinct disadvantage of building a general theory of the *numerus clausus* from the example of the tenancy by the entirety, as Dagan does, is the fact that most other forms of property are not so closely associated with a given pattern of social relations. The *numerus clausus* principle applies to patterns of property holding that correspond to a wide array of social relations, from deep intimacy to paradigmatic arm's-length transacting.

Thus, although Dagan begins with an appropriate skepticism about the normative underpinnings of property forms, he appears to abandon that skepticism in favor of a view of the *numerus clausus* as an ideal reflection of categories of social relation. Focusing on the marital estate of the tenancy by the entirety, Dagan argues that the forms in the *numerus clausus* are the result of "accumulated judicial experience" about the appropriate "frameworks for social

---


175. Id. at 1558. Dagan built his theory from an analysis of the competing approaches to the *numerus clausus* taken by the majority and dissent in the Supreme Court's decision in *United States v. Craft*, 535 U.S. 274 (2002). Dagan, supra note 3, at 1521. In *Craft*, the Court split over the interaction between federal tax liens and state-defined immunity to creditors found in the tenancy by the entirety. 535 U.S. at 276. The majority held that federal tax liens could attach to a husband's interest in the tenancy, while the dissent relied on the nature of the tenancy as conceptually indivisible to argue that there was, in fact, no separate interest to which the lien could attach. Compare id. at 284, with id. at 291 (Thomas, J., dissenting), and id. at 289 (Scalia, J., dissenting).

176. Dagan, supra note 3, at 1562.

177. Id. at 1558.

178. See id. at 1528–29 (describing the Realist critique of deductive formalism).

179. Moreover, the diversity of patterns of marriage belies attempts to associate the tenancy by the entirety with any singular normative vision of the ideal marital community.

180. Rudden similarly argued, in response to the absence of demand explanation, that the wonderful complexities of actual property relations empirically undermine any attempt to link the existing forms to the full range of property forms that might be useful or necessary. See Rudden, supra note 3, at 245 (suggesting that certain types of desired shared entitlement do not "fall easily within the present categories of co-ownership").
interaction." But outside the context of marital estates (and even within that category), there is reason to be cautious about the fit between patterns of social relations and particular legal forms. The mandatory terms of a freehold or leasehold estate, for example, or a patent, may have less to say about any particular alignment of social relations than about the legal system's ex ante (and at times idiosyncratic) structuring of the acceptable terms of holding property.

2. The Numerus Clausus and Objective Well-Being

Daphna Lewinsohn-Zamir has proposed an explanation of the numeros clausus in terms similar to Dagan's focus on ideal relationships. Lewinsohn-Zamir argues that property "must be of a certain quality to fulfill its important function of sustaining and advancing welfare, in terms of both identity and content." For any interest recognized by the numeros clausus, "there is some predefined 'core' of minimal content, without which the property right cannot advance its owner's well-being." Lacking such a core, "the property right resembles an empty shell, devoid of well-being-enhancing content." To Lewinsohn-Zamir, the numeros clausus serves to protect this core of meaning because the principle prevents attempts by private parties to alter objectively meaningful rights and still retain the label "property." For example, the law will not allow a lease for an unlimited term because that would render the reversion devoid of meaning. Similarly, the law will limit servitudes that are not directly related to land use because of their significant adverse effect on the liberty and autonomy of distant parties.

Although Lewinsohn-Zamir's general argument for the role of objective welfare in property law is compelling, it does not entirely map onto the breadth of interests represented in the numeros clausus.
and the dynamic nature of those interests. Her objective well-being perspective leaves open why the law has developed the specific and highly contextual tradeoffs that our present set of restrictions represents. It may be that there are normative advantages to any given set of property interests existing at a given time, but the forms have emerged and continue to develop in highly contextual ways, evidencing significant variability depending on the social, economic, and political context in which a property system operates.\textsuperscript{187}

Lewinsohn-Zamir's objective well-being theory, moreover, does not explain why the law will validate variations from the normative core through contract, but not through property. If parties can more or less easily contract around the strictures that the \textit{numerus clausus} imposes, contract law would seem to allow private ordering that lacks the kind of objective determinants of well-being on which Lewinsohn-Zamir focuses.

3. Democratic Estates

Finally, in a related vein, Joseph Singer argues in a forthcoming article that the estates system reflects the "values that shape the contours of social relations in a free and democratic society."\textsuperscript{188} For Singer, the estates represent choices about the bounds of legitimate social arrangements, which he describes as the "normative commitments of a democratic society composed of free and equal individuals who treat each other respectfully."\textsuperscript{189}

This perspective, which applies across the breadth of the standard forms, ably describes the forms as explicit reflections of normative choices. Singer is perhaps somewhat deterministic about the particular nature of those commitments,\textsuperscript{190} and, as will be discussed, some crosscurrents in the larger panorama of the \textit{numerus clausus} represent normative frameworks that vary from the choices Singer valorizes. This is not to detract from Singer's insights, but rather to underscore the contingent nature of the particular values embodied in the standard forms.

As with efficiency approaches to explaining standardization, there is much wisdom in accounts that pay careful attention to the content of the forms themselves. However, focusing on content as determinative leaves unanswered questions about the structure of the

188. Singer, supra note 3, at 43.
189. Id. at 44.
190. See, e.g., id. at 49–50 (discussing the pluralism of values reflected in the estates).
numerus clausus. These endogenous accounts obscure some larger pattern—some deeper felt necessity in the structure of property that transcends the content of any given form.

Although these accounts provide important insights into individual examples of the numerus clausus, they have a harder time assessing the particular patterns of state control over the standard forms and the range of interests represented at any given time in the numerus clausus. If the content of the forms is an artifact of social patterns or categories of inherent meaning, how then to account for the apparently odd regulatory intrusions that seem to define many of the forms? These limitations—everything from the duration of a copyright to the expansion of tenant leasehold rights to the freedom of alienability associated with the modern fee simple absolute—represent public regulatory goals, leaving much of the actual content of the forms to private ordering.

C. Formalism and the Forms

So, where does that leave the puzzle of standardization? To return to the earliest critiques of the numerus clausus, perhaps, as Rudden speculated, the principle is simply formalism for the sake of formalism. In this view, the legal system clings to categories largely through inertia. This is certainly how some incarnations of the standard forms can appear to operate in practice.191

However slippery and often derided a concept,192 formalism should not be so easily dismissed here. It is true that formalism in its Langdellian sense of legal categories as self-contained, logical systems is certainly hard to credit with any seriousness in the modern discourse over standardization.193 Likewise, formalism as a reductionist mode of judicial reasoning that deterministically links general, contestable terms to rule-like outcomes seems equally inappropriate for the numerus clausus.194

191. See Dagan, supra note 3, at 1525–27 (discussing formalism evident in the Craft Court’s dissent).


193. See Pildes, supra note 192, at 608–09 (discussing the limits of the concept of formalism); Schauer, supra note 192, at 522 ("Those who condemn such an outlook as formalistic criticize the perception of law as a closed system, within which judgments are mechanically deducible from the language of legal rules.").

194. See Schauer, supra note 192, at 513–14, 538 (discussing the interplay between formalism and the application of general terms that provide the choice among eligible supplementary premises).
If formalism is deployed as merely a shorthand for resistance to innovation, however, associating formalism with the forms of property must account for the dynamism evident in the forms. At a general level, the *numerus clausus* does not resist change, at least not in the long run.

Indeed, in managing that dynamism, there may be some potential benefits to the path dependence inherent in formalism. A phenomenon like the forms of property may persist in modern law both because the costs outweigh the benefits of change, and because existing categories may provide stability around which to innovate. Mark Roe and Lucian Bebchuck have argued in the context of corporate ownership structures, for example, that a form may be efficient because of the existing context in which the choice of form is made. Likewise, the forms of property may persist because earlier forms create incentives that perpetuate their existence. Given the potential endurance of property relations, the costs of change in this area of the law may be particularly acute to settled expectation.

The mandatory nature of the formalism found in the *numerus clausus* does raise the question whether these relatively stable conceptual categories may be doing some work for the producers, rather than the consumers, of law. In other words, formalism may have instrumental value in property law that derives from how categorization channels legal innovation and regulation. Formalism in some sense balances space for innovation with the symbolic value of residual categories. This function will be explored in depth below.

---

198. Id. For Bebchuck and Roe, this constraint on choice of form in corporate ownership flows both from the efficiency of operating within a legal and economic system that already recognizes existing forms (in terms of sunk adaptive costs, network externalities, complementarities and the like), as well as because of the internal resistance to change of individuals invested in existing corporate structures. Id. at 139–53.
At this juncture, it suffices to note that critiques of the *numerus clausus* stemming from concerns about formalism may be missing an important aspect of how standardization works.  

Together, current accounts of standardization in property law share a vision of the nature of property interests reflected in the *numerus clausus*. Differing in their particulars and in their normative commitments, each of the existing accounts in some sense posits the *numerus clausus* as an organic response to economic or social concerns—as essentially bottom-up approaches to standardization. These explanations may have salience for certain aspects of the *numerus clausus*. But collectively they fail to explain the peculiar intrusions on private ordering and autonomy so deeply embedded in the law through mandatory limits on property. Unpacking the *numerus clausus* thus reveals a central paradox: standardization persists across time and disparate systems of law, yet it embodies varied and often conflicting strains of property thought and practice. How, then, to account for this essential pluralism?

**III. A Pluralist Account of Standardization**

A close examination of the multiplicity of forms and, most importantly, the varied normative and instrumental goals instantiated in the forms themselves over time, points to a novel explanation for the *numerus clausus*. Standardization in property law serves not primarily to achieve efficiency, nor do the current forms necessarily represent any particular ideal types. Instead, the legal system preserves standardization to provide platforms for resolving myriad social conflicts and set the ever-changing ground rules for defining private relations through property. In other words, throughout its many specific incarnations, the *numerus clausus* has always served the deceptively simple—but still underappreciated—function of providing a basic regulatory framework for property law. This yields a new conception of the *numerus clausus* that highlights the uniquely public aspects of the law of private property.

---

202. *See infra* Part III.

203. Moreover, the issue is not formalism for the sake of formalism, in the sense expressed in classical legal theory. That is, the forms (and here, the focus would be on the common law forms, presumably most perniciously the estates system) survive to express a pre-modern conceptualism that can only conceive of legal relations in terms of formal categories. The argument would then be that although the Legal Realists left little of the intellectual underpinnings of this view, those insights have yet to filter down to the actual practice of the law.

204. *See supra* note 10.
This Part begins with an exploration of standardization as a pluralist phenomenon in property law. It then argues that the best account of the pluralism inherent in the standard forms brings to the fore the particular regulatory role that standardization plays.

A. Property as a Pluralist Institution

Disagreements between scholars about the nature and purpose of phenomena within property often devolve into a shadow game about the relative centrality of various justifications for property. Viewing property as an allocative system tends to privilege efficiency arguments; viewing property as intrinsic to human development or political ordering can likewise lead to instrumental arguments, but tends to foster more deontological accounts. On some level, although scholars are careful to acknowledge the breadth of explanatory tools, this tendency to privilege singular strains plays out in competing explanations for standardization. Accounts of standardization that focus on particular aspects of the phenomenon, however, inevitably miss lessons to be learned from the dynamism in the list and in the internal content of the individual forms.

By contrast, a pluralist approach to standardization takes as its starting point the many, varied, and often conflicting crosscurrents embodied in this dynamism. Pluralism has proven a fruitful approach to understanding property as an institution more generally. In moral and political philosophy, for example, pluralism provides a robust analytical construct through which to examine the inherent conflicts that arise from the variety of normative foundations that underlie any property system. Scholars in this context eschew rigid, single-cause accounts in favor of grappling with overlapping and conflicting justifications. Pluralism has been equally instructive for

205. See supra Part II.
207. As noted above, see supra note 8, pluralism has many guises across disciplines, including political science, ethics, and others, but has particular valence for—and a distinctive meaning in—property theory.
208. See LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 99–107 (1977) (discussing and comparing competing moral justifications for private property); WALDRON, supra note 17, at 42–43 (discussing the pluralism inherent in property systems).
209. Stephen Munzer, for example, has built an interesting pluralist theory of property around three familiar principles—utility and efficiency, justice and equality, and desert based on labor—offering careful arguments for prioritizing and contextualizing these justifications. See MUNZER, supra note 21, at 292–97; Becker, supra note 206, at 198 (discussing Munzer's and Waldron's pluralism).
legal historians tracing the development of property in exploring the varying strands of culture and society reflected in that development. And pluralism continues to offer insights into a number of contemporary aspects of property law.

Because property is inherently embedded in particular cultural contexts that embody multiplicity and conflict, property reflects layers of meaning and purpose. Pluralist approaches recognize the influence of a diversity of institutions, communities, and corresponding perspectives. In property law, pluralism also acknowledges the rich variety of property's functional roles—at times competing and at times complementary—and then seeks to draw meaning from that mosaic. It is possible, then, to identify a particular strain of pluralism in the property law context—less a species of values pluralism and more a functional pluralism. Pluralism in property reflects not only competing normative justifications but equally important competing visions of property's pragmatic function and the aspects of property that deserve greater practical recognition in law.

When conflicts arise at a conceptual level, it might seem reflexive to assert normative priorities. Pluralist approaches to


212. See MARGARET JANE RADIN, REINTERPRETING PROPERTY 169 (1993) (arguing that to the extent cultural commitments are in conflict and pluralistic, such cultural commitments in turn create contested conceptions of property and the justice of structures of entitlement).


property are not necessarily agnostic on these conflicts, but tend to emphasize the multiplicity of forces that shape the law. Descriptively, pluralism acknowledges that any of property's varied goals and functions may be ascendant or muted in particular contexts, although property law itself rarely acknowledges an explicit metahierarchy.

Returning to standardization, it is clear that a multitude of clashing normative precepts find voice in the forms. Consider, for example, the basic system of estates, perhaps the paradigm denizens of the *numerus clausus*. The standard account of the development of the modern estates in land in American law emphasizes an inexorable drive toward alienability and resistance to constraints on the free market in land so crucial to the nation's emerging economy. There is no significant dispute that this contributed to the development of the modern estates. But the standard account tells an incomplete story.

215. *See, e.g.*, MUNZER, *supra* note 21, at 292–97 (observing that conflict is inevitable in a pluralist theory of property, and that such conflict among principles demonstrates irreducibility).

216. A pluralist vision of property might seem to obviate the need to make analytically critical distinctions. Thus pluralism risks eschewing clear solutions in favor of ad hoc amalgamation, sacrificing depth and coherence in the pursuit of breadth and comprehension. After all, if the institution of property inherently contains multiple goals and serves a variety of functions, then understanding any specific aspect of the structure of existing property arrangements might seem an exercise in culinary reverse engineering: sip the stew and try to figure out the ingredients. *Cf.* Becker, *supra* note 206, at 199–200 (suggesting that pluralists face a formidable challenge of showing both coherence and independence by having to demonstrate that their multiple principles are at the same time irreducible, equally fundamental, and all reach the same result). *But see WALDRON, supra* note 17, at 444 (decrying certain strains of pluralist argument as "fraudulent eclecticism"). Any given rule or structure can serve multiple goals or embody multiple aspects of property, but the important task is to bring coherence to the underlying pluralism. *See id.* at 443–45.

217. Gregory Alexander offers an interesting counterexample in the interpretation by the German Federal Constitutional Court of the constitutional property right contained in Article 14 of Germany's Basic Law. *See generally GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY 97–147 (2006).* The court, Alexander notes, has created a hierarchy of protection for property based on the function that property is serving in a given context. *Id.* at 98. Property interests that primarily reflect economic ends receive minimal protection, while property interests that serve dignitary and self-governance ends are accorded much stronger protection. *Id.* at 103–04.


219. *See FRIEDMAN, supra* note 56, at 171 (discussing post-Revolution reform by state legislatures to create a free, mobile market in land).

Equally important to the development of the modern estates were civic-republican concerns with the dispersion of political power and property's role in structuring social relations.\textsuperscript{221} Early American legislatures modified or abolished forms with a very self-conscious anti-feudal ideology influenced more by Jeffersonian than Hamiltonian thinking.\textsuperscript{222}

Similarly, the property aspects of the modern leasehold estate reflect a variety of normative goals. As discussed above,\textsuperscript{223} much of the "revolution" in landlord-tenant law transformed the mandatory terms associated with the lease. These substantive changes included the warranty of habitability, limitations (increasingly rare today) on the amount of rent that can be charged, expansion of landlord duties with respect to third parties, and limitations on landlord termination rights.\textsuperscript{224} These changes were motivated largely by concerns of distributive justice\textsuperscript{225} and have perhaps unsurprisingly engendered economic critiques.\textsuperscript{226} As some of these critiques have taken hold, the balance has shifted away from tenants' rights.\textsuperscript{227} These debates, however, have proceeded within the confines of the forms.

Servitudes have likewise provided platforms for resolving a varied set of concerns.\textsuperscript{228} Susan French has argued persuasively that in modernizing the law of servitudes, the legal system must acknowledge the purposes of policies underlying traditional requirements—requirements such as privity or that a servitude "touch and concern" the land.\textsuperscript{229} Under Professor French's guidance, the recent \textit{Restatement of Property (Third): Servitudes} replaces these odd jurisprudential fragments with a more straightforward approach to

\begin{itemize}
\item \textsuperscript{221} Similarly, earlier developments in common law reflected power struggles between the monarchy and the nobles. See supra text accompanying notes 63–66.
\item \textsuperscript{222} See ALEXANDER, supra note 53, at 26–42, 73–78 (contrasting Jefferson's Civic Republican conception of property with Hamilton's wealth creating understanding of property); see also Joseph William Singer, \textit{After the Flood: Equality and Humanity in Property Regimes}, 52 LOY. L. REV. 243, 275–77 (2006) (discussing anti-feudalism and popular sovereignty as rationales for alienability regimes in the development of the American common law of property).
\item \textsuperscript{223} See supra text accompanying notes 75–78.
\item \textsuperscript{224} See Rabin, supra note 75, at 520–40 (describing the expansion in landlord duties).
\item \textsuperscript{225} Michael S. Moore, \textit{Four Reflections on Law and Morality}, 48 WM. & MARY L. REV. 1523, 1560 (2007).
\item \textsuperscript{226} DUKEMINIER ET AL., supra note 53, at 447–48.
\item \textsuperscript{227} See Korngold, supra note 75, at 707–08 (discussing the diminishing era of change in landlord-tenant law).
\item \textsuperscript{228} See French, \textit{Reweaving}, supra note 35, at 1281 (discussing the variety of roles that servitudes continue to perform); see also Uriel Reichman, \textit{Toward a Unified Concept of Servitudes}, 55 S. CAL. L. REV. 1177, 1179 (1982) (arguing that servitudes allow for sophisticated private planning schemes).
\item \textsuperscript{229} French, \textit{Reweaving}, supra note 35, at 1289–92.
\end{itemize}
the competing policy goals. Servitudes are generally valid under the *Restatement* unless they transgress a handful of policy proscriptions.\textsuperscript{230} Despite this significant reform, the law of servitudes retains a basic formal structure at the same time that it streamlines the traditional categories.\textsuperscript{231}

Intellectual property is another area in which the pluralism of the *numerus clausus* is evident. There is little disagreement that a primary force animating the forms of intellectual property is a balance between incentives for creation and the deadweight loss that attends the grant of a monopoly, even if there remains much disagreement about how to balance those effects.\textsuperscript{232} But the forms of intellectual property embody many other goals.\textsuperscript{233} For example, many aspects of these forms explicitly recognize the need to preserve a commons in information or distribute creative resources broadly.\textsuperscript{234} This has given rise to doctrines such as fair use, originally a common law modification codified in the Copyright Act of 1976,\textsuperscript{235} and recognition of the significant expressive aspects of intellectual property.\textsuperscript{236} And Congress has woven other normative goals into the fabric of

\textsuperscript{230} See *Restatement (Third) of Prop.: Servitudes* § 3.1 (2000) (noting that servitudes that are invalid because they violate public policy include servitudes that: (a) are arbitrary, spiteful, or capricious; (b) unreasonably burden a fundamental constitutional right; (c) impose an unreasonable restraint on alienation; (d) impose an unreasonable restraint on trade or competition; or (e) are unconscionable); French, supra note 34, at 232–33 (explaining that the *Restatement (Third) of Property: Servitudes* replaced the old "touch and concern" requirement with the rule that a servitude is valid unless illegal, unconstitutional, or against public policy).

\textsuperscript{231} See French, supra note 34, at 227–28 (noting that the *Restatement (Third) of Property: Servitudes* recognizes essentially five basic categories: profits, easements, negative covenants, positive covenants, and the conservation servitude). It bears noting that while the *Restatement* introduces much needed clarity to the law of servitudes, it has not been universally accepted in the courts to date.


\textsuperscript{233} See Fisher, supra note 81, at 78–86 (discussing economic, ideological, and social factors that contributed to the expansion of intellectual property rights); Wif, supra note 81, at 203–07 (arguing that intellectual property law has been shaped by varying concerns reflected in New Deal thinking).


\textsuperscript{236} See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 347–48 (1996) (arguing that copyright law is meant to stimulate the creation and public communication of original expression, promoting democracy in civil society by spreading original expression and distributing knowledge).
intellectual property law. Even as Congress and courts have modified the content and elucidated the purposes of intellectual property, the conceptual categories have remained largely intact.

New, emergent forms of property evince no less a multiplicity of prescriptive and pragmatic goals than their historical antecedents. As noted, so-called hybrid property forms are often justified as a basic regulatory response to the risk of overconsumption. But as governments have established this type of property, they have imbued it with other policy ends. The design of international and domestic emissions trading regimes, for example, reflects attention (albeit with mixed results) to distributional concerns. These regimes have accordingly engineered tradable rights to reflect the unequal burden of climate change. On a more structural level, the initial allocation of rights in these regimes reflects conflicting premises about the private expectations and entitlements worthy of state recognition.

These examples, which are by no means exhaustive, illustrate that the mandatory aspects of the numerus clausus involve policies that quite explicitly constrain private ordering and individual autonomy in the process of balancing competing interests. These tradeoffs are ubiquitous: dead-hand control is limited in bequests to


238. See *supra* text accompanying notes 43–49.


240. See *id.* at 170–71, 207–08 (analyzing the Kyoto Protocol’s codification of a Clean Development Mechanism to address the distributional consequences of carbon trading).


243. See *supra* Part III.A.
foster the autonomy of heirs, even if that limits the autonomy of present owners;\textsuperscript{244} tenants are given rights to be free from retaliatory evictions, even though this limits landlords’ traditional right to decide to whom to rent;\textsuperscript{245} copyright holders must cede to the fair use of the public, even if this reduces the value of the copyright.\textsuperscript{246} Similar pragmatic compromises can be found throughout the standard forms.

It should be clear from this discussion that the pluralism inherent in the \textit{numerus clausus} has some unusual and defining features. The mandatory content inherent in the forms leaves much latitude for private ordering.\textsuperscript{247} For example, although the forms take varying approaches to limiting the duration of an interest,\textsuperscript{248} many forms have the potential for temporal flexibility.\textsuperscript{249} Similarly, the physical configuration and in many cases the number of interest holders fall outside mandatory limits.\textsuperscript{250} Functionally, almost any practical goal that market participants seek can be achieved through more or less cumbersome means.\textsuperscript{251}

What is mandatory in the individual forms over time, however, represents an accretion of intrusions into private ordering. Yet these public intrusions hardly represent any preexisting social category or particular normative stance. There is clearly some concern with efficiency in specific aspects of the \textit{numerus clausus},\textsuperscript{252} but the

\begin{itemize}
\item[246.] \textit{See, e.g.,} Wainwright Sec. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) (“The fair use doctrine offers a means of balancing the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry.”).
\item[247.] \textit{See Singer, supra} note 3, at 24 (noting that although property law limits the types of transferable estates, it allows for great freedom in the kinds of conditions and covenants that can be imposed on land ownership).
\item[248.] \textit{See supra} note 86 and accompanying text.
\item[250.] Cf. Bell & Parchomovsky, \textit{supra} note 87, at 1039–40 (discussing asset specification in property).
\item[251.] \textit{See Robinson, supra} note 62, at 1486–88 (discussing property law's ability to create a market for idiosyncratic property interests, and the economic constraints on that latitude); Rudden, \textit{supra} note 3, at 255–59 (noting that freedom of contract allows for almost any contractual figure to be custom built).
\item[252.] Restraints on alienation in the fee simple is one example.
\end{itemize}
phenomenon as a whole evinces a much broader array of regulatory goals. Likewise, patterns of social relation (and objective, external standards of well-being) play out in some, but not all, of the forms.

Paying attention to structure and content together thus reveals an underappreciated role that the forms play in providing forums for resolving recurring economic, social, political, and cultural conflicts. The best way to account for the particular patterns of pluralism evident in the standard forms is to recognize that the terms engraft a variety of (at times clashing) public regulatory goals onto the basic law of private property, while preserving a relatively simple structure through which to do so. It is the variety and sheer messiness of the mandatory content of the forms that make the numerus clausus so interesting. Standardization is both a stable and apparently definitional aspect of "property" across time, culture, and political systems, yet aspects of the standard list reflect many different practical and normative aspects of property.

What this pluralism suggests most strongly is that the primary role that standardization has always played is regulatory, providing platforms through which the law instantiates a variety of normative and pragmatic priorities. These platforms offer relatively stable conceptual categories through which the legal system sets the conditions for holding property.

B. The Numerus Clausus as a Regulatory Platform

Reconceptualizing standardization as a means of providing regulatory platforms resonates with older debates about property as a pre-political or post-political institution and the role of the state in ordering property relations. Most property theorists accept a general framework in which state ownership is posed as an alternative to "private" property. In this view, the state's role in ordering private property is akin to the role the state plays in contract law—providing

253. Cf. Singer, supra note 3, at 27-30 (discussing the importance of recognizing the complexity of property law).

254. As noted in Part II, social relations and objective well-being theories come much closer to accounting for what this Article argues is the function of the numerus clausus than metastructural accounts and are accordingly in less tension with the emphasis on the regulatory aspects of standardization that this Article articulates. Cf. Dagan, supra note 3, at 1559 n.207 (arguing that the law only encourages reliance and the shifting of property interests to protect vulnerable parties when such activity facilitates some important human good).

255. See Heller, supra note 52, at 82-86 (discussing private, state, and commons property regimes); see also Harold Demsetz, Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership, 31 J. LEGAL STUD. S653, S654-55, S658 (2002) (comparing state ownership of resources to private ownership).
a neutral apparatus of enforcement and to some contested degree correcting for identifiable market failures. But the numerus clausus suggests that the state plays a different role in property law than it does in other areas of private ordering—if only as a question of emphasis, however important that emphasis is. In property law, the state sets the preconditions for ownership, deciding as a positive matter what can and cannot be property. In doing so, the state makes decisions about the channels through which property rights take form. Standardization shows that there is no blank slate in the world of property law.

The view of property as post- rather than pre-political is often associated with Jeremy Bentham. Critiquing natural-law arguments, including Locke's, Bentham declared that "there is no such thing as natural property, and that it is entirely the work of law." Accordingly, Bentham argued, property "is nothing but a basis of expectation, the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it." Property may reflect common expectations, but as an institution it requires law. As Bentham put it, "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."

256. Cf. Ronald H. Coase, The Federal Communications Commission, 2 J. LAW & ECON. 1, 14 (1959) (arguing that once property rights are created in a resource, the government "disappears . . . except that a legal system to define property rights and to arbitrate disputes is, of course, necessary").

257. See RADIN, supra note 111, at 19–20 (discussing the limits of commodification); see also infra note 282.

258. See infra note 282 (discussing the relationship between private ordering and state recognition of property rights).

259. Bentham was one of a number of early thinkers who emphasized the post-political aspects of property, just as Locke was one of a number of thinkers (although the most influential in our intellectual tradition) who emphasized the pre-political aspects of property. Hobbes, for example, is also associated, albeit more problematically, with approaches to property that identified the state as foundational. See THOMAS HOBBES, LEVIATHAN 161–62 (Michael Oakeshott ed., Basil Blackwell 1947) (1651) (arguing that property flows from the sovereign state). Hume likewise recognized a state role, although the collective recognition that Hume identified was based more on existing patterns of possession, and in this sense Hume took more cognizance of the structure of entitlements that preexisted any collective recognition. See DAVID HUME, A TREATISE OF HUMAN NATURE 489–90 (L.A. Selby-Brigge ed., Clarendon Press 1965) (1739) (discussing the role of collective convention in recognizing property rights).


262. Id. at 111–12.

263. Id. at 113. Bentham drew his own moral from the necessity of the state to property—that the normative goal of property regimes should be to privilege "a strong and permanent
Bentham’s particular species of property positivism prefigured aspects of modern economic approaches to property and more critical Legal Realist perspectives.264 These two modern views approach property with differing normative commitments, but a similar (if at times unspoken) view of the nature of property rights.265 For many law and economics scholars, this conception of the state role generates prescriptions that privilege minimal state ordering to promote market choice. Economically oriented scholars often critique the design of the legal system in ways that seek to facilitate exchange and reduce transaction costs.266

The Realists’ conception of property starts with a similar anti-essentialist focus on the legally constructed and contingent nature of property.267 For many of the Realists, however, the state’s ordering of property rights carried inherently distributional consequences.268 This led to prescriptions about distributive justice, recognizing that any given distribution of entitlements grants power to some over others,
and there is nothing inherent in property that necessarily prevents the state from changing that distribution.\textsuperscript{269}

These two approaches, generally predicated on the disintegration of property into constituent elements,\textsuperscript{270} have a hard time accounting for the persistent conceptualism reflected in the \textit{numerus clausus}.\textsuperscript{271} But this tension can be reconciled by disaggregating Bentham’s positivism from his utilitarianism.\textsuperscript{272} One need not subscribe to any particular account of the \textit{normative} goals of the state to recognize the patterns of state ordering. Indeed, the pluralism evident in the \textit{numerus clausus} belies the supremacy of any such normative goal.\textsuperscript{273}

Linking this pluralism to the conceptualism of the forms highlights their role in channeling regulatory goals. As noted, most of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{269} See Felix Cohen, \textit{Dialogue on Private Property}, 9 \textit{RUTGERS L. REV.} 357, 365 (1964) (discussing the consequences of state recognition of property rights); Joseph William Singer, \textit{Sovereignty and Property}, 86 \textit{NW. U. L. REV.} 1, 41 (1991) ("Both the creation and the failure to create a property right leaves people vulnerable to harm, either at the hands of the state or at the hands of other persons."). This perspective continues to have modern resonance. See, e.g., \textit{UNDERKUFFLER}, supra note 17, at 141 ("The state—in creating and enforcing [property] rights—makes deliberate, binding, and final choices about who shall enjoy and who shall not.").
\item \textsuperscript{270} See \textit{ALEXANDER}, supra note 53, at 381 (discussing the disaggregated, “bundle of rights” conception of property rights).
\item \textsuperscript{271} The shared hostility to foundationalism in property rights that is a common intellectual heritage of modern economic accounts of property and the Realists suggests a role for the state in policing the \textit{numerus clausus}. Thus Merrill and Smith argue that in achieving the “optimal” configuration of the forms of property, it is preferable to rely on legislative, rather than judicial, change. Merrill & Smith, supra note 1, at 68. At the same time, Hanoch Dagan suggests that society should modify the forms of property to bolster the relationships that develop around property. Dagan, supra note 3, at 1559 ("Ideally, the existing property configurations both construct and reflect the optimal interactions among people in given categories of relationships and with respect to given categories of resources.").
\item \textsuperscript{273} In a recent series of articles, however, Merrill and Smith have attempted to reconcile this tension by reviving a form of conceptualism in law and economics. See Bell & Parchomovsky, supra note 200, at 551 (discussing Merrill and Smith as neo-conceptualists). Merrill and Smith’s theory of the \textit{numerus clausus} is one step, see Merrill & Smith, supra note 1, at 26–34, but they have also extended their account with its focus on information costs to a number of other aspects of property law. See, e.g., Merrill & Smith, supra note 39, at 777; Merrill & Smith, supra note 19, at 387; Henry E. Smith, \textit{The Language of Property: Form, Context, and Audience}, 55 \textit{STAN. L. REV.} 1105 (2003).
\end{itemize}
\end{footnotesize}
the ordering private actors seek to achieve can be accomplished by a combination of the standard forms and allowable contractual modifications. Standardization, however, does real work in the legal system by reinforcing the public goals with which private ordering can conflict. Thus, the *numerus clausus* principle generally gains traction in situations where deploying the forms reinforces a regulatory goal embodied in property law. One example of this is recharacterization, which is the process of rejecting attempts to evade the regulatory goals of a given form, such as judicially deeming certain contracts for the sale of land as mortgages.

At a more general level, when the legal system needs to regulate a given area of property relations, it frequently invokes existing categories. The state limits the forms of property self-consciously at times by explicitly pruning the extant forms. More often, the state refuses to recognize new forms passively. When it limits the forms, it is preserving the conceptual space it needs to regulate property. This is not the only regulatory tool, but it can be thought of as a threshold condition: categorizing property provides a public vocabulary that the state recognizes and preserves to further channel legal change.

Henry Smith is surely correct when he argues that property law provides building blocks for a larger grammar. But here again,

---

274. See id.; see also Rudden, *supra* note 3, at 255–56 (discussing the practical flexibility of the *numerus clausus*).

275. In a variety of situations, courts override the apparent intent of parties to a property related transaction, moving the nature of the property interest at issue from one “form” to another. See Merrill & Smith, *supra* note 1, at 22 (discussing judicial recharacterization of attempts to create “leases for life” into either life estates or tenancies at will). Perhaps the most common example of recharacterization arises in the interaction between installment land sales and the law of mortgages. Installment land sales generally involve long term contracts to purchase real property, with title transferring at the completion of installment payments. At times, however, particularly where purchasers stand to lose significant equity, courts will deem an installment land sale to be a mortgage, thus triggering the consumer protections associated with mortgage law. See John P. Musone, *Crystallizing the Intellectual Property Licenses in Bankruptcy Act: A Proposed Solution to Achieve Congress’ Intent*, 13 BANKR. DEV. J. 509, 520 (1997) (noting that “installment land sale contracts and conditional sale agreements are often recharacterized as mortgages”). Courts engaging in recharacterization tend not simply to impose new requirements to mediate the potential unfairness of installment land sales, but rather to place the transaction in a different “box,” with all of the normative force that that box carries. See, e.g., id.

276. See *infra* Part III.C (discussing varieties of regulatory strategies applied to property).

277. See Smith, *supra* note 272, at 1108 (discussing the communicative aspect of property). Smith argues convincingly that legal institutions reflect compromises that the communicative function of property requires, with different tradeoffs between information intensiveness (the amount of information required to delineate a legal proposition), and information extensiveness (factors that relate to the audience for that information). *Id.* at 1111. Smith argues that the more
the question becomes from where does that vocabulary spring and what purpose does it serve? Is it the artifact of private ordering, in the way that some linguistic theorists argue that language is hardwired into human biology, emerging organically? Or does a legal vocabulary as specialized as the formalism of the numerus clausus require active state intervention?

Looking at what the forms regulate and what they leave to private ordering, as well as how transitions in the list and the forms themselves occur, illustrates that the vocabulary that the numerus clausus frames is not primarily an organic, bottom-up mechanism. Standardization may be hardwired into the nature of property, but that connection flows from property’s initial public ordering. The numerus clausus provides the means for legislatures, courts, and other legal institutions to control the social aspects of property ownership.

In contrast to contract, which is paradigmatically (if controversially) the product of mutual consent, what is “property-like” about property is the fact that the legal system imbues a property interest with power over the rest of society. In doing so, property interests create relationships, and those relationships raise conflicting interests that the legal system steps in to moderate, implicating the state in property relations. While the state is equally involved in enforcing contractual rights, property rights are inherently embedded in a larger social fabric. Even the most exclusionary, seemingly isolated property right—the mythical sole and despotic ownership so often associated with Blackstone—is only meaningful because it is recognized by society. What distinguishes property from contract is thus not only that real rights are good against the world. It is that the world of property, amenable to private ordering, is and has always been a public institution in its basic constitution.

278. Although a “top-down” phenomenon in property law, the numerus clausus still recognizes the many “bottom-up” forces that shape the law of property. In doing so, however, standardization provides conceptual categories into which the state can channel those forces, recognizing some, rejecting others.

279. See Singer, supra note 3, at 22 (discussing the state’s role in mediating property interests).

280. See, e.g., Amnon Lehavi, The Property Puzzle, 96 GEO. L.J. 1987, 2000 (2008) (observing that “property rights are nevertheless traditionally considered to possess the trait of an exclusionary right with universal validity, as most famously depicted by William Blackstone”).

281. See supra text accompanying notes 16–23.

282. Lon Fuller’s analogy to language in the formalism of contract law provides a useful point of comparison. See Lon Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 801 (1941) (discussing the “channeling function of form”). Fuller noted that one function of formalism in contract law—and his focus was on consideration—was to channel private ordering. Id. (“In this extensive the audience for a legal communication, the more formal the communication becomes. Id. at 1113.
The regulatory function of the *numerus clausus*, in short, reflects the insight inherited from the Realists that the choice of the state to give legal sanction to one set of private expectations is just that—a choice. It may be more or less justified on various metrics, whether efficiency, political freedom, equality of treatment, or otherwise. But it is a choice nonetheless.

C. The Problem of Standardization Revisited

A pluralist account of standardization that emphasizes the essentially regulatory role the phenomenon plays may thus finally solve Rudden's puzzle. To begin with, this perspective solves the paradox posed by the persistence of limited forms in a context that otherwise allows the individualization of property rights on a number of dimensions. If the purpose of standardization is to regulate the scale of property interests or to facilitate the market for interests in property, it is a curious mechanism through which to achieve such aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intent.

283. See HALE, supra note 118, at 541 (observing that even in deciding to leave "inequalities undistributed, government would be making a choice... the law confers on each of us legal rights which others are bound to respect"); Cohen, supra note 268, at 380 (noting that relationships become property as a result of state decisions).

284. To public choice adherents, the kind of regulatory compromises embodied in the *numerus clausus*, if varying from a hypothetical optimal efficiency, are generally ascribed to interest group rent seeking behavior. Cf. Levmore, supra note 81, at 183 (discussing "political maneuvering" in the development of property rights). Bell and Parchomovsky's federalism account, for example, is centrally concerned with tempering the risk of a kind of regulatory capture of property interests at the state level by highlighting interstate competition to reduce the rent seeking that would otherwise play out in the *numerus clausus*. See Bell & Parchomovsky, supra note 3, at 100:

The existence of more efficient property regimes in other states, and the ability of consumers to readily take advantage of such regimes, would create a constant pressure on states with less efficient ones to modify their laws... [and would] deter interest group lobbyists from promoting the inefficient legislation in the first place.

However, ascribing all changes in entitlement structures (other than those that enhance efficiency) to some form of interest group capture is overly reductionist of the ends of regulatory structures in property law. This is not to deny that interest group capture occurs—it clearly does. A pluralist view of the nature of legal change, however, requires recognition of the validity of policy goals beyond efficiency—that the legal system exists to remedy inequality, to foster individual identity, and (however imperfectly) to democratically channel competing priorities.
purposes. From any rational efficiency hypothesis, the mandatory elements of the forms at any given time bear no necessary connection to what the market might require. And from a social relations or objective meaning perspective, the question arises as to why particular legal patterns have emerged, some relating to relatively stable extant social or normative categories but many not.

These paradoxes become less puzzling if the structure of the forms has less to do with information externalities or inherent categories of meaning and more to do with providing focal points through which to resolve the social and economic conflicts inherent in property. Bringing the active role of the state in managing the forms to the fore suggests that standardization need not be as much of a mystery as the contemporary literature assumes. The tensions that Bernard Rudden first identified and that have resonated through recent scholarship problematize a phenomenon that is only troubling for a vision of property that privileges a fairly narrow perspective on private ordering. This is not the place to plumb the depths of that perspective, but merely to suggest that standardization fits more comfortably with a vision of property grounded in public norms rather than in freedom from state coercion.

285. See supra Part II.A.

286. One might posit that in the long run, not just the number of forms (Merrill and Smith's optimal) but the content of the actual forms themselves will be efficient. Some have argued, for example, that the elimination of the fee tail was efficient. See, e.g., Jeffrey Evans Stake, Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities, 32 FLA. ST. U. L. REV. 401, 411–15 (2005) (highlighting the inefficiencies of the fee tail). But this is as open to question as the likelihood of any other normative goal to dominate the forms.

287. The stability provided by the numerus clausus can serve the value that Bell and Parchomovsky recently argued lies at the heart of property—increasing the value of assets and decreasing the costs of trade. See Bell & Parchomovsky, supra note 200, at 552 (arguing that “a property system with stable rights increases the value of assets to users (now owners) and decreases the costs of obtaining and defending those assets”). Bell and Parchomovsky’s essentially Benthamite view about the advantages of stable expectations, id. at 538, sheds light on a number of interests and dynamics in property law. However, there is cause for skepticism of their account as a positive matter. Property law in many guises reflects interests far removed from the individual wealth maximizing potential of stability. Bell and Parchomovsky attempt to side step this by taking aspects of property law that conflict with their value theory out of their definition of property altogether. See, e.g., id. at 611–12 (dismissing the distributional goals of marital property upon dissolution of marriage by divorce as outside the scope of “property”).

288. Some might argue that conceptualism is universal in the law—that the basic way legal actors approach their tasks is to place problems and doctrines into recognizable boxes, for example, “negligence” versus “strict liability” in tort law. It is hard to deny the taxonomical urge that plays out in many areas of law. See, e.g., Mark A. Lemley & Christopher R. Leslie, Categorical Analysis in Antitrust Jurisprudence, 93 IOWA L. REV. 1207 (2008) (critiquing taxonomical approaches to antitrust law). But there are many areas of the law where conceptualism, to the extent that it exists, plays much more of a background role. Contract law is
The question of how standardization as a regulatory strategy interacts with more general regulation of property remains, and it is fair to examine why one approach or the other predominates as the locus for contestation. It is well recognized that regulatory strategies can be ex ante or ex post. The former strategy sets the preconditions under which an activity can take place or an institution operates. Conversely, the latter imposes constraints or assesses liability for any given state of affairs after the fact. Defining the mandatory content of the *numerus clausus* is largely an ex ante regulatory strategy, although modifications to content do at times apply ex post to existing forms.\(^2\)\(^8\)\(^9\) It is fair, then, to ask why the legal system would need the kind of ex ante categories represented by standardization to regulate property if there are other more direct methods of regulation.\(^2\)\(^9\)\(^0\)

There is perhaps no single, overarching answer for why this regulatory strategy continues to have the centrality it does in property law. No metric, for example, balancing frustration costs and information costs provides a singular reason why the categories prove useful in their regulatory work. Rather, property law's continuing reliance on standardization reflects a combination of path dependence, historical memory, and convenience for the producers of law. As

\(^2\)89. Changing the terms of the "lease" rather than any particular landlord-tenant relationship or the rules that govern common interest communities or condominiums, to take two contemporary examples, means that by legislation or judicial decision, the conceptual category as a whole changes. In other words, the law creates a category, reflecting existing social and economic forces, and then deploys that category to regulate the acceptable boundaries of the relationships created through such property forms.

Of course, private parties recognize this intuitively, and gamesmanship around regulatory categories occurs. This then forces courts to step in and police the boundary, returning a relationship around property to the appropriate regulatory category. One clear example of this can be found in the process of recharacterization. See supra note 275 and accompanying text.

\(^2\)90. Even as the forms of property have provided sites to resolve contentious pragmatic and normative problems, the legal system has also regulated ownership in other ways, increasingly so in the modern world. See Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 22 (2007) (finding that "there is no system of property rights without laws regulating ownership"). Real property, of course, is subject to comprehensive land-use regulation, and the contemporary regulation of personal property—through health, consumer, safety law, and many other regulatory regimes—is ubiquitous. See Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 317 (2002) (discussing the extensive regulation of personal property). Moreover, nuisance and similar common law doctrines are simply another ex post regulatory structure, albeit a structure usually triggered by private disputes over the use of property. See Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety*, 48 WM. & MARY L. REV. 1927, 1931 (2007) (discussing the ex post nature of nuisance law).
discussed above, once a form exists, it provides a relatively stable point of focus around which changes in meaning and content can be negotiated. Less as a matter of notice and more as a matter of channeling the public aspects of property through common frames, standardization facilitates the regulation of particular problems in property in a more targeted manner than regulating on a system-wide basis (as with, for example, unconscionability in contract regulation).

That the legal system maintains multiple regulatory strategies is hardly surprising and hardly unique to property law. If any pattern can be discerned, it is that the category-specific strategy represented by the *numerus clausus* may be giving way increasingly to more comprehensive, general strategies as the default approach to the regulation of property. But our legal system continues to find it useful to define and redefine the mandatory content of the standard forms for particular contexts.

Viewing the *numerus clausus* as regulatory platforms requires embracing, even if cautiously, a certain strain of conceptualism in property law. This strain recognizes that not only the general notion of property, but also categories within property, are meaningful. In this view, the forms of property are primarily tools to assist legal actors—courts, legislatures, and other formal sources of legal recognition—in their regulatory role. Social and economic relations are often contract- or norms-based, but when the regulatory goals of property come to the fore, the legal system insists upon standardization.

The regulatory platforms that standardization provides as a convenience for legal actors have a larger signaling function as well. The signal is not primarily what market participants, communities, or social actors look to the law to embody; indeed, private ordering can provide such signals as often as public regulation can. Rather, the signal attends most notably to the task of property in mediating relations, resolving conflicts, and setting the ground rules for social and economic interaction.

Of course, acknowledging the work that categories do in providing relatively stable arenas for contestation implies nothing determinative, descriptively or prescriptively, about the present constellation of forms or their internal content. This is as it should be. The important point is to recognize that in defining and constantly redefining the permissible realm of property, the legal system is not

291. See supra Part II.C.
292. See supra Part I.A.1.
293. See supra note 272 (discussing the revival of conceptualism in modern property theory).
bound by any particular alignment of entitlements, and scholars must pay close attention to the tradeoffs and choices embodied in any given property regime.

Which leads back to pluralism. Property in formal terms exists to the extent that it is recognized by the state. Even if private convention and social norms can replicate or replace functions associated with property law, such private ordering does not command the essential binding force on the world that defines property. Thus, the process of that state recognition necessarily reflects the tumult inherent in any social and political process. The process of resolving conflicts over a myriad of competing priorities in property law has played out and will continue to play out largely within the confines of the forms.

In the end, a regulatory view of the numerus clausus inverts the basic problem posed by standardization—that it can reduce efficiency (in some circumstances) and that it restraints individual


295. In many situations in which private ordering mirrors the functions of property, the arrangements lack the basic mandatory constraints on third parties that legal recognition of such ordering provides. Informal norms that frequently develop around resources both significant and mundane, see Richard Epstein, The Allocation of the Commons: Parking on Public Roads, 31 J. LEGAL STUD. S515, S524–25 (2002) (discussing the creation of informal norms), may work reasonably well, at least in a cultural context of shared expectations. But the minute an outsider cuts in front—disrespects the norm—there is simply no ground for insisting that the norm be followed. Any expectation of priority is simply that—an expectation.

296. Bell and Parchomovsky have identified several core questions that any theory of property must address—namely, which entitlements qualify for legal recognition, against whom, what is their content, and how should infringements be remedied? Bell & Parchomovsky, supra note 200, at 538. A pluralist account of the numerus clausus recognizes that the answers to these questions are fundamentally contested and continue to evolve, and no account of property should essentialize the answers.

A regulatory view of the numerus clausus, moreover, does not attempt to account for the separate question of what can be made the subject of property. As scholars have noted, virtually anything can theoretically be the subject of property (and thus exchange, see ALEXANDER, supra note 53, at 380 (noting that “everything that has exchange-value is (or could be) property, including babies, politics, even justice itself”)), although some scholars have paid careful attention to the limits of commodification. See RADIN, supra note 111, at 16–30. Questions of anticommodification are important but essentially orthogonal to this Article’s focus on the mechanics of the political definition of property rights.

297. Understanding the standard forms as regulatory platforms, moreover, sheds light on the institutional question of how the forms are actually policed in American law. As noted above, Merrill and Smith characterize the numerus clausus as a doctrine of judicial self-restraint, while continental scholars highlight the explicit positivism of civil law systems. See supra Part I.A.3. The pluralist perspective on standardization this Article sets forward is capacious enough to account for property interests, though rare, that fall outside of the standard forms, what the Article has described as the weak form that standardization takes in our system. Since standardization is primarily a regulatory strategy, and not the only one, there are other avenues that the legal system takes at times to label an interest “property.”
autonomy (in most circumstances). Understanding the pluralism inherent in the *numerus clausus* means that any particular normative goal will rarely be ascendant in the forms or in any given form, and that social, economic, and moral tradeoffs will always continue.\textsuperscript{298}

IV. IMPLICATIONS

A pluralist account of the standard forms as regulatory platforms provides a new way not only to explain the *numerus clausus* principle, but also to approach some recurring debates in general property theory. In particular, scholars have paid increasing attention in recent years to origin myths in property, positing increasingly sophisticated accounts of how the conditions under which private property emerges inform the development of existing property regimes. Scholars are also engaged in an ongoing and vibrant debate about the conceptual tensions that arise in defining intellectual property as property. And no discourse is more active than the balance between public ordering and private entitlement in the constitutional dimension of property rights, particularly in the law of takings. This Article's theory of the *numerus clausus* has relevance to each of these discussions.

A. Standardization and the Development of Property Rights

Legal scholars are engaging increasingly with the mechanisms through which private property initially arises. Fascination with origin myths is a long-standing staple of property theory.\textsuperscript{299} Locke's arguments for private property, for example, center on a story about a natural progression from abundance to individual acquisition to government protection of that labor.\textsuperscript{300} Other early modern thinkers

---

\textsuperscript{298} This perspective is open to what might be considered a teleological challenge. Until fairly recently, primarily with Merrill and Smith's work, there was relatively little acknowledgement of the existence of the *numerus clausus* in the American legal system, yet this Article has argued for placing standardization at the heart of the regulation of property. The answer is that actors in the legal system need not be self-conscious in deploying the conceptual categories represented in the *numerus clausus* in the regulatory manner this Article describes.

\textsuperscript{299} See Richard Schlatter, Private Property: The History of an Idea 10 (1951) (discussing the longstanding impulse to explore "the origin and validity of the conventions upon which ownership rests").

\textsuperscript{300} See Rose, supra note 109, at 38 (observing that Locke's *Second Treatise on Government* "clearly unfolds a story line, beginning in a plenteous state of nature, carrying through the growing individual appropriation of goods, then proceeding to the development of a trading money economy, and culminating in the creation of government to safeguard property").
likewise justified their views of the role of property and the state with narratives about the evolution of property rights.\textsuperscript{301}

The renewal in interest has come largely from economically oriented legal scholars’ engagement with the problem of mechanism in Harold Demsetz’s account of private property.\textsuperscript{302} Demsetz’s basic thesis was that when an external change in the costs and benefits of resource management occurs, and social benefits exceed social costs, private property develops.\textsuperscript{303} Demsetz illustrated this thesis with a story drawn from Eleanor Leacock’s research into the emergence of property interests in land among the Montagnes Indians, which Demsetz hypothesized had developed in reaction to the increase in value of beaver pelts after the introduction of fur trading.\textsuperscript{304}

Demsetz never spelled out the mechanism through which this internalization of the benefits of private property took place, nor how any group of individuals undertakes the cooperation necessary to make that transition.\textsuperscript{305} Some scholars argue that such phase shifts,
at least at the initial moment of transition from commons to private ownership, are best understood through “invisible hand” explanations. Others, however, argue that these explanations inadequately account for the political mechanisms through which regime shifts occur.

A regulatory perspective on the *numerus clausus* sheds light on this problem of mechanism. The contemporary fascination with origin myths conflates two distinct questions. It takes the question of how private property comes to exist from some state of commons and translates it into a theory of how changes are made once there is a regime of private property. This is another way to restate the cost-benefit internalization of externalities view. In some sense, *why*—the moving cause—is much less interesting than *how*. The basic problem is the question of collective action: If property evolves through some kind of legal parthenogenesis to capture the gains that come from solving the problem of the commons, then why are the same collective mechanisms inadequate to solve the underlying collective action problem?

In this debate, the *numerus clausus* can be seen as the residual echo of the creation of property rights by the state, although an echo that continues to witness active intervention. Like the microwave background radiation that survives the Big Bang, the standard forms illustrate that when the state recognizes entitlement, it has to have some formal construct around which to coalesce rights. If the first question relating to property that a society might answer is whether to enforce the decision to allocate a resource to A over B, the next question is what to call that recognition?

The contemporary revival of accounts of property that emphasize the institution’s pre-political aspects must recognize the consistent mechanism through which the state identifies “property.” Any “just-so” story of the state ratifying and protecting prior property regimes, and proposes an interest group theory to explain such transitions. See Banner, *supra* note 196, at 360 (discussing the process of reallocation of property rights).

306. See Wyman, *supra* note 10, at 121 n.7 (“Demsetz’s explanation also might be described as an ‘invisible hand explanation’ for the transformation of property rights.”).

307. See id. (discussing the emergence of private property as the result of a political process); *see also* Jonathan Remy Nash, *Economic Efficiency versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673, 674 (2008) (discussing the dichotomy in economic explanations for the emergence of property rights between efficiency accounts and public choice accounts). Similarly, Andrzej Rapacynksi has argued that the traditional economic account of property rights as a foundation for market economies ignores situations in which market institutions themselves form the preconditions for property rights. See Andrzej Rapacynksi, *The Roles of the State and the Market in Establishing Property Rights*, 10 J. ECON. PERSP. 87, 102 (1996).
entitlements, like the limits of social-relations accounts, pays insufficient attention to the role of the state as a mediating force and the inevitable complexity that attends that role. The persistence and ubiquity of standardization at the least suggest a more interventionist evolution of property rights than invisible-hand explanations allow.\textsuperscript{308} It also suggests that framing the evolution of property rights as a contest between efficiency and public choice leaves out many interesting variables.

B. Intellectual Property as Property

One of the livelier current debates in the realm of intellectual property revolves around the extent to which intellectual property is or should be considered “property.”\textsuperscript{309} Although some of the discussion is categorical (e.g., do copyright, patent and trademark conceptually belong in the realm of property?), much of the discussion is consequentialist. Conceiving of intellectual property as property is often rejected as overly deterministic or inappropriate in a particular instance.\textsuperscript{310} Or, the connection is embraced to draw on real and personal property as a realm of individual dominion, defined chiefly by strong exclusion rights.\textsuperscript{311}


[Models predicated on] assumptions of autonomous evolution and authoritative allocation overlook the inherently contested nature of formation and change in property rights systems. Economic models tend to ignore what anthropologists have long asserted: that property rights are both a result and a cause of resource conflicts. As such, they are not so much authoritative entitlements chosen by market participants and guaranteed by the state as they are processes and products of constant negotiation, contestation, and compromise.


\textsuperscript{310} See, e.g., Sterk, \textit{supra} note 309, at 445–46 (discussing the problems created by analogizing intellectual property to real property).

\textsuperscript{311} See, e.g., Frank H. Easterbrook, \textit{Intellectual Property is Still Property}, 13 HARV. J.L. & PUB. POLY 108, 109 (1990) (“Patents give a right to exclude, just as the law of trespass does with real property.”); F. Scott Kieff, \textit{Property Rights and Property Rules for Commercializing Inventions}, 85 MINN. L. REV. 697, 703 (2001) (discussing the treatment of patents as property and emphasizing the importance of a patentee’s “power to restrict use”); see also Adam Mosoff,
A common subtext to the view of property deployed in this debate is that the freedom available to the state to moderate and modify the "forms" of patent, copyright, and trademark is somehow more fluid than the latitude granted to the state in, for example, defining estates in land. Normatively, the debate becomes framed as a question of how close intellectual property should be to a static vision of more traditional property as the bastion of exclusionary rights, relatively free from state ordering.312

A regulatory perspective on the numerus clausus suggests caution about this subtext. The kind of ex ante ordering evident in standardization of real property is no less constitutive than the forms found in intellectual property. The specific policy goals and the tradeoffs they represent certainly vary, but the larger structural dynamic is quite similar. The forms of property in land and chattels are just as much the locus of policy compromise and state ordering as exists in intellectual property. Granted, this process is much more often in the background for traditional property than in intellectual property. This does not resolve any specific question in debates over the impact of considering intellectual property as property, and analogies across forms may or may not be instructive depending on context. A regulatory perspective of the numerus clausus does, however, call into question any assumption that the malleability and ex ante state control so evident in intellectual property is somehow categorically distinct from other categories of property.

C. Reliance and Public Ordering in Regulatory Takings

Finally, understanding the standard forms of property as providing regulatory platforms has consequences for current debates about the law of takings.313 Indeed, the numerus clausus played a relatively unheralded, but highly illuminating, role in setting the terms of one of the most important disputes in current constitutional property law: the role of "background principles of property law" in defining the balance between acceptable state ordering and private expectation.


312. See, e.g., Carrier, supra note 309, at 4–5 (discussing the deployment of property rhetoric in debates about the nature of intellectual property).

This debate has gained importance since the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Commission*.[314] In *Lucas*, the Court held that a regulation that restricts all economically viable uses of property constitutes a per se violation of the Takings Clause with one notable exception.[315] The Court had to account for the history of restrictions on property that had destroyed all value without compensation in the name of preventing harm—a rationale the Court argued was indeterminate and manipulable.[316] Instead, the Court said that takings liability would not attach to limitations on property rights that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[317] The Court seemed skeptical, however, that the kind of environmental purposes South Carolina was trying to achieve could be reconciled with what the Court saw as a conceptually clear category of ownership—the fee simple.[318] In other words, the invocation of a form was at least suggestive of a trump for resisting legal innovation.

In the decade and a half since *Lucas*, this idea of "background principles" has sparked a significant and ongoing scholarly and jurisprudential debate about how to divine such principles and which institutions—courts or legislatures—are best capable of identifying such principles. The Court has only tentatively waded into the conceptual chasm *Lucas*’s elevation of "background principles" has spawned. In *Palazzolo v. Rhode Island*, the Court was confronted with whether regulations in existence at the time a transfer of property takes place bar a claimant from bringing a regulatory takings claim.[319] Although the *Palazzolo* Court rejected a hard no-liability rule on the basis of notice,[320] it did leave open the possibility that at some point

---

315. Id. at 1019.
316. Id. at 1022–26.
317. Id. at 1029.
318. Cf. id. at 1016 n.7 (discussing ambiguities with respect to the "deprivation of all economically feasible use" rule, but concluding that the "difficulty" could be avoided because the property interest at issue was a "fee simple").
320. Id. at 627–28:

The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation. The State may not put so potent a Hobbesian stick into the Lockean bundle.
and through some undefined transmogrification, most types of state intervention in property rights can become background principles of property law.321

The only other clue to this process that the Court has provided comes from Chief Justice Rehnquist’s dissent in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, a case that upheld a temporary moratorium on development.322 The dissent acknowledged that temporary restrictions on development had come to constitute background principles of state property law.323 This was so even though comprehensive zoning is a relatively recent phenomenon in common-law-evolutionary terms. At some point between recent enactment and the three or four generations that have passed since land-use regulations became ubiquitous, Chief Justice Rehnquist seemed to intimate, state ordering comes to inhere in title.

The issue of the mechanism through which state restrictions on property become background principles essentially recapitulates the question of property as a pre- or post-political institution.324 If the numerus clausus is the framework through which the state orders private relations around property, then the discourse on “background principles” should recognize the significant history of tinkering with the standard forms. This does not necessarily resolve any individual inquiry into the balance between public interest and protection for private property, but does suggest a more expansive view of the state’s role in that balance.325

321. Id. at 629–30:
   We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title.

323. Id. at 351 (Rehnquist, C.J., dissenting).
324. Cf. RADIN, supra note 212, at 168 (discussing the limits of positivism in accounts of transitions in entitlements). Thus, at a conceptual level, emphasizing the post-political nature of property forms challenges the kind of fundamental property rights rhetoric driving foundationalist interpretations both of the Public Use Clause in traditional eminent domain and of the Takings Clause as applied to regulatory restrictions. See, e.g., Gideon Kanner, The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?, 33 PEPP. L. REV. 335, 346–47 (2006) (discussing “the slippery slope” of the Supreme Court’s takings jurisprudence).
325. See RADIN, supra note 212, at 170 (“Owners belong to the culture of property. They can be understood to participate in it and therefore to understand the areas of flexibility, the areas where evolution is to be expected.”). Thus, if standardization serves an essentially public function, prospective changes in the nature of the forms should arguably raise fewer expectation concerns. Cf. Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical
Indeed, focusing on the constitutional balance between private ordering and public control through the lens of the *numerus clausus* suggests an interesting role for reliance. When the government creates a form and invites reliance on that form, there is a strong argument that private expectation formed on that basis deserves respect. Conversely, however, the fact that the state often alters the forms gives corresponding notice of the reach of private latitude. This will often be a question of timing and the reasonableness of reliance, but in the difficult balance between expectation and state ordering, a regulatory perspective on the *numerus clausus* places a bit more weight on the public side of the scale.\(^\text{326}\)

**CONCLUSION**

Stephen Munzer recently ventured that “the last word on explaining the *numerus clausus* principle has yet to be uttered.”\(^\text{327}\) Although this Article is hardly that last word, it has attempted to provide a new framework through which to understand an intriguing conundrum at the heart of property law. Mature systems of property throughout history and in disparate legal regimes today adhere to a limited menu of standard forms. This list has evinced remarkable stability at a structural level and equally remarkable dynamism in terms of the content of the menu and the substance of the individual forms. The paradox that this poses is best explained by understanding

---

326. Understanding the regulatory function of the *numerus clausus* has relevance as well to an important debate in the jurisprudence of regulatory takings over the so-called denominator problem. This problem arises from the fact that evaluating the impact of regulation on property requires a predicate determination of the relevant "parcel"—both in physical and legal terms. See Margaret Jane Radin, *The Liberal Conception of Property: Cross-Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (discussing conceptual severance). Although the Supreme Court has held that regulations are to be evaluated at the "whole parcel" level, see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002), a myriad of practical interpretational questions continue to plague the lower courts in applying that standard. See Rebecca Nowak-Doubek, Comment, *A Victory for Property Rights: How State Courts Have Interpreted and Applied the Decision from Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 36 U. Tol. L. Rev. 405, 415–22 (2005) (discussing states' application of the "whole parcel rule").

To the extent that the nature of the legal interest is a determinant of the relevant parcel, a regulatory perspective on the *numerus clausus* acknowledges the contestability of such interests. Indeed, in a footnote battle over the relevant parcel in *Lucas*, the majority oddly cited the fact that the petitioner’s property was held in fee simple, as though that resolved the issue. See 505 U.S. at 1016 n.7 (citing the relevant "interest in land" as a "fee simple interest"). Of course, the fact that the estate was in fee simple is not inherently determinative of the baseline against which a regulation’s impact is to be assessed.

that property law is first a public institution; it is through the *numerus clausus* that legal systems define and regulate the landscape of acceptable interests in property. Standardization is thus inherently pluralistic, with the forms providing platforms within which to resolve the inevitable conflicts perpetually at play in the law of property.

This approach to conceptualizing the *numerus clausus* clarifies challenges about the phenomenon that have long vexed scholars. It sheds light on an important aspect of property law as a political institution, provides a new perspective on the intellectual-property-as-property discourse, and has implications for contemporary concerns about the scope of constitutional property.

In the end, the great strength of any pluralist institution like property law is that it can accommodate ever-changing patterns of social, economic, cultural, and moral relations. Standardization is simply a tool—as useful as the goals it embodies and as vulnerable to critique as any kind of formalism—for the legal system to instantiate fundamental questions at the heart of property. It is no more, and no less.
***


Title 28, section 1331 of the United States Code provides the jurisdictional hook for the majority of cases heard in the federal courts, yet it is not well understood. The predominant view holds that section 1331 doctrine both lacks a focus upon congressional intent and is internally inconsistent. I seek to counter both these assumptions by re-contextualizing the Court’s section 1331 jurisprudence in terms of the contemporary judicial usage of “right” (i.e., clear, mandatory obligations capable of judicial enforcement) and cause of action (i.e., permission to vindicate a right in court). In conducting this reinterpretation, I argue that section 1331 jurisdiction is best understood as a function of the federal right and cause of action a plaintiff asserts. Under my view, these two concepts, when weighed against each other, offer strong evidence of congressional intent to vest the federal courts with jurisdiction and form the foundational elements for the federal question jurisdictional analysis. This principle underlies three standards that offer both a better explanation of the Court’s past section 1331 cases and better guides for future decisions than the Holmes test. Under the first standard, section 1331 jurisdiction lies when a plaintiff makes an assertion of a non-judicially created federal cause of action and a mere “colorable” assertion to a federal right. Under the second standard, section 1331 lies when a plaintiff alleges a state-law cause of action and asserts a more weighty “substantial” federal right. Finally, under the third standard, section 1331 jurisdiction lies when a plaintiff asserts a cause of action created as a matter of federal common law and a plaintiff asserts a “substantial” federal common law right coupled with a sufficient showing to support the right.