



Alabama Law Scholarly Commons

Articles

Faculty Scholarship

2016

The Concept of Property

Meredith M. Render

University of Alabama - School of Law, mrender@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_articles

Recommended Citation

Meredith M. Render, *The Concept of Property*, 78 U. Pitt. L. Rev. 437 (2016).

Available at: https://scholarship.law.ua.edu/fac_articles/467

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Alabama Law Scholarly Commons.

THE CONCEPT OF PROPERTY

Meredith M. Render*

Table of Contents

Introduction	439
I. The Conceptualist/Non-Conceptualist Divide	446
A. Form Restriction in Property	447
B. The Conceptualist Claim	452
1. Coherence	453
2. Unity	458
C. Conceptualism as an Explanation of Positive Law	461
1. Explanation Rather than Justification	461
2. Positive Law Versus Natural Law Conceptualism	462
II. The Unusual Formalism of <i>Numerus Clausus</i>	463
A. The Ruleness of <i>Numerus clausus</i>	465
B. The Realist Critique of <i>Numerus clausus</i>	470
III. Freeing <i>Numerus Clausus</i> from the Realist Critique	477
A. <i>Numerus Clausus</i> as “Empty” Formalism	477
B. The Problem of Capacity	480
1. Constraint	480

* Associate Professor of Law, The University of Alabama School of Law. The author would like to thank Dean Brandon and the Law School Foundation for generous support of this project. For valuable insights and comments on this piece, I am grateful to Abraham Bell, Lee Fennell, Eric T. Freyfogle, Timothy Mulvancy, Shuyi Oci, Michael Pappas, Michael Pardo, Sally Brown Richardson, Jessica Shoemaker, as well as audiences at the 2015 Property Roundtable at Tulane Law School, and the 2015 Annual Meeting of the Association of Law, Property and Society.

a.	The Elimination of Variables	482
b.	Coordination Function	485
2.	The Problems of Obfuscation and False Constraint	489
IV.	Conclusion	492

INTRODUCTION

Property scholars can roughly be divided into two theoretical camps: those that understand property to be a unique and cohesive conceptual domain and those who do not.¹ The fundamental question that is dividing property scholars is whether property represents a distinct conceptual approach to law.²

The answer is not obvious. Property is basically about the ownership of things.³ Ownership, in turn, is about our right to use and possess things.⁴ But other areas of law also inform our right to use and possess things: contract, criminal law, tort, and even constitutional law all have something to say about the use and possession of objects in the world.⁵ More pointedly, law and economic scholars, in particular, have argued that property rules serve only to set background entitlements that serve as the basis for future exchanges.⁶ From this perspective, property (or “ownership”) is nothing more than a series of in personam legal obligations—in other words, a subset of contracts.⁷

¹ See, e.g., Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005) (“[M]odern property scholarship has utterly splintered the field. On the one hand, instrumentalists view property as nothing more than default contract rules. On the other hand, conceptualists proclaim the primacy of in rem rights and specially privileged rights such as the rights to exclude, to use, and to transfer. Still other legal scholars think of property as a ‘bundle of sticks’ capable of assuming any shape or form.”). What Bell and Parchomovsky describe as “bundle of sticks” scholars is a specific type of non-conceptualist approach.

² See *id.* at 534–37 (describing the conceptualist/non-conceptualist divide in property theory); see also Thomas W. Merrill & Henry E. Smith, *The Contract/Property Interface*, 101 COLUM. L. REV. 773, 775 (2001) [hereinafter Merrill & Smith, *Interface*] (describing form restriction as a “fundamental characteristic[] that distinguish property and contract as legal institutions”).

³ Bell & Parchomovsky, *supra* note 1, at 577 (“It is crucial to clarify that in the context of property, the term ‘thing’ extends beyond physical objects. Property’s usage of the concept of ‘thing’ is capacious, including not just tangible items but also ideas and qualities.”).

⁴ John E. FCC, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1011–12 (2003) (describing ownership as “the right to exclude others, the right to use and possess without interference by others, and the right to transfer ownership to others”).

⁵ See Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2006) (describing how contract law affects property interests).

⁶ Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 376 (2001) [hereinafter Merrill & Smith, *What Happened*] (“For modern economists, property rights are primarily regarded as a prerequisite for exchange.”).

⁷ *Id.* at 370–71 (“In addition to providing the analytical framework for subsequent efforts by economists to explain property rights, certain of the expository aspects of Coase’s article also exerted a pervasive influence over subsequent thinkers . . . [Coase] implicitly modeled property rights as a collection of in

This Article takes the opposite position. This Article takes the position that property is a conceptually distinct area of law, and what makes it conceptually distinct is the principle of *numerus clausus*.⁸ *Numerus clausus* is a common law rule imposed by judges that demands that every legal ownership arrangement fits within a restrictive menu of existing forms of ownership—the life estate, the fee simple, and so forth.⁹ In defending the fundamental role of *numerus clausus* in property doctrine, this Article articulates the best-case-scenario for understanding property as an analytic archetype.

If property “counts” as a legal analytic archetype—or, if property is a coherent legal concept—it *must* be because the legal concept of “property” can be said to have criterial features.¹⁰ There must be at least one criterion we can point to that separates property from, say contract.¹¹ Most commonly, conceptualists understand that criterion to be the principle of *numerus clausus*, a common law rule that imposes a restriction on allowable forms of ownership.¹² In contrast, non-conceptualists do not

personam rights. Insofar as the two-party model was to become the norm for subsequent law and economics treatments of property rights, this made it all the easier to overlook the differences between in personam and in rem rights.”)

⁸ I have elaborated on this aspect of the thesis elsewhere. See Meredith M. Render, *Complexity in Property*, 81 TENN. L. REV. 79, 93–96, 124–28 (2014) [hereinafter Render, *Complexity*]; see also Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549, 562–68 (2013).

⁹ Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1598 (2008) (“[P]roperty law recognizes only a limited and standard list of mandatory forms.”); see also JESSIE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 197 (2010) (“By requiring that property owners create only legally recognized property interests, which have a standardized form, the principle [of *numerus clausus*] directly restricts freedom of ownership.” (describing *numerus clausus* as “legally mandated list of immutable forms”)).

¹⁰ See Ken Kries, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 MICH. L. REV. 1871, 1878 (“[T]he truth-conditional perspective maintains that there are necessary and sufficient conditions for the truth of legal propositions. A slightly weaker thesis . . . maintains that there are criteria for the correct application of legal concepts and propositions, criteria that might fall short of necessary and sufficient conditions.”).

¹¹ Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000) [hereinafter Merrill & Smith, *Numerus Clausus*] (“A central difference between contract and property concerns the freedom to ‘customize’ legally enforceable interests.”).

¹² Of course, some disagreements exist among conceptualists with respect to what “counts” as the criterial features of property. See, e.g., Bell & Parchomovsky, *supra* note 1, at 535 (“The conceptualists . . . insist[] on the primacy of in rem.”); Stephen R. Munzer, *A Bundle Theorist Holds On to His Collection of Sticks*, 8 ECON. J. WATCH 265 (2011) [hereinafter Munzer, *Bundle Theory*] (concluding that “the right to exclude” is a potentially criterial feature for Merrill and Smith).

view form restriction as a necessary or important (or in some versions, extant) feature of property or property systems.¹³

However, before turning to the merits of these two positions, it is important to pause for a moment to consider the real-world application and significance of the conceptualist/non-conceptualist divide. Does it make a difference in the real-world if we categorize an ownership arrangement as falling in the domain of property as opposed to contract?

The 2007–2008 financial collapse provides a striking application of the conceptualist/non-conceptualist divide—as well as an excellent illustration of the magnitude of its continued importance. The 2007–2008 financial collapse was fueled by many variables, but virtually all experts agree that one of the most significant contributing factors was the proliferation of “opaque” securities, such as synthetic collateralized debt obligations (“CDO”).¹⁴ A CDO is a type of derivative.¹⁵ The value of a CDO is dependent upon the performance of a set of underlying assets.¹⁶ At base, a CDO is comprised of a set of promises in which the buyer pays a premium to the seller and the seller promises to pay the buyer a large lump sum in the event of a default in the underlying asset.¹⁷ The buyer is betting that the underlying asset will default, and the seller is betting that it will not.¹⁸

Despite the fact that CDOs are traded en masse in huge volumes, each CDO is potentially unique.¹⁹ Each CDO represents a customizable set of in personam

¹³ See Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 6 (stating that some scholars “tend to react to manifestations of the numerus clausus as if it were nothing more than outmoded formalism”).

¹⁴ See, e.g., R. Christopher Whalen, *The Subprime Crisis: Cause, Effect and Consequences*, 17 SPG J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 219, 220 (2008) (citing “the rapid growth of over-the-counter (OTC) derivatives and securities” as a cause of the crisis).

¹⁵ *Id.*

¹⁶ Lynn A. Stout, *Uncertainty, Dangerous Optimism, and Speculation: An Inquiry Into Some Limits of Democratic Governance*, 97 CORNELL L. REV. 1177, 1184–85 (2012) (“Derivatives are literally bets-contractual agreements between two parties that one will pay the other an amount of money determined by whether or not some future event occurs.”).

¹⁷ *Id.*

¹⁸ *Id.* at 1185 (“[D]erivatives are fundamentally wagers, they offer a unique opportunity for pessimists to try to make profits betting on falling prices.”).

¹⁹ See Saule T. Omarova, *License to Deal: Mandatory Approval of Complex Financial Products*, 90 WASH. U. L. REV. 63, 70 (2012) (“Complex financial instruments are difficult to understand and value, because their risks are not easily measured and controlled. This is attributable to the potential complexity of the specific reference assets and the structure of the transactions.”).

promises to pay money (when certain conditions are met), rather than an irrevocable exchange of underlying assets.²⁰ Consequently, CDOs are *contracts*.²¹ If, by way of contrast, a CDO were an irrevocable exchange of the underlying assets (i.e., a bank sold mortgagor debt to an investor without a promise to pay in the event of default), then it would be *property*.

The fact that CDOs are structured as contracts rather than property (which requires standardization and form restriction) contributed to—and perhaps even caused—the financial collapse of 2007–2008.²² In retrospect, the most conspicuous problem with the proliferation of CDOs that included bundled subprime mortgages was the fact that investors had a great deal of difficulty assessing their risk of loss.²³ Even large institutional investors like Goldman Sachs, which had an enormous capacity to compute risk, were unable to accurately track their risk.²⁴ This was because the contracts that determined the value of the CDOs were not standardized. Each contract could be individually customized to suite the particular risk-hedging needs of the buyer and seller. When these individually customized instruments were then bundled and sold en masse, it became impossible to determine with any accuracy the value of the package.²⁵ So although they were *regarded*, traded, and (semi) regulated as though they were stable financial assets, CDOs *behaved* like highly unstable personal contracts.

This disastrous discontinuity between how 2007-era CDOs were regarded and how they ultimately behaved is attributable to the woefully mistaken but widespread (non-conceptualist) belief that there is no essential difference between a conventional property asset (like debt) and a customizable promise pay. This belief gravely

²⁰ See Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1183–84 (2012) (“The structure of these products made them very difficult to gauge, and hence price, their risk accurately.”).

²¹ Stout, *supra* note 16, at 1178 (describing CDOs as “contractual arrangements”).

²² Levitin & Wachter, *supra* note 20, at 1183–84 (“[F]ailure of markets to price risk correctly due to the complexity, opacity, and heterogeneity of the unregulated private-label mortgage-backed securities” led to the financial crisis.).

²³ Omarova, *supra* note 19, at 69 (“One of the fundamental causes of that crisis, however, was the unprecedented level of complexity of financial products and markets.”).

²⁴ Sanjeev Arora, Boaz Barak, Markus Brunnermeier & Rong Ge, *Computational Complexity and Information Asymmetry in Financial Products* 2–3 (Princeton Univ., Working Paper, Oct. 19, 2009), <https://www.cs.cmu.edu/~odonnell/hits09/arora-barak-brunnermeier-ge-complexity-of-financial-derivatives.pdf>.

²⁵ *Id.*

misapprehends the role that form restriction plays in providing a bulkhead against the kind of opaque complexity that devastated the U.S. financial system in 2007–2008. Financial instruments that fall within the conceptual extension of “property” are subject to the rule of *numerus clausus* and are not customizable. This rule exists to avoid the very failing that lay at the heart of the financial crisis: an overwhelming complex system of property exchange.

Because confusion about the role of *numerus clausus* can lead to disastrous results as in the case of the financial crisis, the first objective of this Article is to clarify the conceptualist account of “property” and the central role of *numerus clausus*.

A second agenda point of this Article is to defend the conceptualist account of property from its most dogged normative criticism: the criticism that conceptualist accounts of property champion a deleterious form of legal formalism.²⁶ This criticism, which has pursued the conceptualist account since its nascent days, has much intuitive appeal.²⁷ After all, *if* property comprises a unique conceptual domain, it is a domain characterized by some pretty unpopular traits. In a world (legal and otherwise) that is increasingly focused on fluid concepts, where continuums are preferred to categories, the conceptual approach of property is rightly understood to be inflexible and constraining.

This Article concedes that the distinguishing characteristic of property is a kind of formalism, but argues that it is not the kind of formalism that is problematic in the ways that non-conceptualists anticipate. Instead, formalism, it turns out, is a virtue in the context of ownership. This Article posits that form restriction in property

²⁶ See Davidson, *supra* note 9, at 1646 (describing the realist challenge to conceptualists’ emphasis on *numerus clausus* as a challenge to extant legal categories based on the concern that “the state’s ordering of property rights carried inherently distributional consequences”). I describe this as the central *normative* concern, because a separate descriptive concern has been raised regarding whether the conceptualist accounts, and particularly the emphasis on *numerus clausus*, accurately describes the phenomenon of property. See, e.g., Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 380 (2002) (faulting an explanatory account of the principle for failing “to explain why property law is more restrictive than contract law”); Joseph W. Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1025, 1061 (2009) (arguing that the system of estates does not “result in anything close to simplification or standardization of the package of rights that go along with ownership”). I have addressed this concern in some detail elsewhere. See Rendon, *Complexity*, *supra* note 8, at 108–09.

²⁷ Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1107 (2003) [hereinafter Smith, *Language*] (“The realists and their successors argue that many features traditionally associated with formalism—from literalistic interpretation to standardization of property under the numerus clausus principle—are nothing more than archaic relics.”).

avoids the pitfalls of formalism generally because the function of form restriction is not to arrive at a *correct* or even a substantively justifiable classification of interests in a given dispute, but rather to arrive at a classification.²⁸ *Numerus clausus* is first and foremost a coordinating tool.²⁹ In this sense, form restriction as a rule set shares much in common with rules of etiquette, rules of language, or the rules of a game.³⁰

Rather than reflecting or directing deep normative commitments about the distribution of assets, form restriction primarily serves to sort interests into a finite (and therefore manageable) set of categories.³¹ To maintain a finite set of categories, *numerus clausus* must eliminate idiosyncratic property interests.³² In this light, form restriction's success is measured not by the degree that it disallows unjust or unjustifiable outcomes, but instead by the degree that it disallows *novel* outcomes.

The realist critique does not obtain in the specific context of form restriction in property because formalism in property is about *exclusion* not *inclusion*. The application of *numerus clausus* does not help a legal decision-maker arrive at a single, uniquely justifiable judgment in a property dispute. Instead, it ensures that an infinite array of idiosyncratic estates will be excluded.³³

²⁸ Rander, *Complexity*, *supra* note 8, at 117 (“[N]umerus clausus’ primary regulatory role is barring the highly idiosyncratic property interest.”).

²⁹ More specifically, *numerus clausus* is a coordination rule. A coordination rule can be described as a rule which arises when it is everyone’s best interest to have a regularity of behavior, but more than one course of behavior (if regularized) would serve equally well as another. David Lewis developed a helpful example of a coordination rule with the now familiar example of driving on a particular side of the road. DAVID LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* 6 (1969). The primary purpose of such a rule is coordinate behavior. Rather than prescribing a uniquely justifiable result, a coordination rule can be said to be justified by the coordination function itself.

³⁰ These types of rules are often referred to as “conventions.” A rich literature is directed at the phenomenon of conventional rules. *See, e.g.*, H.L.A. HART, *THE CONCEPT OF LAW* 56–57, 256–57 (1961) (discussing conventions as a type of social rule); LEWIS, *supra* note 29 (presenting an influential account of conventional behavior); *see also* ANDREI MARMOR, *SOCIAL CONVENTIONS* (2009) (challenging Lewis’s account); Hilary Putnam, *Convention: A Theme in Philosophy*, 13 *NEW LITERARY HIST.* 1 (1981); Elizabeth Anderson, *Beyond Homo Economicus: New Developments in Theories of Social Norms*, 29 *PHIL. & PUB. AFF.* 170 (2000).

³¹ Rander, *Complexity*, *supra* note 8, at 116 (“[Numerus clausus] maintain[s] a manageable taxonomy of ownership options.”).

³² *Id.* at 85 (“[T]he primary function of numerus clausus is to eliminate highly idiosyncratic property interests.”).

³³ *Id.* at 116 (explaining that *numerus clausus* eliminates “a potentially infinite host of possible ownership arrangements”).

By excluding these variables, *numerus clausus* fills the vital role of ensuring that our property system is not overwhelmingly complex in the same way that the rule that directs us to drive on the right rather than left side of the road fills the vital role of ensuring that we do not collide with one another in our cars.³⁴ Put simply, *numerus clausus* serves as an organizational limit for what would otherwise be a catastrophically complex system of property. In this way, *numerus clausus* serves as the conceptual center of the legal concept of property, while simultaneously serving as the lynchpin of any functional property system.

The third, and final, imperative of this piece is to illuminate the boundaries of the conceptualist/non-conceptualist divide. Regardless of whether conceptualist scholars are correct that *numerus clausus* represents a feature that meaningfully distinguishes property, or non-conceptualist scholars like Thomas Grey are right that property is not a coherent legal concept, the debate has grown increasingly less productive in recent years.³⁵ Recent work directed at the question has been hindered by vague misapprehensions and unfounded assumptions.³⁶

For example, many commentators have taken the conceptualist/non-conceptualist debate to be a kind of “code” for political disagreements about economic justice and property distribution.³⁷ Too often objections raised by form restriction skeptics reveal a concern that the principle could undermine progressive distributive ends.³⁸

³⁴ See LEWIS, *supra* note 29, at 6.

³⁵ Thomas C. Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69, 74 (J. Roland Pennock & John W. Chapman eds., 1980) (arguing that “property . . . is no longer a coherent or crucial category in our conceptual scheme,” and that, in fact, property “ceases to be an important category in legal and political theory”).

³⁶ See, e.g., Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 108–10 (2013) (describing conceptual disagreements among property theorists in broad and bluntly political terms and, particularly, characterizing “the Left” who care about helping “historically marginalized groups,” as distinguished from “conservatives” who, assumedly, do not).

³⁷ See, e.g., MARGARET JANE RADIN, REINTERPRETING PROPERTY 120–35 (1993) (comparing and contrasting a “classically liberal” conception of property with a “neoconservative view of property”); see also Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009) (articulating a list of “progressive”—as implicitly contrasted from “non-progressive”—statements about property law); Munzr, *Bundle Theory*, *supra* note 12, at 268 (“A virtue of [bundle theory] is that it makes few if any moral or political commitments The bundle theory I proposed can be used by many different sorts of property scholars, whatever their moral or political views.”).

³⁸ See, e.g., Merrill & Smith, *What Happened*, *supra* note 6, at 365 (“[T]he motivation behind the realists’ fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property.”).

That fear, however, is misplaced. The question of whether property *has* a conceptual center is quite distinct from the question of what (if anything) a conceptual center dictates in terms of real-world outcomes. The principle itself is neutral in terms of resource distribution. If conceptualists are right that *numerus clausus* is doing important work in delineating the conceptual boundaries of property, then the principle can just as readily be conscripted to progressive ends as regressive ends. This Article provides an insider's guide and annotated mapping of this heavily trod yet rarely understood terrane.

In sum, this Article adopts three positions: (1) that property is conceptually distinct from other areas of law, and that it is *numerus clausus* that makes it distinct; (2) while *numerus clausus* embodies a kind of formalism, it is the *good* kind of formalism, not the bad (as in savaged by the American Realists) kind of formalism; and (3) regardless of whether one agrees with the conceptual account of property, it is important to clarify what that account is and to distinguish it from the confusion that generally surrounds it.

This argument is presented in the following format. Part I introduces the conceptualist/non-conceptualist divide and explicates the necessary point of divergence between the positions. Part II discusses various anti-formalist critiques as they are relevant to the conceptualist account of property. Part III demonstrates how *numerus clausus* succeeds both in avoiding the pitfalls of formalism generally and in effectuating form restriction. Finally, Part IV offers a conclusion.

I. THE CONCEPTUALIST/NON-CONCEPTUALIST DIVIDE

The conceptualist/non-conceptualist divide has to do with whether “property” is a legal concept that has criterial features. Criterial features are features that distinguish entities that fall within the extension of the concept (i.e., things that “count” as “property”) from entities that do not. Conceptualists understand the concept of “property” to include one or more criterial features.³⁹ Most commonly, conceptualists understand “property” to necessarily include the principle of *numerus clausus*, a common law rule that imposes a restriction on allowable forms of ownership.⁴⁰ In contrast, non-conceptualists generally do not view form restriction

³⁹ Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 3 (“A central difference between contract and property concerns the freedom to ‘customize’ legally enforceable interests.”).

⁴⁰ *See id.* Some identify various scholars’ conceptions of “the right to exclude” as a (or the) primary demarcation between the various conceptualist camps. *See* Rosser, *supra* note 36, at 108–09; Munzer, *Bundle Theory*, *supra* note 12, at 266 (attributing the view that “the right to exclude” is a core property value to Merrill and Smith).

as a necessary or important (or in some versions, extant) feature of property or property systems.⁴¹ Moreover, some non-conceptualists have criticized the conceptualist emphasis on *numerus clausus* as misplaced and unduly formalist.⁴² The disagreement goes to the heart of what makes something a property entitlement (i.e., what “counts” as property) as opposed to another kind of legally protected interest.

The formalist mechanism that property conceptualists embrace is embodied in the principle of *numerus clausus*, a common law rule that restricts the form of legally cognizable ownership.⁴³ Rather than permitting owners to transfer customized or novel interests that are tailored to the parties’ individual preferences, the rule of *numerus clausus* restricts the form of cognizable interests to a set and finite menu of possible interests.⁴⁴

A. Form Restriction in Property

Property law is surprisingly formalist.⁴⁵ Despite the fact that formalism as a mechanism of legal decision-making is notoriously out of fashion,⁴⁶ property law resolutely clings to a method of classifying and enforcing ownership interests that is

⁴¹ See Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 6 (stating that some scholars, “tend to react to manifestations of the *numerus clausus* as if it were nothing more than outmoded formalism”).

⁴² *Id.* at 6–7 (observing that scholars and judges seem to react to the principle as if it were formalist).

⁴³ Davidson, *supra* note 9, at 1598 (“[P]roperty law recognizes only a limited and standard list of mandatory forms.”).

⁴⁴ Merrill & Smith, *Interface*, *supra* note 2, at 778 (describing *numerus clausus* as “legally mandated list of immutable forms”).

⁴⁵ See, e.g., HANOCH DAGAN, PROPERTY 8 (2011) [hereinafter DAGAN, PROPERTY] (describing an emphasis on the forms of property as “a nice illustration of classical formalism” that is subject to the legal realist critique “of form obscuring substance”). There is more than one sense to the term “formalism” and arriving at an “exact definition” of formalism is not easy. Morton White, *The Revolt Against Formalism in American Social Thought of the Twentieth Century*, in 8 J. HIST. IDEAS 2, 133 (1947). It is used here to refer to a method of decision-making that resolves legal conflicts applying rule-bounded extant categories.

⁴⁶ Martin Stone, *Formalism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166 (2002) (observing that “formalism” has come to be used almost exclusively as a term of opprobrium); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) [hereinafter Schauer, *Formalism*] (observing that the word “formalism” generally connotes something negative); White, *supra* note 45 (positing that formalism as an analytic methodology was intellectually eviscerated by the cross disciplinary “anti-formalist” revolt led by thinkers such as Oliver Wendell Holmes, John Dewey, Thorstein Veblen, and Charles Beard).

remarkably categorical.⁴⁷ This system of classification of ownership interests revolves around a fixed set of categories or “forms.”⁴⁸ To be enforceable, a property interest must fit within a recognized category, which include the fee simple, fee simple defeasible, life estate, and leasehold, among others.⁴⁹

Property’s attentiveness to form is puzzling to many.⁵⁰ Conventional wisdom holds it to be a frustrating and anachronistic feature of property law.⁵¹ In prioritizing the homogenization of interests, some significant normative considerations are necessarily sacrificed.⁵² Many an eye is rolled upon discovering the extremely subtle linguistic differences that give rise to, for example, a fee simple subject to condition subsequent versus a fee simple determinable, particularly when one realizes how much turns on the distinctions.⁵³ Estates change hands and ownership interests are destroyed with the inadvertent use of the word “revert” rather than “reenter” or the use of the permissive “may” rather than the mandatory “shall.”⁵⁴ Even the off-handed

⁴⁷ See Robert L. Fischman, *The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act*, 83 IND. L.J. 661, 673 (2008) (“Property law . . . is strongly tied to the categorical, rather than the utilitarian approach.”).

⁴⁸ Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 3 (observing that the “basic” forms of real property ownership include “the fee simple, the defeasible fee simple, the life estate, and the lease”).

⁴⁹ *Id.* at 3 (“With respect to interests in land . . . the basic forms are the fee simple, the defeasible fee simple, the life estate, and the lease.”). This is not intended to be a comprehensive list, and reasonable minds can disagree about what does and does not “count” as a property form.

⁵⁰ Davidson, *supra* note 9, at 1598, 1618 (describing the phenomenon of *numerus clausus* as a “puzzle” and noting that “standardization has long proven challenging to predominant accounts of property”).

⁵¹ Of course many scholars have defended the utility or necessity of property forms. See, e.g., Davidson, *supra* note 9, at 1600 (arguing that property forms serve to mediate pluralistic public and private values in the context of ownership); Hansmann & Kraakman, *supra* note 26, at 380 (arguing that form restriction in property serves a verification of rights function); Merrill & Smith, *Numerus Clausus*, *supra* note 11 (arguing that property forms serve to reduce information costs in property transactions).

⁵² One such consideration is the autonomy value described as “liberty of contract.” See Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1568 (2003) [hereinafter Dagan, *Craft*] (observing that freedom of contract is necessarily curtailed by strict adherence to *numerus clausus*).

⁵³ See, e.g., *Marhrenholz v. County Bd. of Sch. Trs.*, 417 N.E.2d 138, 142 (Ill. App. Ct. 1981) (holding that the statement “land to be used for school purpose only” gave rise to a fee simple determinable and stating that “a fee simple subject to a condition subsequent would have arisen had the [grantor] given the land upon the condition that or provided that it be used for school purposes [only]”).

⁵⁴ *Id.*

placement of a comma or the unintentional ordering of clauses can seem to dispossess one owner while supplying another owner with a windfall.⁵⁵

The common law rule that orchestrates property law's fealty to form is usually referred to as the principle of *numerus clausus*.⁵⁶ The phrase "*numerus clausus*" literally means "the number is closed."⁵⁷ The principle of *numerus clausus* requires that property interests conform to one of the existing forms of ownership.⁵⁸ Unique or customized property interests are prohibited.⁵⁹ Should an owner attempt to convey an individually-tailored interest, courts will convert it to a recognized interest.⁶⁰

In such a case, adherence to the formal system of property forms seems to many to be "a good example of the triumph of form over substance," often with intuitively unappealing consequences.⁶¹ Basic subsistence and human dignity frequently hang in the balance. Consider the following example. A pro se testator leaves a handwritten will that states:

I, Jessie Lide . . . appoint my niece Sandra White Perry as executrix of my estate. I wish Evelyn White [decedent's sister-in-law] to have my home to live in and not to be sold.⁶²

The language of the conveyance does not conform to any of our recognized forms of ownership. Did Mrs. Lide intend to give Evelyn White a fee simple? This

⁵⁵ *Id.*

⁵⁶ See DAGAN, PROPERTY, *supra* note 45, at 8 (describing emphasis on forms in property law as "a nice illustration of classical formalism").

⁵⁷ Davidson, *supra* note 9, at 1598 (The name *numerus clausus* originates "from the civil law concept that the 'number is closed.'").

⁵⁸ *Id.* at 1598 ("[P]roperty law recognizes only a limited and standard list of mandatory forms.").

⁵⁹ Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 3 ("[I]ncidents of a novel kind' cannot 'be devised and attached to property at the fancy or caprice of any owner.'").

⁶⁰ *Id.* at 3 ("If [parties] attempt to customize a new type of interest, the courts will generally recast the conveyance as creating one of the recognized forms.").

⁶¹ DUKEMINIER ET AL., *supra* note 9, at 184. Textbook editors tend to highlight these intuitions, noting, for example, that the taxonomy of property forms delineates "distinctions that have, or should have, lost their relevance." *Id.*

⁶² *White v. Brown*, 559 S.W.2d 938, 938 (Tenn. 1977).

construction is undercut by testator's directive that the house not be sold.⁶³ The power to transfer is a feature of the fee simple estate.⁶⁴ On the other hand did Mrs. Lide intend to give Mrs. White a life estate in the home—a construction that is supported by the phrase “to live in?”⁶⁵ If so, it is peculiar that she did not name Mrs. White's successor in interest. Under that construction, Sandra Perry—who along with her mother Mrs. White lived with testator “as a family” in the home for twenty-five years—would not inherit the home when Mrs. White died.⁶⁶ Instead, a set of distant relatives who may or may not have been acquainted with Mrs. Lide, Mrs. White, or the house, would take possession of the house upon Mrs. White's death.⁶⁷

When the resolution of a case like this turns upon a single word or phrase inadvertently selected by a pro se testator in a hand-written will, property's formalistic leanings can seem an affront to justice. Surely legal decision-making in such a case should turn on the underlying substantive merits of the respective claims—or better still: grantor's specific, if idiosyncratic, intention—rather than testator's accidental linguistic approximation of one or another of the recognized forms of ownership.

Yet, subtle linguistic choices and careful attention to form do have a substantial impact on property rights. Despite the fact that formalism as a mechanism of legal decision-making has been resoundingly criticized,⁶⁸ property law continues to employ a method of classifying and enforcing ownership interests that is remarkably categorical.⁶⁹

⁶³ *Id.* (parsing the language of an ambiguous pro se will to determine whether grantor intended to create a fee simple or a life estate).

⁶⁴ *See, e.g.,* Percy Bordwell, *Alienability and Perpetuities II*, 23 IOWA L. REV. 1, 14 (1937) (alienability is a characteristic of the fee).

⁶⁵ 559 S.W.2d at 938.

⁶⁶ *Id.* at 939.

⁶⁷ *Id.*

⁶⁸ *See* Stone, *supra* note 46, at 166 (noting that “Formalism” as a term has a uniformly negative connotation).

⁶⁹ *But see* Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L.J. 467, 478 (2011) (arguing that “property law does not feature the categorical restriction” in the way that conventional wisdom perceives).

In practice, the principle of *numerus clausus* means that even if it is clear that grantor intends to create a novel, idiosyncratic interest, grantor's intent will not be given effect. For Mrs. Lide this means that even though it appears she intended to create a fee simple (i.e., an estate that could theoretically go on forever) that is limited by an obligation that it cannot be transferred by the grantee—that intent is ignored. Lide can either grant White an estate that could last forever, or Lide can ensure that White is not empowered to sell the house. But she cannot do *both*. The rule of *numerus clausus* forces the court to choose between competing cognizable estates, rather than allow Lide to create her own novel estate.

Further, in addition to thwarting justice, adherence to property forms is thought to likewise inhibit private ordering in property transfers.⁷⁰ While contract law allows for “an infinite range of promises the law will honor,”⁷¹ property law enforces only a limited list of ownership rights.⁷² Contract law's sensitivity to individual preference is generally believed to promote efficiency in the use and distribution of resources.⁷³ In contrast, *numerus clausus* would seem to hinder that mechanism of efficiency.⁷⁴

Given these (seemingly fair) criticisms of *numerus clausus*, it is not surprising that the principle serves as the focal point for the criticism that property law is unduly formalist or that property law employs “formalism” as a method of legal decision-making.⁷⁵

One of the chief objections to *numerus clausus* stems from the fact that the principle appears to require the slavish and mechanical application of a rule, without regard to the substantive merits of the claims at hand.⁷⁶ On this view, the principle can fairly be characterized as formalist and, worse still, its formalism is thought to

⁷⁰ Davidson, *supra* note 9, at 1598.

⁷¹ Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 3.

⁷² Davidson, *supra* note 9, at 1598.

⁷³ *Id.* at 1619.

⁷⁴ *Id.* at 1619–22 (describing the concern that *numerus clausus* causes inefficiencies).

⁷⁵ See, e.g., Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 6 (stating that “[s]cholars and judges tend to react to manifestations of the *numerus clausus* as if it were nothing more than outmoded formalism”).

⁷⁶ See Dagan, *Craft*, *supra* note 52, at 1528. The term “mechanical jurisprudence” as a criticism of formalist legal decision-making originated in Roscoe Pound's *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

favor existing and/or entrenched distributions of property interests.⁷⁷ Further, to many, it is a classic example of an “empty” formalism—ruleness for ruleness’ sake—serving no substantial or discernible purpose.⁷⁸ Still others wonder whether *numerus clausus* is capable of producing the result that it purports to produce: namely form restriction in property.⁷⁹ This concern is particularly keen in light of the realist skepticism about the capacity for rules to dictate unique outcomes.⁸⁰

This is a significant point at which conceptualists and non-conceptualists views diverge: whether *numerus clausus* is an anachronistic feature of property law, a form of empty formalism that emphasizes all the wrong aspects of decision-making in the distribution of assets; or whether, as conceptualists contend, *numerus clausus* is a central, criterial feature of property that distinguishes it from other areas of regulation. A careful consideration of this disagreement follows.

B. *The Conceptualist Claim*

Predictably, there is no one conceptualist account of “property.” Instead, there are several distinct accounts of “property” that operate from the premise that “property” can be understood as a coherent legal practice—and, importantly, as distinguishable from other legal practices—insofar as it is a practice that embodies one or more criterial features.

This claim is often made in opposition to the claim originally made by Thomas Grey in 1980 that, “property . . . [is] no longer a coherent or crucial category in our conceptual scheme” and that, in fact, property “ceases to be an important category in legal and political theory.”⁸¹ Of course, one need not be a conceptualist to disagree with this claim. Grey has also been challenged on this point by those who do not identify themselves as conceptualists.⁸² For example, Stephen Munzer, originator of

⁷⁷ See, e.g., Dagan, *Craft*, *supra* note 52, at 1528 (describing as formalist the application of *numerus clausus* as a decision rule in actual cases).

⁷⁸ Schaur, *Formalism*, *supra* note 46, at 510. The term “ruleness” was coined by Frederick Schaur in the context of describing “decision-making according to rule” as the “heart” of formalism.

⁷⁹ Dorfman, *supra* note 69, at 478 (“[I]t is roundly acknowledged that private persons can ‘almost always’ achieve whatever it is that they initially aim to achieve through manipulating the existing forms of property rights, without being forced to tailor a novel form.”).

⁸⁰ See, e.g., Singcr, *supra* note 26, at 1024 (describing the estate system as “disturbing to modern sensibilities”).

⁸¹ See, e.g., Grey, *supra* note 35, at 81.

⁸² See, e.g., STEPHEN MUNZER, *A THEORY OF PROPERTY* 31–36 (1990).

the bundle-of-sticks theory (which is the predominate non-conceptualist account of property), has also described Grey's claim as "unsound" and "overdrawn and confused."⁸³

Yet, Grey's description of property law as simply the sum of a collection of rules that bear no coherent relationship to one other provides an antithesis to the conceptualist thesis.⁸⁴ While conceptualist accounts vary in their understanding of what it is, exactly, that renders property coherent, conceptualists disagree with the proposition that property law lacks coherence as a category of legal regulation.⁸⁵ It is likewise true that conceptualist accounts vary in the degree to which they understand the doctrine to be coherent and/or unified.⁸⁶ Nonetheless, a consideration of what might be understood to be the "core" conceptualist claims along these lines follows.

1. Coherence

Property conceptualists adopt the position that "property" is a coherent category and/or legal concept.⁸⁷ For conceptualists, this coherence issues from the fact that the legal concept of "property" is defined—in the sense of being

⁸³ *Id.* at 31 (stating also that Grey's claim "seems to stand directly in the path of" Munzer's own argument regarding Munzer's conception of property as a bundle-of-sticks).

⁸⁴ See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691–92 (2012) ("But if legal realism and its progeny insisted on anything, it was that property is not about things. According to this conventional wisdom, property is a bundle of rights and other legal relations availing between persons. Things form the mere backdrop to these social relations, and a largely dispensable one at that. Particularly with the rise of intangible property, so this story goes, the notions of ownership and property have become so fragmented and untethered to things that property is merely a conclusion, a label we affix to the cluster of entitlements that result from intelligent policymaking. By contrast, according to the realist and postrealist conventional wisdom, the traditional baselines provided by property law not only were undertheorized and underjustified, but also represented a pernicious superstition and an obstacle to clear thinking and progressive remaking of the social order. An inclination to take traditional property baselines seriously can then be dismissed as a failure to get with the program and a reflection of lack of sophistication or a partiality for entrenched interests.").

⁸⁵ See, e.g., Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2105 n.26 (2012) ("Much of this debate is couched in terms of whether there is a 'core' to property and, if so, whether it has anything to do with exclusion.").

⁸⁶ Henry Smith, for example, has described property as having some formal aspects and other aspects that are not formal. Smith, *supra* note 84.

⁸⁷ For a discussion of how concepts are rendered coherent by their limiting criteria, see Meredith M. Renck, *Boundaries: Introduction to the Meador Lectures on Boundaries*, in MEADOR LECTURES ON BOUNDARIES (2014) [hereinafter Renck, *Boundaries*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321341.

distinguished from other areas of regulation—by one or more criterial features.⁸⁸ The phrase “criterial feature,” as it is used here, is intended to connote a feature that both distinguishes property from other areas of legal regulation and, to some degree, unifies the doctrine.⁸⁹

For some conceptualists, that criterial feature may be the right to exclude.⁹⁰ For others—and this is the position advanced here—the sole criterial feature of property is the phenomenon of form restriction.⁹¹ Some conceptualists seem to be positing that both form restriction and the right to exclude are criterial.⁹² Still others seem to be identifying other criterial features.⁹³

As noted above, I embrace the position that form restriction is a criterial feature in property. Insofar as form restriction is criterial, we should expect to see form restriction in each instantiation of the legal concept of “property.” It is in this sense that form restriction renders the legal concept of “property” coherent. Form restriction shapes each instantiation of the legal concept of “ownership.” In turn, the legal concept of “ownership” is, in one way or another, the subject or predicate of every other rule of property law. *Numerus clausus* structures ownership, and ownership’s ambit is coextensive with the doctrine.

⁸⁸ *Id.* at 4 (“The coherence of every concept that we hold depends upon its limitation. To be coherent a concept must encompass a set of criteria that distinguishes the concept from other concepts. The concept of ‘green,’ for example, would have no content if anything could be fairly described as green and nothing could be excluded from it.”).

⁸⁹ In using the term “criterial” here, I am not making a claim about what does or does not “count” as positive law. For example, if a judge rejected the rule of *numerus clausus* and declined to employ it, that decision would still “count” as law insofar as it otherwise met the criteria for what counts as “law” (e.g., it comported with the rule of recognition and so forth), even though the decision did not comport with our legal concept of “property.” It would simply be a poorly decided case.

⁹⁰ Thomas W. Merrill, *The Right to Exclude*, 77 NEB. L. REV. 730 (1998) [hereinafter Merrill, *Exclude*] (“Deny someone the exclusion right and they do not have property.”).

⁹¹ I, for one, am committed to this position. Rander, *Complexity*, *supra* note 8.

⁹² Thomas Merrill, for example, has been understood to adopt this position. See Merrill, *Exclude*, *supra* note 90, at 730.

⁹³ J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 742 (1996) (“The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.”).

It is important to be clear that I am not making the claim that form restriction *explains* or even informs the content of every rule of property law.⁹⁴ For example, form restriction does not explain why property law allocates the risk to buyer when there is a catastrophic loss (caused by, say, a fire that destroys Blackacre) between the execution of the contract for sale of real property and the delivery of the deed. The rule could just as easily be otherwise (seller bears the risk of loss). Form restriction has nothing to say about which rule is appropriate.

By way of contrast, consider Jules Coleman's conceptualist account of tort. Coleman claims that "tort law is best understood in terms of a conception of corrective justice."⁹⁵ Coleman claims that corrective justice is embodied in the practice of tort law and also explains the practice of tort law.⁹⁶ In his view, corrective justice explains why the rules of tort contain the specific content that they do—why one choice is made instead of another. For Coleman, corrective justice unifies the *content* of tort doctrine.⁹⁷

Numerus clausus does not unify the content of property doctrine. Aside from preventing a catastrophic complexity which would destroy our capacity for a property system at all (which is nothing to sneeze at), *numerus clausus* does little more than distinguish ownership interests from other types of private law interests. In this light, the claim made here is not a strong claim of coherence, as compared, say, to those that Coleman has made about tort.⁹⁸ But it *is* a claim about the way in which even disparate aspects of property doctrine are related to one another through the structure of ownership that is dictated by the principle.

While emphasizing the relative modesty of the coherence claims made here, it may be helpful to clarify that I am also not making the claim that form restriction *causes* property law to contain the content that it contains. Form restriction does not cause, for example, the implied warranty of habitability. The claim of coherence is not a causal claim.

⁹⁴ In fact, it may be the case that the only rule that *numerus clausus* informs is the rule that ownership must assume a recognized form.

⁹⁵ JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 4 (2001).

⁹⁶ *Id.* at 10.

⁹⁷ *Id.*

⁹⁸ *Id.*

I am not even making the claim that form restriction necessarily results in the particular forms that we have, or that the forms that we have are the “right” or optimal number of forms to have. *Numerus clausus* is indifferent to whether we should have a dynasty trust or three separate defeasible estates. The singular commitment of the principle of *numerus clausus* is to prohibit the creation of novel ownership arrangements by private parties.⁹⁹ This does not mean that the list of cognizable interests is intractable or ossified. The principle merely ensures that the power to create idiosyncratic or novel interests is reserved for collective—rather than individual—action.¹⁰⁰ From time to time, legislatures will add or remove interests from the slate of cognizable forms. The fee tail, for example, has been legislatively eliminated in a majority of U.S. states.¹⁰¹ On the other hand, a dynasty trust is a relatively new interest that is recognized in an increasing number of jurisdictions.¹⁰²

Instead, my claim is that form restriction in property is *necessitated* by the intrinsic problem of complexity in property. Form restriction is a necessary feature of not only our property regime, but of any property regime. Ownership of tangible objects must assume a limited set of forms to avoid the creation of a catastrophically complex system of property. As I have explained in greater detail elsewhere, this risk of catastrophic complexity is unique to property, and as such, the necessity of *numerus clausus* is unique to property. We could (and may) find form restriction in other areas of regulation, say, for example, in contract, but it is uniquely necessitated by each instance in which we are regulating human interactions with material objects.

Further, form restriction is a criterial feature of property because of this unique connection between owning objects and complexity. In this way, we can distinguish what does and does not “count” as property by identifying whether the instantiation in question conforms to the rule of *numerus clausus*. It is in this way that the principle structures ownership and renders the doctrine coherent.

⁹⁹ Render, *Complexity*, *supra* note 8, at 94.

¹⁰⁰ See Dorfman, *supra* note 69, at 483 (“[*Numerus clausus*] is the negative aspect of the broader notion that the forms of property rights ought to be creatures of collective undertaking—viz, public legislation.”).

¹⁰¹ John Hart, “A Less Proportion of Idle Proprietors”: Madison, Property Rights, and the Abolition of Fee Tail, 58 WASH. & LEE L. REV. 167, 170 (2001) (“Abolishing fee tail was part of a legislative program supported by Madison as well as Jefferson.”).

¹⁰² Lucy A. Marsh, *The Demise of Dynasty Trusts: Returning the Wealth to the Family*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 23, 24 (2013) (“Recently, a flurry of state legislation has made it possible for an individual to create a long-term private trust, called a Dynasty Trust.”).

This claim about the relationship between complexity and property, which I have described as the complexity thesis, is supported by the fact that the principle of *numerus clausus* appears to be a universal feature of property systems.¹⁰³ All post-feudal property systems seem to embrace a system of limited property forms that are defined by the state.¹⁰⁴ This fact presents the question: why is form restriction *universal*? As Nestor Davidson has observed: “this transcendence suggests that there must be some overriding structural reason” for property form restriction.¹⁰⁵

Complexity is the overriding structural feature of property that necessitates *numerus clausus*.¹⁰⁶ The problem of complexity is the central feature of any system of property.¹⁰⁷ This is because certain ontological features of tangible objects render our property systems inherently complex.¹⁰⁸ First, tangible objects are necessary to human survival. Every single one of the seven billion human beings presently on the Earth must interact with multiple tangible objects every day in order to survive. Also, real property and other tangible objects have the potential to outlast both the ownership arrangements that we create and the human beings that created them.¹⁰⁹ These factors taken together render tangible objects uniquely alienable and vulnerable to successive ownership arrangements.¹¹⁰ If each of those ownership arrangements was subject to customization, our property system would rapidly

¹⁰³ Davidson, *supra* note 9, at 1600 (“Versions of the *numerus clausus* are found in Roman law and recur throughout the history of feudal and post-feudal English common law. Likewise, some form of a standard list appears in disparate modern civil law and common law systems throughout the world.”).

¹⁰⁴ *Id.* at 1600 (“[P]roperty interests almost always coalesce around forms defined by the state.”).

¹⁰⁵ *Id.* at 1600. By way of contrast, we do not see analogous form restriction in the context of other legally enforceable interests, such as contract interests, for example. See Hansmann & Kraakman, *supra* note 26, at 380 (querying why form restriction does not appear in contract law).

¹⁰⁶ Render, *Complexity*, *supra* note 8.

¹⁰⁷ *Id.* at 135–43.

¹⁰⁸ *Id.* I would here reiterate a point I have made in previous work that I have developed my account of property solely in the context of tangible objects of property. I have not considered non-tangible property interests—for example, copyright interests. I am, as of yet, agnostic as to whether the same legal concept of “property” protects intangible property interests, or, if, as some have suggested, another concept or legal phenomenon is (or should be) at work. See, e.g., Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, 12 THEORETICAL INQUIRIES L. 59, 96 (2011) (arguing that “the considerations that support a strict form of protection for tangible property rights do not call for a similar form of protection when applied to the case of copyright”).

¹⁰⁹ Render, *Complexity*, *supra* note 8, at 140–42.

¹¹⁰ *Id.*

become so complex that it would ultimately cease to function.¹¹¹ Formalism in the form of *numerus clausus* serves to prevent this worst-case-scenario of overwhelming complexity.¹¹² There may be a better way to grapple with the problem of complexity inherent in ownership, but if there is, we have yet to find it.

Thus, in property, the coherence claims tend to be more modest and circumspect than concepts in some other doctrinal areas.¹¹³ Property doctrine is, by all accounts, a diverse doctrine, encompassing a wide range of issues, interests, objects, and subjects. In asserting that this diverse field is coherent, the conceptualist claim is only that *numerus clausus* structures ownership and ownership is coextensive with the doctrine.

2. Unity

If the conceptualist account is correct, that “property” entails a criterial feature, then we would expect to see that feature in every recognized instantiation of the legal concept of “property.” It is in this way that the criterial feature unifies the doctrine.¹¹⁴

Now it may be that some conceptualists go further than others in the claim that the criterial features of property unify the doctrine. For example, Merrill and Smith have been read by some as making broader claims of unity than the rather circumspect claim—advanced here—that a criterial condition unifies the field of property insofar as the criterion is present in each instantiation of the concept of property. Stephen Munzer, for one, has read Merrill and Smith as seeking “to impose more unity on property than any other casebook in its field by putting the right to exclude front and center and by leading students through diverse areas of property law to search for the maximization of exclusion-efficiency.”¹¹⁵ In this criticism,

¹¹¹ *Id.* at 82 (“In the absence [*numerus clausus*], the normative commitments that comprise our rights and duties with respect to the tangible objects in the world would rapidly grow so complex as to overwhelm our capacity to understand them.”).

¹¹² *Id.* at 130 (“The primary function of *numerus clausus* is to avoid a worst-case scenario: a property system that is completely overwhelmed by relevant information.”).

¹¹³ *Cf.* COLEMAN, *supra* note 95, at 9–10 (making a stronger claim for conceptual coherence in the context of the legal concept of “tort”), with John Gardner, *What is Tort Law for? Part I. The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 2–6 (2011) (challenging, to some degree, Coleman’s coherence claim).

¹¹⁴ Assumedly, this is a less robust notion of unification than the notion referred to by Stephen Munzer’s query: “What does it mean to say that property is a ‘unified subject’? Merrill and Smith seem to mean that some concept . . . or some principle . . . explains why property law has a coherent structure.” Munzer, *Bundle Theory*, *supra* note 12, at 271.

¹¹⁵ *Id.*

Munzer seems to read Merrill and Smith as claiming that property rules are coherent (and the doctrine is unified) because property rules encourage efficiency through the robust and uniform use of the right to exclude.

Were this reading of Merrill and Smith accurate (and I do not think that it is), then it could be said that Merrill and Smith are making a deeper claim about the legal concept of “property”: namely that “property” is rendered coherent by reference to the principle (and/or value) of efficiency because property doctrine both embodies and is explained by the value of efficiency.¹¹⁶ That is to say, that the value and/or principle of efficiency serves to explain the doctrine of property, in much the way that Jules Coleman has argued that tort law embodies the principle (or value) of corrective justice and that tort law is also explained by corrective justice.¹¹⁷

I do not take Merrill and Smith to be making this deeper claim about the values and/or principles that explain property doctrine. For example, in their work on *numerus clausus*, I do not understand Merrill and Smith to be making strong efficiency claims to account for the presence of the principle.¹¹⁸ Yet, they clearly understand the principle of *numerus clausus* to be a central feature of property.¹¹⁹ It would be peculiar for Merrill and Smith to identify *numerus clausus* as one of the salient features of property (and a feature that distinguishes property from contract), yet not make strong efficiency claims to explain its presence in the doctrine, if it were the case that their account of property ultimately depended upon the notion that property law is unified and/or rendered coherent by reference to the principle of efficiency.

Nonetheless, despite my skepticism of the point itself, it is important to raise the point, because this understanding of Merrill’s and Smith’s account of property seems to be animating some of the less careful treatment of the conceptualist project as a whole. Much of the less careful treatment of their work (whether it assumes the form of a critique or an accolade) seems to embark from the premise that to be a conceptualist is to assume that the value of efficiency either explains or justifies

¹¹⁶ Munzer seems to suggest as much, stating that Merrill and Smith’s casebook “load[s] students through diverse areas of property law to search for the maximization of exclusion-efficiency.” *Id.*

¹¹⁷ COLEMAN, *supra* note 95, at 9.

¹¹⁸ For example, Merrill and Smith do not claim that *numerus clausus* reduces information (or measurement) costs to the fullest extent possible, only that costs are reduced. Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 8.

¹¹⁹ *Id.* at 3 (describing *numerus clausus* as “a central difference between contract and property”).

property law.¹²⁰ This assumption seems to be an extrapolation from Merrill and Smith's emphasis that *numerus clausus* reduces information costs.¹²¹ However, assuming this to be true, it does not follow that property law either *is* or *ought* to be unified by the principle or value of efficiency to the exclusion of other values or principles. It is only to say that *numerus clausus* is not an example of "empty" formalism insofar as it serves a desirable end. In this way, the Merrill and Smith account offers an explanation of the rule of *numerus clausus* that challenged the then widely-held account that *numerus clausus* was an "archaic relic."¹²²

Moreover, even if it were the case that a given conceptualist made the claim that efficiency provided the best explanation for property law as it is currently comprised, it would not follow that to be a conceptualist is to necessarily make the same claim about the essential or salient or criterial features of property. Conceptualists are unified in their understanding that the legal concept of "property" embodies one or more criterial features. Conceptualists are not unified in their understanding of *which* features are criterial.¹²³ Similarly, conceptualists who agree about which features are criterial may still offer differing explanatory accounts of the criterial feature.

By way of example, my own account of "property" departs from Merrill's and Smith's account insofar as they understand the right to exclude to be a "core" feature of property.¹²⁴ On the other hand, my account converges with the Merrill and Smith understanding that *numerus clausus* is criterial.¹²⁵ But even in finding agreement with them that *numerus clausus* is criterial, I make no primary claims about

¹²⁰ See, e.g., Rosser, *supra* note 36, at 109.

¹²¹ Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 8 ("The existence of unusual property rights increases the cost of processing information about all property rights . . . Standardization of property rights reduces these measurement costs.")

¹²² Smith, *Language*, *supra* note 27, at 1107.

¹²³ For example, as stated above, some conceptualists understand the right to exclude to be criterial, while others do not.

¹²⁴ Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (describing the right to exclude as a "core aspect" of property).

¹²⁵ See Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 3 ("A central difference between contract and property concerns the freedom to 'customize' legally enforceable interests . . . The law of property is very different in this respect. Generally speaking, the law will enforce as property only those interests that conform to a limited number of standard forms.")

information costs or efficiency.¹²⁶ Instead, I offer a distinct explanation of the phenomenon of *numerus clausus* based entirely on the problem of complexity in property.

Yet, we are all conceptualists in that we all understand there to be a criterial feature of property that distinguishes it from other areas of regulation. To understand property through the lens of conceptualism is not to embrace any one notion of the unifying feature of property law; it is only to understand property law to *have* a unifying feature. In this light, it seems difficult to fathom why the moniker of “conceptualist” in property discourse has come to be understood as code for “conservative,” especially among scholars who have only tangentially engaged the work.

C. *Conceptualism as an Explanation of Positive Law*

Having outlined the main points of convergence among contemporary property conceptualists, it may be helpful to further refine these claims by disaggregating them from some common confusions about the conceptualist project. Two such confusions are discussed below.

1. Explanation Rather than Justification

A related point of clarification is also in order: in claiming that property law is unified by the criterion of form restriction, conceptualists offer only an explanation of, not a *justification* of, the phenomenon of property. Jules Coleman has helpfully offered the following succinct description of the difference between explanations and justifications:

There is an important and familiar distinction between theoretical explanations and theoretical justifications. While both can illuminate or deepen our understanding, explanations do so by telling us what the nature of a thing is, or by telling us why things are as they are; by contrast, justifications seek to defend or legitimate certain kinds of things—for example, actions, rules, courses of conduct, practices, institutions, and the like.¹²⁷

¹²⁶ I use the qualifier “primary” here because my account acknowledges that Merrill’s and Smith’s information cost thesis is consistent with my complexity thesis. Merrill’s and Smith’s thesis may be descriptively accurate, but the complexity thesis offers the better explanation of the phenomenon of *numerus clausus*. “Explanations are regulated by norms of descriptive and/or predictive accuracy” and the complexity thesis explanation of *numerus clausus* fares better by these and other meta-theoretical standards of explanation. See COLEMAN, *supra* note 95, at 3.

¹²⁷ *Id.*

Conceptualist accounts aim to explain the practice of property law. They do not, for the most part, aim to justify it. Now, some individual conceptualists may also seek to justify the doctrine or parts of the doctrine by reference to criterial conditions or other, extrinsic, values or norms. But justification is not a necessary aspect of a conceptualist account.

2. Positive Law Versus Natural Law Conceptualism

A further distinction should be made among conceptualist accounts. It is important to distinguish positive law conceptualism from natural law conceptualism.¹²⁸ Positive law conceptualism presents an account of an area of law based, predictably, on positive law (meaning decisional law, statutes, et cetera).¹²⁹ Drawing from these sources of positive law, a positive law conceptualist may make claims about a principle that is embodied in the positive law and/or explains the positive law.¹³⁰

My account of the legal concept of “property” is a positive law conceptualist account. I make the positive law claim (both here and elsewhere) that *numerus clausus* is embodied in the doctrine.¹³¹ I also claim that *numerus clausus* can be best explained in light of the risk of complexity in property. The complexity thesis explains the presence of *numerus clausus* in the doctrine, in light of ontological facts about material objects and ownership. It is a two-pillared, yet mutually reinforcing analysis: *numerus clausus* distinguishes property because of ontological facts about owning; ontological facts about owning explain *numerus clausus*.

My reference to ontological features of tangible objects may invite a natural confusion as to whether I am seeking to invoke a natural law method of analysis. I am not. I do not claim that *numerus clausus* is an inherent or inexorable aspect of the enterprise of “property”—although I do believe that in the absence of *numerus clausus* there is little to distinguish property rights and obligations from *in personam* private law rights and obligations.¹³² Nonetheless, theoretically, one could (nominally) have a property system that lacked form restriction; it would just be a

¹²⁸ *Id.* at 4 n.3.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ I do not mean to suggest that I am alone in making this claim. Merrill and Smith first identified this insight, although they offered a distinct means of explaining the presence of *numerus clausus* within the doctrine. Merrill & Smith, *Numerus Clausus*, *supra* note 11.

¹³² Render, *Complexity*, *supra* note 8.

very poor, very complex, and very short-lived system. Its brief tenure would, nonetheless, “count” as law until another instantiation of positive law supplanted it.

In contrast, natural law conceptualism understands the unifying or criterial feature of a body of law not to issue from the positive law itself, but instead from the application of a moral norm that is or reflects an a priori aspect of the enterprise itself. Under this methodology, an instantiation of law that fails to embody the criterial feature ceases to “count” as law at all. Were I to adopt a natural law account that *numerus clausus* is criterial to property, I would need to connect *numerus clausus* to a moral norm (or understand it to be, in and of itself, a moral norm (which it is not) that is an a priori aspect of property law. However, that is not at all the argument that I have made.

Thus, the question of whether *numerus clausus* is a criterial feature of property law serves as a primary point of divergence between conceptualist and non-conceptualist accounts of property. Moreover, the disagreement about *numerus clausus* is both descriptive and normative. The descriptive disagreement centers on skepticism about whether *numerus clausus* serves the functions ascribed to it by conceptualists (e.g., whether it succeeds in distinguishing property law from other areas of regulation, such as contract).

A second aspect of the conceptualist/non-conceptualist disagreement about *numerus clausus* is more normative than descriptive. This aspect of the disagreement centers on the concern that *numerus clausus* (or, at least, emphasis on *numerus clausus*) is duly formalist. This concern is considered in detail below.

II. THE UNUSUAL FORMALISM OF *NUMERUS CLAUSUS*

To engage in a discussion of formalism in property, it is helpful to first lay bare our terms.¹³³ The term “formalism” is notoriously difficult to define.¹³⁴ “Formalism” is a term that tends to evoke strong reactions even among those who disagree as to its meaning.¹³⁵ Frederick Schauer has observed:

¹³³ The term “realists” as used here refers both to the set of 1920s era American Legal Realist thinkers such as Karl Llewellyn, Jerome Frank, Max Radin, as well as more contemporary realist scholars such as Hanoah Dagan and Thomas Grey. See DAGAN, PROPERTY, *supra* note 45, at xviii (“Over the years I have become increasingly conscious of the debt my understanding of property owes to the legacy of legal realism.”).

¹³⁴ Schauer, *Formalism*, *supra* note 46, at 509–10 (“[There is] scant agreement on what it is for decisions in law, or perspectives on law, to be formalistic.”).

¹³⁵ See Ernest J. Weinrib, *Legal Formalism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 332 (Dennis Patterson ed., 1999) (describing the “caricature of formalism in contemporary legal

The pejorative connotations of the word “formalism,” in concert with the lack of agreement on the word’s descriptive content, make it tempting to conclude that “formalist” is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.¹³⁶

Yet, the term “formalism” does have a descriptive content.¹³⁷ By most accounts, formalism is a theory or method of adjudication in which law is perceived to be “rationally determinate.”¹³⁸ Law is rationally determinate “if the class of *legal* reasons [which includes positive law, rules of interpretation, and principles of reasoning] justifies one and only one outcome to a legal dispute” without appeal to the facts or (as some would have it) context of the case at bar.¹³⁹

When used to describe a method for making decisions, it is often thought to describe decision-making in the absence of judicial discretion.¹⁴⁰ This idea is sometimes described as “mechanical” decision-making, although apart from being evocative, the term is not especially helpful and some accounts eschew this description.¹⁴¹ In the formalist account, there is no opportunity for juridical resort to

scholarship, where formalism . . . serves principally as a ‘loosely employed term of abuse’”). Weinrib takes the term “formalism” to connote a theory of legal justification that is focused on the analysis of legal relationships with respect to their “necessary conditions, their internal principles of organization, and their presuppositions.” *Id.* at 333.

¹³⁶ Schauer, *Formalism*, *supra* note 46, at 510; *see also* Brian Leiter, *Positivism, Formalism, and Realism*, 99 COLUM. L. REV. 1138, 1144 [hereinafter Leiter, *Positivism*] (“‘Formalism’ is . . . frequently used as an epithet, and thus inspires unflattering, and sometimes colorful, characterizations.”).

¹³⁷ Schauer, *Formalism*, *supra* note 46, at 510 (“There does seem to be descriptive content in the notion of formalism, even if there are widely divergent uses of the term.”). Henry Smith has described formalism as relative “indifference to context” and stated that a rule system is “more formal the less its interpretation or application depends on context.” Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2105 (2012).

¹³⁸ Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 228, 265 (Dennis Patterson ed., 1996) [hereinafter Leiter, *Legal Realism*] (“The law on some point is rationally indeterminate when the ‘class of legal reasons’ . . . is insufficient to justify a unique outcome on that point.”).

¹³⁹ Leiter, *Positivism*, *supra* note 136, at 1145.

¹⁴⁰ Stone, *supra* note 46, at 169 (describing this misperception of formalism and adding, “the implication would be that, for a formalist, a judicial decision is never justified but, at best, excusable as a causally determined effect”).

¹⁴¹ *Id.* at 169 (“[I]t seems implausible, if not comical” to imagine the formalist genuinely understands decision-making to be “mechanical.”).

extra-legal norms or judgments about what would be just or fair in light of the particular facts at bar.¹⁴²

A. *The Ruleness of Numerus clausus*

When critics refer to formalism in property, they are generally referring to courts' application of the principle of *numerus clausus*, which prohibits the creation of idiosyncratic property interests.¹⁴³ Despite the simplicity of its core commitment, *numerus clausus* has long been the focus of scrutiny and controversy regarding the function and significance of the principle.¹⁴⁴

It may be helpful to begin then with an illustration of how *numerus clausus* may be understood to be formalist.

Prohibiting the private creation of idiosyncratic interests is *numerus clausus*' sole achievement, but it is a significant achievement.¹⁴⁵ The principle restricts the number of enforceable ownership arrangements that are possible in private exchanges.¹⁴⁶ It is a feature—indeed some believe it to be the sole feature—that substantively distinguishes property from contract.¹⁴⁷ If it were not for *numerus*

¹⁴² Leiter, *Positivism*, *supra* note 136, at 1145.

¹⁴³ DAGAN, PROPERTY, *supra* note 45, at 8 (describing *numerus clausus* as “a nice illustration of classical formalism”).

¹⁴⁴ See, e.g., Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 8 (arguing that *numerus clausus* “stems from the *in rem* nature of property rights,” and serves to reduce information costs in property transactions); Hansmann & Kraakman, *supra* note 26, at 373, 382, 416–17 (arguing that standardization in property serves to “aid verification of the ownership of rights offered for conveyance”); Dagan, *Craft*, *supra* note 52, at 31 (“The *numerus clausus* principle, in other words, sustains the institutions of property as intermediary social constructs through which law interacts with—reflects and shapes—our social values.”); Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1730–39 (2003) (advancing the theory that various conceptions of objective well-being serve as a justification for the *numerus clausus* principle); Davidson, *supra* note 9 (arguing that the principle is a means by which property doctrine accommodates competing pluralist values); Singer, *supra* note 26 (arguing that structural features of proper law, like *numerus clausus*, are justified or unjustified in light of the degree to which those features support democratic values); Dorfman, *supra* note 69, at 467 (arguing that the principle of *numerus clausus* represents a moral commitment to democratic self-government).

¹⁴⁵ Render, *Complexity*, *supra* note 8, at 117 (“*Numerus clausus*' primary regulatory role is barring the highly idiosyncratic property interest.”).

¹⁴⁶ Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 3 (“If [parties] attempt to customize a new type of interest, the courts will generally recast the conveyance as creating one of the recognized forms.”).

¹⁴⁷ The principle itself reflects a deeper conceptual distinction between property and contract, at least insofar as property law applies to tangible objects.

clausus, we might think of our ownership arrangements as nothing more than a set of *in personam* commitments.¹⁴⁸ *In personam* commitments, such as contracts, are more or less infinitely amenable to individual tailoring.¹⁴⁹ If an exceedingly specific or peculiar interest suits the needs of the parties to a contract, those parties can tailor that interest within the terms of their contract and courts will enforce it. Within the parameters of some broad proscriptions (e.g., unconscionability), parties to a contract can sculpt and mold the interests they create to suit their individual needs, whims, or fancy.¹⁵⁰

However, this is not the case with property interests.¹⁵¹ While property interests may be subject to peculiar (and sometimes exceedingly peculiar) limitations on the use of real property, ownership of real property is formally standardized within the system of estates.¹⁵²

In this light, if *numerus clausus* can be said to be formalist, it is because it embodies a kind of “ruleness” where the imperative of the rule itself (instead of, for example, the reasons for the rule, or other rules, or other facts)¹⁵³ applies prescriptive pressure with little regard to the context in which it is applied.¹⁵⁴ Indeed, Frederick Schauer has described formalism as “decisionmaking according to rule.”¹⁵⁵ In Schauer’s account, “[f]ormalism is the way in which rules achieve their ‘ruleness’ precisely by doing what is supposed to be the failing of formalism: screening off from a decision-maker factors that a sensitive decisionmaker would otherwise take into account.”¹⁵⁶

In other words, rules succeed, when they succeed, by limiting the universe of variables that a decision-maker is permitted to consider in making a decision. In the

¹⁴⁸ Merrill & Smith, *Interface*, *supra* note 2, at 776.

¹⁴⁹ Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 3 (“The parties to a contract are free to be as whimsical or fanciful as they like.”).

¹⁵⁰ Merrill & Smith, *Numerus Clausus*, *supra* note 11, at 3.

¹⁵¹ *Id.* at 2.

¹⁵² See Singer, *supra* note 26, at 1025 (observing that the principle of *numerus clausus* does not prevent land from being burdened with any number of “weird” conditions that defy “ordinary expectations”).

¹⁵³ Although Ronald Allen and Michael Pardo have persuasively made the case that the “rules” (or law itself) are themselves sets of facts, so this may be a misleading contrast. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003).

¹⁵⁴ See Smith, *Language*, *supra* note 27, at 1112 (describing a rule system as formal to the degree it does not rely upon context).

¹⁵⁵ Schauer, *Formalism*, *supra* note 46, at 510.

¹⁵⁶ *Id.*

context of legal analysis, rules may fail or succeed in narrowing the universe of variables that arise in the process of adjudicating a controversy.

With respect to *numerus clausus*, this ruleness may be manifest in several ways. First, *numerus clausus* directs us to sift interests into categories, rather than solely understanding the interest in light of grantor's intent. Grantor's intent is a factor in determining the correct category, among competing categories of interests. Yet, insofar as *numerus clausus* succeeds in directing us towards categories and away from inquiry into the specific and perhaps idiosyncratic set of powers, rights, obligations, and so forth that grantor intended to create, it has succeeded in screening off a set of factors that a decision-maker would otherwise take into account.

Additionally, the categories themselves—the fee simple, life estate, leasehold, and so forth—can also be understood to be products of the principle of *numerus clausus*. In the absence of the rule, there would be no need to construct cognizable “forms” of ownership. Each form of ownership in itself is likewise constituted with criterial conditions—e.g., a fee simple is an interest with a potentially infinite duration, that includes the right to transfer. In directing us towards these (and *only* these categories), *numerus clausus* succeeds in eliminating a potentially infinite set of variables regarding other potential ownership packages that might be transmitted by a non-standardized conveyance.

For example, in the absence of *numerus clausus*, if an owner has in mind to construct a complex set of conditions and powers with respect to an object she wishes to transfer—say, for example, a car—a court, in seeking to enforce the interests created would have to consider a greater number of variables. This is because literally *any* combination of powers, rights, duties and obligations could be subject to legal enforcement (assuming, of course, that they are not otherwise proscribed by broad prohibitions, such as rules prohibiting discrimination or rules prohibiting unreasonable restraints on alienation). A seller could convey an ownership arrangement with respect to the car that is incredibly complex. An owner could convey the right to drive a car on every third Thursday, while reserving the right to transfer the car. In the same conveyance, the seller could impose a duty to care for the routine maintenance of the car some of the time, and the power to terminate the ownership arrangement should a woman become president, assuming the owner is so inclined. In seeking to enforce this arrangement, a court would have to consider a great number of variables that are omitted from consideration under *numerus clausus*.

Form restriction then limits the number of variables that must be considered in that it limits the number of forms that ownership can assume. In so doing, *numerus clausus* limits the package of rights, duties, powers, and so forth that can attend a single conveyance. This is not to say that *numerus clausus* prevents conditional property interests. *Numerus clausus* allows conditional interests, and those

conditions can even be highly idiosyncratic. However, the interest—i.e., the package of powers, duties, rights, et cetera that is created with respect to the object in question—cannot be idiosyncratic. The interest must assume a standardized form.

For example, a grantor might convey the following: “Blackacre to Adams, for so long as red roses remain planted in the garden.” Grantor has created a peculiar limitation on Adam’s (and his successors in interest) use of Blackacre: rather than having plenary control over the content of the garden (or the freedom to eliminate the garden altogether), Adam and his successors must use the garden in the manner prescribed by Grantor. The condition is idiosyncratic, and it could easily be characterized as the product of Grantor’s individual whim or fancy. Yet, the *interest* that Grantor has created in the conveyance—the estate—is not idiosyncratic. It is a fee simple determinable.

We know that the estate that Grantor has created is a fee simple determinable because we know it must be one of the recognized estates and it meets the criteria of a determinable estate.¹⁵⁷ Knowing that it is a determinable estate, we know that it could, in theory, last forever, but that it might not.¹⁵⁸ If the determinable condition comes to pass, the estate will end and Grantor’s corresponding future interest will automatically become possessory.¹⁵⁹

A compliment of standard powers, limits, and obligations attend ownership of a fee simple determinable.¹⁶⁰ Once we have categorized the conveyance, a set of broadly applicable rules bounding Adam’s ownership of Blackacre necessarily obtain. The rules that govern Adam’s relationship to Blackacre are also applicable across the whole class of interests that meet the criteria of the category of fee simple determinable. The rules delimiting ownership of Blackacre are not created by nor are they specific to this individual conveyance. Thus, our initial categorization of the Blackacre conveyance leads to a set of nondiscretionary rules that regulate not only our conveyance, but all such conveyances. If the conveyance is a fee simple determinable, then X necessarily follows. The initial characterization seems to compel a particular result. This is one of the facets of *numerus clausus* that is frequently identified as formalist.

However, it is important to consider how we arrive at the initial characterization. Adam’s conveyance seems to represent a relatively “easy” case of

¹⁵⁷ DUKEMINIER ET AL., *supra* note 9, at 244–45.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

applying a single rule (i.e., “no novel forms of ownership are recognized”) to the uncomplicated facts of a straightforward conveyance. Nonetheless, there are, of course, many rules that bear on the initial classification of this relatively straightforward interest.

First, the rules of language bear on every legal question, including this one. Second, legal rules that constitute the various estates—i.e., criterial rules that tell us what “counts” as a fee simple determinable—play a central role here. Prior decisional law has established a criterial rule that a determinable estate is created when grantor intends to create an estate with an inherent durational limit. A second rule holds that duration language signifies the intent to create such an estate. A third rule likewise culled from prior decisional law tells us that the phrase “so long as” is thought to be durational and thereby signifies a determinable estate. Only by applying these three rules together (and the underlying rules of language which animates them) are we able to reach the “easy” conclusion that a fee simple determinable is established.

Further, in the background of our criterial rules about what “counts” as a fee simple determinable are other rules about when, how, and why we apply precedent, what “counts” as binding precedent, and so on. Beneath these rules are rules about what “counts” as law in the jurisdiction, the rules that constitute the jurisdiction, et cetera.

So what work is *numerus clausus* doing amid the application of all these rules? Primarily, *numerus clausus* directs a decision-maker to apply one set of rules rather than another set in determining the distribution of the asset in question. Rather than applying rules that govern the means by which we discern grantor’s intent and the rules that bound the various legally cognizable powers, rights, obligation, and so forth that the conveyance purports to convey, we apply rules that govern the constitution of a set list of cognizable estates. In the absence of *numerus clausus*, we still apply sets of rules, they are just different sets rules.

Here enters a set of realist concerns regarding the formalism of *numerus clausus*. On the one hand, if the ruleness of *numerus clausus* succeeds in precluding a decision-maker from considering a set of variables, then the realist concern is that the decision-maker is precluded from making use of important, appropriate, and potentially outcome-determinant information. This concern is made worse, if one adopts the perspective that *numerus clausus* itself serves no legitimate or discernible end.

In the case of Mrs. Lide, for example, insofar as *numerus clausus* precludes the decision-maker from considering the relative substantive merit of the potential owners’ claims, then *numerus clausus* may be causing the decision-maker to reach an unjustifiable result.

On the other hand, if *numerus clausus* lacks the adequate ruleness to limit the set of variables the decision-maker takes into account, then emphasis on the principle—and, in particular, articulation that *numerus clausus* compels a specific analysis or result—merely serves to obscure the actual dynamics of decision-making with respect to the distribution of an asset.¹⁶¹ A consideration of these concerns follows.

B. *The Realist Critique of Numerus clausus*

The intellectual error of formalism as a method of legal decision-making is fairly straightforward. Critics of formalism posit that it is simply not possible to “mechanically” apply rules and thereby deduce conclusions without the aid of *reasons*.¹⁶² Rules are, by nature, broad prescriptions.¹⁶³ Broad prescriptions applied to concrete and particular facts cannot generate conclusions that are uniquely justifiable with reference only to the rule.¹⁶⁴ The heart of this insight is descriptive. Rather than asserting that rules *should* not be applied without the intervention of reasons, the criticism holds that rules *cannot* be applied without the intervention of reasons.¹⁶⁵ Thus, when a court claims to be employing a formalist method of resolving a legal question, the actual decision-making dynamics of the court’s decision are obscured.¹⁶⁶

To address the questions of whether and how property law may be understood to be formalist (and/or conceptualists who emphasize the significance of *numerus clausus* may be said to be formalists or formalistic), we must closely match realists’ objections about formalisms with the specific phenomenon of *numerus clausus*.

¹⁶¹ Smith, *Language*, *supra* note 27, at 1106.

¹⁶² Or more specifically, without the aid of *nonlegal* reasons. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 278 (1997) [hereinafter Leiter, *Rethinking*] (“What the descriptive Formalist really claims is that judges are (primarily) responsive to legal reasons, while the Realist claims that judges are (primarily) responsive to nonlegal reasons.”).

¹⁶³ FREDERICK SCHAUER, *PLAYING BY THE RULES* 17 (1999) [hereinafter SCHAUER, *RULES*] (“There are no rules for particulars.”).

¹⁶⁴ Instead, judges require “reasons” as a means of justifiably applying a rule. These reasons may be limited to *legal* reasons (including, for example, prior cases, reasoning by analogy) rendering the outcome legally justifiable. On the other hand, the reasons may include non-legal reasons, which reflects the realist worry. See Leiter, *Legal Realism*, *supra* note 138, at 265.

¹⁶⁵ See Leiter, *Rethinking*, *supra* note 162, at 278.

¹⁶⁶ H.L.A. Hart (critically) described this realist claim: “talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them.” HART, *supra* note 30, at 136.

Be assured, ours is not the first oar in these waters. The theses of this paper are situated within a long-standing conversation within property theory about the nature of property law generally and the significance, role, and function of *numerus clausus* specifically. It is a conversation that can be traced back as least as far as the 1920s and 1930s era legal realists, a cohort that includes thinkers like Karl Llewellyn, Jerome Frank, Underhill Moore, Felix Cohen, Leon Green, Herman Oliphant, Walter Wheeler Cook, Max Radin, and others.¹⁶⁷ The realists offered a critique of what was sometimes described as “conceptualism,” and other times called “formalism,” both of which roughly refers to the practice in legal decision-making of treating an extant legal category as though it compelled a unique legal outcome.¹⁶⁸

At the outset, it is perhaps helpful to note that realists were not engaged in interrogating concepts.¹⁶⁹ In many ways the realist project is indifferent to the question that is central to those who are interested in the legal concept of “property”—i.e., “what, if anything, distinguishes the legal concept of property from other concepts?” Instead, the realists were concerned about the capacity of rules to produce unique results.¹⁷⁰

The realists famously expressed deep skepticism about the capacity of legal rules (which include not only precedent and statute, but also the rules of interpretation, doctrinal principles, logic inference and deduction, and so forth) to produce unique results.¹⁷¹ Of course, to some degree this is a necessary oversimplification—the realists advanced several distinct and nuanced varieties of rule-skepticism.¹⁷² But for the purpose of this discussion it is sufficient to focus on what Brian Leiter has described as the “core claim” of legal realism, which is the

¹⁶⁷ Leiter, *Rethinking*, *supra* note 162, at 269 (describing this group as “everyone commonly thought to be a Realist”).

¹⁶⁸ See Davidson, *supra* note 9, at 1631 (describing Dagan’s self-described realist analysis as “fruitfully align[ing] with the Legal Realist project of challenging the formalism of extant legal categories”).

¹⁶⁹ Leiter, *Rethinking*, *supra* note 162, at 270–72.

¹⁷⁰ Leiter, *Legal Realism*, *supra* note 138, at 265.

¹⁷¹ Leiter, *Rethinking*, *supra* note 162, at 295 (“[T]he Realists claim that the law is rationally indeterminate in the sense that the class of legal reasons—i.e., the class of legitimate reasons a judge may offer for a decision—does not provide a justification for a unique outcome.”).

¹⁷² Leiter, *Legal Realism*, *supra* note 138, at 265–74.

claim that given that legal rules fail to compel unique results, judges respond primarily to the stimulus of facts rather than legal stimulus of legal rules.¹⁷³

To say that the realist critique of conceptualism or formalism has been well received in the American legal academy is to understate.¹⁷⁴ Although it is always perilous to generalize, it is safe to say that the realist critique continues to be a highly influential, if not predominating, idea in the American legal academy.¹⁷⁵ It is, of course, a cliché to say “we are all legal realists now.”¹⁷⁶ However, there are pockets within the American legal academy where the predominance of the realists’ critique of conceptualism remains, to some degree, contested. Legal philosophy, for example, is such a pocket, and perhaps surprisingly, property theory is another.¹⁷⁷

Over the years, property theorists have periodically revived the conversation between conceptualist understandings of property rights and various realist perspectives.¹⁷⁸ The most recent incarnation of interest in this discourse arose around the turn of the millennium when Henry Smith and Thomas Merrill wrote a series of articles about the significance of form restriction in property.¹⁷⁹ Merrill and Smith proposed that *numerus clausus* was a defining feature of property law and that form restriction served certain specific functions within the doctrine, not the least of which was to distinguish property interests from other types of privately created legal interests.¹⁸⁰ Other scholars responded.¹⁸¹ Some have offered alternative accounts and

¹⁷³ Leiter, *Rethinking*, *supra* note 162, at 277 (“The Realists, then, share a commitment to the view that in deciding cases, judges respond primarily to the stimulus of facts of the case.” (emphasis added)).

¹⁷⁴ *Id.* at 267 (describing the influence of Legal Realism as “enormous”).

¹⁷⁵ See Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (“All major current schools of thought are, in significant ways, products of legal realism.”).

¹⁷⁶ See *id.* at 467 (“To some extent, we are all realists now.”); see also Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 AM. J. COMP. L. 131, 131 (2002) (“‘We are all Realists now,’ as the saying goes.”).

¹⁷⁷ See, e.g., Pennor, *supra* note 93 (criticizing the “instrumental” view of property as explicated by the “bundle of rights” account of property, and favoring instead a conceptualist account).

¹⁷⁸ See, e.g., *id.*

¹⁷⁹ See Merrill & Smith, *Numerus Clausus*, *supra* note 11; Merrill & Smith, *Interface*, *supra* note 2; Smith, *Language*, *supra* note 27.

¹⁸⁰ See Merrill & Smith, *Numerus Clausus*, *supra* note 11.

¹⁸¹ See, e.g., Munzer, *Bundle Theory*, *supra* note 12 (criticizing Merrill and Smith’s account); Hansmann & Kraakman, *supra* note 26 (critiquing Merrill and Smith’s thesis).

explanations of *numerus clausus*, while others have disputed Merrill and Smith's claims of its function, role, or significance.¹⁸²

The realist perspective on *numerus clausus* is centrally tied to the realists' broader skepticism about formalism as a methodology.¹⁸³ Although formalism's deep-rooted intellectual flaw is thought to be manifest in a myriad of contexts,¹⁸⁴ the context that is most relevant to *numerus clausus* concerns an over-emphasis on the form of legal rules.¹⁸⁵ When used in this context, "formalism" describes a specific kind of decision-making that purports to rely solely on the imperative (or "command") of a rule as the basis of a decision to the neglect of other possible bases, such as the purpose of the rule, the reason for the rule, or other conflicting but equally applicable rules.¹⁸⁶

While formalism as a methodology—indeed, even as a system of justification—has its defenders,¹⁸⁷ by and large conventional wisdom has clustered around the notion that the 1920s era American Legal Realists dealt an intellectual deathblow to formalism.¹⁸⁸ Brian Leiter summarizes the realist critique:

"Formalism" . . . held that judges decide cases on the basis of distinctly *legal* rules and reasons, which justify a unique result in most cases The Realists argued instead that . . . courts really decide cases . . . not primarily because of law, but based on their sense of what would be "fair" on the facts of the case.¹⁸⁹

¹⁸² See, e.g., Hansmann & Kraakman, *supra* note 26 (challenging the information cost thesis).

¹⁸³ See DAGAN, PROPERTY, *supra* note 45, at 8.

¹⁸⁴ Stone, *supra* note 46, at 170–71 (identifying seven distinct situations that are identified as "formalist" in the literature, of which emphasis on the form of a rule rather than its content is only one).

¹⁸⁵ This error is thought to be both a mistake of legal practice in which judges are "overly-rule bound" in their decision-making—and as a result are insensitive to the "aims and needs the law is meant to serve," and a mistake of theory in which the formalist believes that there are some instances in which rules may be applied without reference to reasons. Stone, *supra* note 46, at 172–73.

¹⁸⁶ Shauer, *Formalism*, *supra* note 46, at 513–14.

¹⁸⁷ Cf. Weinrib, *supra* note 135.

¹⁸⁸ See Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005) [hereinafter Leiter, *American Realism*].

¹⁸⁹ *Id.* at 50.

The realists posited that legal rules could not be the fulcrum of legal decision-making because legal rules were indeterminate—at least in a class of “hard” cases.¹⁹⁰ Realists pointed to the fact that positive legal rules (e.g., statute, precedent, and canons of interpretation) and accepted forms of legal reasoning (e.g., deduction and analogy), often conflicted.¹⁹¹ For example, two accepted canons of statutory interpretation might point in opposite directions in a given case. As a result, in “hard” cases, more than one outcome could be justified in light of applicable legal rules and accepted forms of legal reasoning.¹⁹²

Thus, the first pillar of the realist critique involved what has come to be known as the “indeterminacy thesis.”¹⁹³ The term “hard” cases is typically associated with Hart who argued that legal rules offered definitive answers to most cases (termed “core” cases) while a smaller subset of cases occupied the penumbra of legal reasoning,¹⁹⁴ a point with which most realists agreed.¹⁹⁵

A second mainstay of the realists’ general criticism of formalism concerned a worry over judges’ sense of (or, more cynically, articulation of) false constraint: judges claimed to be obliged to take a certain action (e.g., strike down a labor law, as in the infamous *Lochner*) because the law *compels* this outcome.¹⁹⁶ The realist critique purported to reveal the constitutive nature of judging—that in deciding cases, judges were engaged in the act of constituting the very rules they claimed to be constrained by *within* the case. Yet, this insight remained inconsistent with the

¹⁹⁰ See *id.* at 53 (“Realists were especially concerned . . . [with] that class of more difficult cases that reached the stage of appellate review.”).

¹⁹¹ *Id.* at 51.

¹⁹² *Id.* at 50.

¹⁹³ There are, actually, at least two indeterminacy theses (and more than one possible formulation of each of these). The first thesis concerns the worry that legal rules are indeterminate due to an indeterminacy of reasons. This thesis, which is the primary concern here, is explained *infra*. The second thesis worries that whatever the compliment of accepted legal rules and reasons, those rules and reasons fail to satisfactorily explain what *causes* a judge to make a decision. Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 559–60 (1993).

¹⁹⁴ HART, *supra* note 30, at 125–54.

¹⁹⁵ See Leiter, *American Realism*, *supra* note 188, at 52 (“The Realists were (generally) clear that their focus was indeterminacy at the stage of appellate review, where one ought to expect a higher degree of uncertainty in the law.”).

¹⁹⁶ Schauer, *Formalism*, *supra* note 46, at 513–14.

rhetoric of judges who generally declined to acknowledge that they were engaged in a constitutive act. Frederick Schauer has described the trouble in the following way:

[O]ne view of the vice of formalism takes that vice to be one of deception, either of oneself or of others. To disguise a choice in the language of definitional inexorability obscures that choice and thus obstructs questions of how it was made and whether it could have been made differently.¹⁹⁷

Thus, one of the principle insights of the legal realist movement was that judges were choosing among variously justifiable results rather than mechanically applying rules.¹⁹⁸

In the context of property, realist insights have been translated (and perhaps mistranslated) into a broad skepticism that suspected that judges' personal and political preferences favoring entrenched resource distributions (a preference thought to be inherently conservative) were determining the outcome of decisions rather than property forms themselves.¹⁹⁹ As Henry Smith has observed: "The realists and their successors tirelessly have pointed out how older, more 'conceptualistic' or 'formalistic' modes of legal thinking and interpretation obscure the richer reality to which law should respond. Property is one of the main battlegrounds in this struggle."²⁰⁰

This skepticism of formalism as applied to *numerus clausus* points to the conclusion that the principle tends to be overemphasized in property scholarship and doctrine.²⁰¹ By the realists' lights, this overemphasis replicates the same intellectual errors that attend formalist methodology generally. Henry Smith has summarized this concern in the following manner:

¹⁹⁷ *Id.* at 513.

¹⁹⁸ Hanoch Dagan has stated the criticism the following manner: "[L]egal realists argue that this type of reasoning, which is an integral part of the conception of property as forms, is objectionable because it falsely presents important value judgments made by judges as inevitable, obscuring their choices and shielding them from empirical and normative critique." DAGAN, PROPERTY, *supra* note 45, at 8.

¹⁹⁹ *Id.*

²⁰⁰ Smith, *Language*, *supra* note 27, at 1106.

²⁰¹ DAGAN, PROPERTY, *supra* note 45, at 8.

The realists and their successors argue that many features traditionally associated with formalism—from literalistic interpretation to standardization of property under the *numerus clausus* principle—are nothing more than archaic relics.²⁰²

Given this skepticism about formalism generally, it is not surprising that many thinkers writing from the realist perspective have declined to directly engage with *numerus clausus*. Many writing in this tradition have determined that the principle does not warrant excessive attention, embodying as it does the very sort of false “ruleness” that the realist critique strove to unseat. As Nestor Davidson has observed, the realist project writ large is “challenging the formalism of extant legal categories” and *numerus clausus* is nothing if not an affirmation of extant legal categories.²⁰³

Hanoch Dagan has described this realist’s principal property insights in the following manner:

Property theorists usually invoke the bundle of sticks understanding in an effort to . . . liberate property law from the confines of sheer form. The bundle metaphor captures the truism that . . . [t]here is neither an a priori list of entitlements that the owner of a given resource inevitably enjoys nor an exhaustive list of resources that enjoy the status of property.²⁰⁴

In other words, the realist insights purport to lay bare the fact in property, as elsewhere in the law, the reason for a legal decision could not be merely that the judge was constrained by a rule because judges were no more (or less) constrained by rules in property than in any other doctrinal area of law.²⁰⁵ Consequently, in the realists’ view, emphasis on formalism or “ruleness” is seriously misplaced.

Thus, in challenging formalism in property (and evocating challenges to formalism writ large) critics of conceptualism raise three distinct concerns: (1) that *numerus clausus* is an example of empty formalism that lacks a legitimate or inherent utility or purpose within the doctrine; (2) that *numerus clausus* is not capable of

²⁰² Smith, *Language*, *supra* note 27, at 1107.

²⁰³ Davidson, *supra* note 9, at 1631.

²⁰⁴ DAGAN, PROPERTY, *supra* note 45, at 11.

²⁰⁵ *Id.* (“[T]he idea that legal concepts (in our context, the forms of property) inevitably entail some doctrinal conclusions is false It is thus futile to attempt . . . to derive doctrinal conclusions by such internal deductive reasoning.”).

constraining judicial decision-making in “hard cases”; (3) that reference to or invocation of *numerus clausus* as the reason for a decision in a “hard case” necessarily obscures the actual dynamics of decision-making in the case, which in turn creates a situation ripe for the imposition of a preference for entrenched distributions of property.²⁰⁶ Each of these concerns is explored below.

III. FREEING *NUMERUS CLAUSUS* FROM THE REALIST CRITIQUE

As discussed above, those that adopt a skeptical approach to the conceptualist claims that *numerus clausus* is a criterial feature of property law have, on occasion, objected to the principle (or in some cases, what they understand to be an over-emphasis of the principle) along classically realist lines. They have expressed the worry that *numerus clausus* represents a type of “empty” formalism. They have expressed the concern that *numerus clausus* is not capable of constraining judicial decision-making in “hard cases.” *Numerus clausus* has also been criticized as a distraction from or obfuscation of the actual dynamics of decision-making with respect to the distribution of an asset. These ideas are explored in turn below.

A. *Numerus Clausus as “Empty” Formalism*

A first concern about conceptualism in property has to do with skepticism about the purpose or necessity of *numerus clausus*. Critics worry that *numerus clausus* embodies an “empty” formalism that lacks a legitimate role within the doctrine. After all, *numerus clausus* is a common law rule—by some lights as much judicial habit as obligation. It is not the result of democratic deliberation nor is it derived from a broader set of binding principles, as might issue from constitutional or international law. It is strictly a creature of property doctrine. This fact, coupled with the fact that *numerus clausus* imposes categorical forms upon the substantive intentions of parties leads to the worry that judges may be employing formalism for its own sake, without justification or benefit.

This argument is a variant of what Richard Pildes has termed “apurposive rule-following.”²⁰⁷ This worry holds that there is nothing special about “property” that requires (or even recommends) a principle of *numerus clausus*.²⁰⁸ Property

²⁰⁶ *Id.* at 8–9.

²⁰⁷ Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 612 (1999) (describing “apurposive rule-following” as one of many forms of formalism).

²⁰⁸ See, e.g., GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 381 (1997) (“[The Realists] were responsible for replacing in mainstream legal consciousness that conception with the disaggregated, more

entitlements are similar to (or even identical to) entitlements that are conferred in contract, tort, et cetera, and those entitlements are nothing more and nothing less than what we decide they should be.²⁰⁹

From this perspective, there is reason to be skeptical that the principle of *numerus clausus* is anything more than an antiquated throw-back to feudal land ownership.²¹⁰ On this view, resistance to abandoning the principle and adopting novel forms of property is suspect, fueled, perhaps, by a normative preference to preserve existing resource allocations.²¹¹ In other words, the principle of *numerus clausus* may simply be a principle of protecting existing interests at the peril of more egalitarian aims.²¹²

In response to this worry, those associated with the conceptualist position have offered various explanations of the principle.²¹³ Rather than embodying a preference for entrenched distributions, Merrill and Smith, for example, have argued that *numerus clausus* reduces information costs associated with ownership.²¹⁴ Elsewhere, I have argued that the principle serves to tame complexity and thereby render our property systems intelligible.²¹⁵ In my account, ontological features of object ownership necessitates *numerus clausus*. Others have offered other possible purposes, explanations, and/or functions of *numerus clausus*.²¹⁶

explicitly social ‘bundle of rights’ conception From this point of view . . . property exists in whatever resources have market value, and increasingly in American society the most valued goods are not the tangible things but the intangible interests, expectations, and promises.”).

²⁰⁹ See Merrill & Smith, *What Happened*, *supra* note 6, at 359–60 (tracing “the rise of the view among modern legal economists that property is simply a list of use rights in particular resources”).

²¹⁰ *Id.* at 364–66.

²¹¹ *Id.*

²¹² See DAGAN, PROPERTY, *supra* note 45, at 9 (“Deductive formalism, which uses legal concepts [here, forms] as reasons rather than as conclusions, bars the way to open inquiry of the normative desirability of alternative judicial decisions.”).

²¹³ See, e.g., Merrill & Smith, *Numerus Clausus*, *supra* note 11 (explaining that *numerus clausus* serves to reduce information costs); Render, *Complexity*, *supra* note 8 (explaining that *numerus clausus* serves to tame complexity in property).

²¹⁴ Merrill & Smith, *Interface*, *supra* note 2, at 789–99.

²¹⁵ Render, *Complexity*, *supra* note 8, at 128–41.

²¹⁶ See, e.g., Dorfman, *supra* note 69 (arguing that *numerus clausus* manifests a commitment to democratic self-government).

It is worth noting that several scholars who do not identify as conceptualists have offered potentially “benign” explanations for the presence of *numerus clausus* in property doctrine. Hagan Dagan, for example, understands property forms to serve as useful (although malleable) “default” modes of interacting with one another with respect to the material world.²¹⁷ Approaching the problem from a realist perspective, Dagan’s account understands property forms as “intermediary social constructs through which law interacts with—reflects and shapes—our social values.”²¹⁸ Limiting the forms of ownership “consolidates expectations and express[es] ideal forms of relationship.”²¹⁹ The virtue of creating default “social constructs” appears to be that it maintains the “normative integrity of the institutions of property.”²²⁰

Similarly, Nestor Davidson has suggested the formal rigidity of property forms provides a stable structural platform for negotiating and contesting these competing values, while the *numerus clausus* tolerance for flexibility within the content of the forms accommodates inherent tensions in these values as they are applied in the context of property rights.²²¹ He contends, “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).”²²² Moreover, he notes, that “resolving conflicts over a myriad of competing priorities in property law has played out . . . largely within the confines of the forms.”²²³

It is not necessary to rehearse here the relative strengths and weaknesses of these various analyses, as they are offered only to highlight the unlikelihood that *numerus clausus* serves no purpose whatsoever in property doctrine. Many, if not most, of these are quite plausible descriptions of work that *numerus clausus* may be doing within the doctrine of property. The fact that *numerus clausus* is a universal

²¹⁷ Dagan, *Craft*, *supra* note 52, at 1520.

²¹⁸ *Id.* at 1565.

²¹⁹ *Id.* at 1567 (“Limiting the number of property forms and standardizing their content facilitates the roles of property in consolidating expectations and expressing ideal forms of relationship.”).

²²⁰ See DAGAN, PROPERTY, *supra* note 45, at 33.

²²¹ Davidson, *supra* note 9, at 1652–53.

²²² *Id.* at 1653.

²²³ *Id.* at 1654.

feature of post-feudal property systems also serves to underscore the unlikelihood that the principle is a form of “apurposive rule-following.”²²⁴

B. *The Problem of Capacity*

Critics of *numerus clausus* have also presented the concern that rules lack the capacity to constrain decision-making in a way that produces a unique or uniquely justified result.²²⁵ This worry has been fairly leveled against “ruleness” in all contexts, and it must be grappled with here. After all, if *numerus clausus* serves only to afford the appearance of constraint, while in fact multiple valid alternative resolutions are available to legal decision-makers, then the formalism of property rules may indeed be serving only to obfuscate consequentialist preferences.²²⁶

We can think about this critique in two steps. Step one contends with the question of whether *numerus clausus* is capable of constraining judicial behavior in a manner that can be said to be causal: i.e., does *numerus clausus* cause or produce a result? The second step, on the other hand, wonders whether *numerus clausus* is capable of producing a *unique* or uniquely justified result.

1. Constraint

The contention that rules lack the causal capacity to constrain judicial decision-making meets with some difficulties in the context of *numerus clausus*. First, and most superficially, if form restriction does not meaningfully constrain legal decision-making, it is difficult to account for the remarkable success of *numerus clausus* in preventing new forms of ownership. If, for example, Dagan’s account is correct that property forms serve as “default frameworks” but that legal decision-makers should (or, perhaps in reality, do) permit new forms where there is a good reason to do so, we should expect to see novel forms of ownership recognized with some regularity.

Yet, this does not seem to be the case. Although reasonable minds can disagree as to the exact number and content of cognizable property forms, over the last few hundred years, a core compliment of Anglo-American forms (i.e., the fees, life estates, defeasible estates, leaseholds) have remained relatively stable with the

²²⁴ See Pilades, *supra* note 207, at 612.

²²⁵ See Dagan, *Craft*, *supra* note 52, at 1567 (worrying that “deductive reasoning” from the “frozen forms of property” is “misplaced” (a view he attributes to Merrill and Smith) and questioning whether it is “even possible”).

²²⁶ DAGAN, PROPERTY, *supra* note 45, at 9 (quoting Cohen and articulating the worry that emphasis on forms can cause us to “forget the social forces which mold the law and the social ideals by which the law is to be judged”).

addition of only an arguable handful of newer forms (e.g., the mortgage, the trust) and the elimination of fewer still (e.g., the fee tail).²²⁷ If form restriction lacks the capacity to meaningfully constrain legal decision-making, how has *numerus clausus* remained so successful at prohibiting customized or novel forms of ownership?

The answer lies in the phenomenon of rule-following. Much has been written about whether and the degree to which rules can constrain decision-making and a full treatment of the relevant analyses are both beyond the scope of this project and unnecessary to address the concern in this context. Although it is an oversimplification, it is sufficient here to observe that a rule constrains behavior if the rule itself provides a reason for the rule-follower to comply with its imperative.

Numerus clausus is structured such that the application of its imperative is relatively insensitive to context. If Henry Smith is correct that formalism is most usefully understood as invariance to context²²⁸ then *numerus clausus* is among our most formal of legal rules. Although there is no one authoritative formulation of the rule, it might fairly be formulated as “no novel forms allowed.” The rule operates as a toggle: if a conveyance has created a recognized form, it is allowed. If the conveyance has created anything other than a recognized form, it is disallowed. There is only one variable that applies pressure to the application of the rule (i.e., whether the interest is a recognized interest) and it is a relatively simple (as opposed to complex) variable in that it operates as a toggle, rather than say a threshold as would be the case if *numerus clausus* permitted novel interests under certain circumstances.

Another way of thinking about this point is that there exists an inverse relationship between a rule’s “formality” and the number and complexity of variables that come to bear in its application. In turn, the number and complexity of variables that must be brought to bear on a rule’s application is determined in large part by the degree to which the rule’s imperative succeeds in limiting the rule’s extension. An exploration of *numerus clausus*’ mechanism for limiting its extension as well as its utility in serving a coordination function follows.

²²⁷ But see Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 1006 n.59 (2005) (reviewing MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003)) (“[T]he relevant standardized forms clearly change over time; no real estate lawyer today knows much about the dizzying array of ‘incorporeal hereditaments’ that Blackstone described (e.g., advowsons, dignities, and corodies), whereas Blackstone knew nothing of condominium restrictions and time-shares.”).

²²⁸ Smith, *Language*, *supra* note 27, at 1135–36.

a. The Elimination of Variables

H.L.A. Hart famously stated, “[i]n all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.”²²⁹ In other words, rules are a tool that we may employ to guide us towards solutions, but they are not themselves solutions. It may seem like a failing—and a serious one at that—that rules are ill-equipped to resolve legal problems given that positive law and our accepted forms of legal reasoning are little more than a great web of rules. In this light, the whole of our legal system may seem suddenly to be built upon an alarmingly inadequate construct.

Yet, this worry about rules’ inadequacy is mitigated once we consider that a rule’s task, its charge, its *raison d’être*, is not to resolve problems. Instead, a rule’s task is to limit the number of relevant variables that bear on a given decision.

Consider, for example, a rule that prohibits wearing hats in church. The rule seems fairly straightforward until we consider whether a headscarf “counts” as a hat under the rule. Here we see an instantiation of problem mentioned earlier: the rule cannot *resolve* the problem of whether a headscarf “counts” as a hat. Nonetheless, the rule has done *some* work. Assuming we try to decide what to wear to church in light of the rule, the rule has eliminated from our consideration all entities that we all agree “count” as hats in all contexts—a baseball hat, a cowboy hat, a fedora. Moreover, with respect to these entities to which the rule plainly obtains (i.e., uncontroversial “hats”) the rule has removed from our consideration any number of reasons why wearing a hat might be a good idea. The rule has thus succeeded in rendering irrelevant a number of variables that would otherwise be relevant to our decision. It has succeeded in narrowing our scope of consideration.

Narrowing the scope of consideration is the charge of rules of all stripes. All (intelligible) rules distinguish—to varying degrees—entities that fall within the extension of the rule from those that do not. Some rules leave little doubt as to what entities fall within its extension (as in the rule “two plus two equals four”). Other rules do less work in eliminating variables (as in the rule “like cases must be treated alike”). The degree to which a rule is able to limit the number of variables that bear a question depends upon two factors: (1) the constitution of the boundaries of the

²²⁹ HART, *supra* note 30, at 126.

concepts that comprise the imperative of the rule; and (2) the variability of the consequent.²³⁰

Variability of the consequent is of the simpler of these two to identify. A rule's consequent is the consequence of the application of the rule.²³¹ It is what happens if the rule obtains.²³² "Variability" here means the degree to which the consequence of the application of the rule is contingent. For example, consider the rule: "Violators may be prosecuted." There are two points in the application of the rule during which variables come into play. First, the decision-maker must determine who "counts" as a violator. The number and complexity of variables that come into play at this stage depends upon the boundaries of the concept "violators" as it is used in the rule, a point we will return to momentarily.

The second point in which variables may enter is the consequent stage. Once we have apprehended the class to whom the rule obtains (i.e., who "counts" as a "violator"), the rule will dictate what is to happen. The rule's consequent may be necessary or it may be contingent. In the example of "violators may be prosecuted" the consequent is contingent. The question of what will happen if the rule obtains is subject to further variables. In contrast, if the imperative of the rule was "violators must be prosecuted," then the consequent would be necessary. If one "counts" as a violator then one must be prosecuted and no further variables are at play.

Now let us consider the consequent of *numerus clausus*. Assuming our formulation of "no novel forms allowed," the consequent of *numerus clausus* is necessary. If an entity "counts" as a novel form, then it must not be allowed. There is no contingency in the consequent, which serves to limit the number of variables that bear on the application of the rule.

This returns us to the first and more vexing point at which variables may come into play in the application of a rule: the constitution of the boundaries of the concepts that comprise the imperative of the rule. The concept that comprises the imperative of *numerus clausus* is the concept of "novel form." If an entity "counts" as a novel form, then the rule obtains. But how does a legal decision-maker decide what "counts" as a novel form?

²³⁰ See SCHAUER, RULES, *supra* note 163, at 23 (describing a rule's "consequent" as "prescribing what is to happen if the conditions specified in the factual predicate obtain").

²³¹ *Id.*

²³² *Id.*

To answer that question, we must consider how the concept of “novel form” is bounded. To be coherent, a concept must encompass a set of criteria that distinguishes the concept from other concepts.²³³ The concept of “blue,” for example, would have no content if anything could be fairly described as blue and nothing could be excluded from it. The same may be said for every concept. However, it is not always clear how boundaries render concepts coherent.

Consider, for example, the phenomenon of baldness.²³⁴ Baldness is a concept that is bounded by a threshold. We know that baldness exists, and we can identify specific instances of baldness, but what distinguishes a haired person from a bald person? Being possessed of a single hair probably does not remove one from the category of “bald,” yet what about being possessed of ten hairs? Or twenty? At what point does a haired person cross the threshold into baldness? If we were to apply the rule “only bald people are permitted,” we must engage with a number of variables to determine to whom the rule obtains.

However, the number of variables which bear on the question of what “counts” as “bald” is reduced precipitously if we transform the concept of “bald” into a concept that is bounded by a rule rather than a threshold. If, for example, the term “bald” referred to any person with less than twenty hairs on her head, then we would be able to point to the “rule of twenty” as a justification for our use of the term “bald.” The “rule of twenty,” were it to exist, may also serve as a basis of criticism of someone’s “incorrect” use of the term.

Of course, when we apply a rule to bound the concept “bald” we face the same problem of applying that rule as we do when we apply any rule. The number and complexity of variables that attend the “rule of twenty” is determined by the variability of its consequent and the constitution of the boundaries of the concepts that comprise its imperative. To apply the “rule of twenty” we would have to determine what “counts” as “twenty” and what “counts” as a “hair,” and so on. The imperative of the “rule of twenty” itself may be comprised of concepts that are bounded thresholds that are as every bit as porous as the concept of “bald” itself. But to the degree that the concepts that comprise the “rule of twenty” do a better job of excluding variables than the concept of “bald” itself, then the “rule of twenty” has

²³³ See generally Rander, *Boundaries*, *supra* note 87.

²³⁴ The example of baldness is often used to describe what is known as “little by little” arguments (also described as the sorites paradox, which is discussed *infra*). The specific example of baldness has been attributed to the Megarian logician Eubulides of Miletus. Dominic Hyde, *Sorites Paradox*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2011), <http://plato.stanford.edu/archives/win2011/entries/sorites-paradox/>.

succeeded in its “ruleness”—that is, it has succeeded in cabining the host of variables that come to bear on the application of the concept “bald.”

Returning now to *numerus clausus*, the concept of “novel form” is bounded by a set of rules rather than a threshold. What “counts” as a “novel form” depends upon the rules that constitute our extant forms, and thus, application of *numerus clausus* depends upon the application of those rules.

At this juncture, a problem may appear: if *numerus clausus* depends upon the application of the rules of property forms (i.e., the fees, the life estate, et cetera), and those rules are vulnerable to the criticisms of indeterminacy and/or the lack of capacity to constrain, then is *numerus clausus* equally subject to those same criticisms?

However, a close consideration of the function of *numerus clausus* reveals this not to be the case. *Numerus clausus* does not constitute the category of “novel form.” It leaves the constitution of that category to exogenous rules. Those exogenous rules may get the answer wrong—finding, for example, that a given conveyance “counts” as a leasehold, when it should not “count” as a leasehold. Alternatively, justifiable application of the exogenous rules may lead to multiple justifiable results. But once the interest in question has been authoritatively characterized as either a recognized form (in which case a package of powers attaches) or a novel form (in which case the interest is disallowed and/or amended) *numerus clausus*’ job is merely to ensure that its consequent obtains. Thus, *numerus clausus* succeeds as long as a legal decision does not enforce something that has been authoritatively identified (by application of the exogenous rules) as a “novel form.”

So even assuming the rules that constitute the forms fail to produce uniquely justifiable results, *numerus clausus* is still able to produce a uniquely justifiable—if *highly* formal—correct result. The imperative of form restriction is to eliminate novel or highly idiosyncratic property interests so that our property rights remain comprehensible. In this light, form restriction’s success is measured not by the degree that it ensures that property interests are justifiably categorized, but instead by the degree to which it ensures that authoritatively categorized interests are correctly sorted into those that are allowed (i.e., recognized) and those that are disallowed (i.e., novel). An elaboration of this idea follows.

b. Coordination Function

The toggle of *numerus clausus* may best be described as a coordination rule. *Numerus clausus* plays only a very modest role in determining legal outcomes (i.e., the distribution of the asset). In describing the prescriptive force of *numerus clausus*, it becomes clear that *numerus clausus*’ primary influence on the distribution of assets involves denying individualized ownership packets. Mrs. Lide, for example, is not able to convey a fee that lacks the power to transfer.

Given this fact, we might reasonably be concerned that the role that *numerus clausus* plays in determining legal outcomes is itself unjustified. In applying prescriptive pressure to legal decision-makers to mold property interests into extant categories, a substantial degree of innovation and autonomy is sacrificed. Moreover, because *numerus clausus* provides little in the way of guidance as to which ownership prerogatives should be altered to comport with existing categories (or even which category is the closest approximation to grantor's intention) we may be concerned that *numerus clausus* is indeed obscuring "the social forces which mold the law and the social ideals by which the law is to be judged."²³⁵

To some degree this concern is mitigated by the understanding that *numerus clausus* only commands that interests must conform to extant categories, it does not determine whether a given interest succeeds or what should be done about it if it does not. Therefore, there are multiple points of decision surrounding yet exogenous to *numerus clausus* where the "richer reality"²³⁶ of legal decision-making remains unobscured.

Moreover, aside from the manifested preference against novel estates, there is no normative commitment implied by *numerus clausus*. There is no normative content to the rule aside from the singular commitment to prohibit individualized interests. The command of form restriction is not to arrive at a *correct* or even a substantively justifiable classification of an interest in a given dispute, but rather to arrive at *a* classification. In this sense, form restriction as a rule set shares more in common with rules of etiquette, rules of language, or the rules of a game.

The rules of etiquette, rules of language, or the rules of a game serve primarily to coordinate behavior among people. In these contexts, it is more important that adherents to the rule system are able to identify the rule, than the content of the rule itself. For example, it does not matter very much whether an etiquette rule requires one to smile upon meeting a stranger or not. It does matter, however, that adherence to the etiquette rules system are able to identify what "counts" as polite behavior so as to avoid offense. Similarly, it does not matter much whether the rules of basketball permit dunking or not, but it does matter that adherents of the rule system are able to identify what "counts" as a basket.

²³⁵ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811-12 (1935).

²³⁶ Smith, *Language*, *supra* note 27, at 1106.

Form restriction similarly serves a coordination function. To illustrate this point, consider the rule that we must drive on the right side of the street.²³⁷ What is the purpose of such a rule? First and foremost, the purpose is to prevent us from colliding with one another in our cars. It is a rule that solves a coordination problem.²³⁸ The rule embodies a preference for the right side over the left side, but there is no (or a least very little) normative content to that preference. The prescriptive force of the rule is directed at avoiding collisions. It really does not matter much whether motorists drive on the right (as we do in the United States) or motorists drive on the left (as one finds in the United Kingdom, for example), as long as all motorists in the same place drive on the same side. Therefore, the choice of left versus right itself does not require a great deal of justification. There is simple very little in way of normative content in that choice.

An analogy can be made to *numerus clausus*. It does not matter much (except to the individuals involved in a given dispute) whether a conveyance creates a fee simple determinable or a fee simple subject to condition subsequent, but it matters greatly that we know that a novel or idiosyncratic interest has not been created. In disallowing the idiosyncratic interest, *numerus clausus* serves to stave off what would otherwise be an overwhelmingly complex reality of standing in normative relation to objects in the world. This is the worst-case-scenario that *numerus clausus* avoids, just as the driving-on-the-left rule avoids the worst-case-scenario that follows in the absence of its coordinating function.

In this light, it is possible to observe that any concern about a lack of constraint and/or indeterminacy that attends *numerus clausus* lies not in the potential to expand or contract the list of forms, but it arises in the context of determining whether a given conveyance fits a given form. Consider again, by way of example, the pro se testator who creates an ambiguous conveyance. If she has created a fee simple, her elderly sister-in-law will remain in possession of the decedent's house. On the other hand, if testator created a life estate, the sister-in-law will be dispossessed of her home. It may be that applying the rules that determine whether a conveyance "counts" as a life estate or "counts" as a fee simple to the facts of this case (i.e., the language of this particular conveyance) will not render a unique result. More specifically, application of the rules which bound those forms may not produce a uniquely justified result—either determination (i.e., that the conveyance created a fee simple or, alternatively, that the conveyance created a life estate) maybe be

²³⁷ See LEWIS, *supra* note 29, at 22–25 (discussing the rule that we drive on one side of the road as a convention to coordinate behavior).

²³⁸ *Id.*

justifiable in light of the relevant rules, the facts of the case, and the norms of legal reasoning.

If this is the case, then it would seem that the realist critique is well-taken and that form restriction only serves to obscure the actual dynamics of legal decision-making in such an instance. But this understanding misapprehends the work that form restriction is doing in such a case. *Numerus clausus* does not necessarily produce a unique answer to the question: “which form of ownership did testator create?” However, form restriction does provide a unique answer to the question: “did testator create a new form of ownership?” In light of the imperative of *numerus clausus*, the only justifiable answer to that question is “no.”

In this light, form restriction does not select among competing plausible or justifiable outcomes. Instead, the prescriptive power of form restriction lies in the imposition of selection itself—regardless of which estate is selected. *Numerus clausus* works to eliminate all possible resolutions that lie outside the list of extant estates.

Recall the case of Mrs. Lide’s testamentary gift to her sister-in-law, Mrs. White. In the absence of *numerus clausus*, there would be no need to select among existing forms of ownership. Instead, the will would create an estate that is customized to Mrs. Lide’s particular preferences. Mrs. White would then have an individualized estate: a fee simple that she lacked the power to transfer. Instead of choosing between option A (a fee simple) and option B (a life estate), the conveyance would create a novel option: the Lide estate.

Numerus clausus disallows the creation of the novel estate. It applies prescriptive pressure such that legal decision-makers are bound to select among existing options.

Of course, reasonable disagreements may emerge as to whether a particular conveyance does or should “count” as falling within the extension of a particular form. Applying, for example, the rules of language, the rules of construction, and the various rules that constitute each form (i.e., rules that tell us what “counts” as a fee simple, and what “counts” as a life estate, et cetera), a legal decision-maker might reasonably conclude that Mrs. Lide created a fee simple and a legal decision-maker might also reasonably conclude that she created life estate. Indeed, these views were respectively articulated by the majority and the dissent in *White v. Brown*.

Thus, the question that *numerus clausus* resolves does not concern how the asset should or will be distributed—a question to which there may well be multiple plausible resolutions in light of the rules of language, the rules of construction, the broad substantive rules of property (e.g., rules prohibiting unreasonable restraints on alienation) and the rules that constitute each form. Instead *numerus clausus* tells us that whatever the substantive collection of ownership powers that has been created

by a given conveyance, those powers must be fairly describable as falling within the extension of one our existing ownership categories. In other words, *numerus clausus* tells us that every enforceable estate will be referred to (and identifiable as) a fee simple, a life estate, a leasehold, and so forth.

2. The Problems of Obfuscation and False Constraint

A final criticism of the formalism of *numerus clausus* should be addressed. Critics have voiced the worry that focus on *numerus clausus* obscures the actual dynamics of decision-making in the context of the distribution of assets, because the decision-maker either genuinely believes—or disingenuously states—that she is constrained by the principle of *numerus clausus* in a manner that results in a particular distribution. In the case of Mrs. Lide, this claim would hold that the court believed (or claimed to believe) that it was required by *numerus clausus* find the Mrs. Lide’s conveyance created either a life estate or a fee simple. The court was not permitted to find a fee simple that lacked the power to transfer.

Yet, while it is the case that the imperative of *numerus clausus* disallows the novel estate of a fee simple that lacks the power to transfer, the distribution of the asset in Mrs. Lide’s case (or, arguably, in any case) does not turn on the application of *numerus clausus*. *Numerus clausus* only serves to eliminate option 3—the novel estate. *Numerus clausus* does not tell us anything about whether option 1 (the life estate) or option 2 (the fee simple) should be selected. As discussed above, rules exogenous to *numerus clausus* guide that decision.

Further, it is in selecting between options 1 and 2 that determines the distribution of the asset. If option 1 is selected, distant relatives will end up with the asset. If option 2 is selected, the favored niece will be the recipient. *Numerus clausus* has nothing to say about how this decision will be or should be made.

In this way, the concern that *numerus clausus* serves to invidiously and artificially entrench existing property distributions to the peril of egalitarian redistributive efforts is premised on a misunderstanding about the role that property forms play in the distribution of assets.

Further, no one contends that the principle of *numerus clausus* prohibits legislative (or even executive branch) imposition on individual property rights. The formalism found in property does not impinge upon the ability of the collective to impose upon individual property rights. On the contrary, the rules that tell us what “counts” as an enforceable property interest are frequently changed by collective action. *Numerus clausus* does not prevent a legislature from eliminating (or even

inventing) property forms. Consider the estate in fee tail.²³⁹ All but four states have eliminated it as a property form.²⁴⁰ The fate of the tenancy by the entirety may someday be similar as it no longer exists in a majority of states.²⁴¹

Neither the fact that we have a limited set of forms, nor the content of the particular forms that we have (e.g., fee simple versus life estate) significantly impacts the distribution of assets across a property system. Instead it is our broad property prescriptions—such as those that prohibit discrimination, or protect alienability, or ensure that residential rental property is fit for human habitation—that most dramatically shape our distributional landscape. These rules emerge from both the common law and, increasingly, from legislative action, and *numerus clausus* does not affect them in any way. For example, a growing number of states have eliminated the common law form of the Rule Against Perpetuities, which for centuries served as a significant constraint on the creation of future interests.²⁴² Settled equitable principles can likewise be realigned by judicial or legislative prerogative and the application of *numerus clausus* does nothing to constrain that realignment.

Thus, in terms of distributive sting, the realist critique of formalism, although insightful as applied to many doctrinal areas, simply misses the point in property—at least as it has been applied to the principle of *numerus clausus*. Property forms serve as tools that aid us in organizing property interests into distributional packages, but they do not tell us where or to whom the packages are to be delivered.

Henry Smith has analogized the rules that comprise *numerus clausus* and our individual property forms to the rules which structure language.²⁴³ In this light, to

²³⁹ DUKEMINIER ET AL., *supra* note 9, at 321.

²⁴⁰ *Id.* (describing the decline of the fee tail in American property law).

²⁴¹ *Id.*

²⁴² *Id.* at 307–08 (describing the perpetuities reform movement).

²⁴³ Smith, *Language*, *supra* note 27, at 1107–08 (“Relatively context-sensitive realism and relatively acontextual formalism can be seen as points along a spectrum of methods of striking a tradeoff between communicating a lot to a few or a little to many. This informational tradeoff points to an unacknowledged tension lurking in the realist project of coupling nuanced decisionmaking with concern for the audience: Not all audiences—especially large and heterogeneous audiences—can process nuanced messages at reasonable cost. The realists and their successors argue that many features traditionally associated with formalism—from literalistic interpretation to standardization of property under the *numerus clausus* principle—are nothing more than archaic relics. Controversy has centered on how far, if at all, the benefits of certainty in the law mitigate the inevitable incorrect results in some cases—much less the promotion of unattractive and outmoded values. But, some of these ‘formalistic’ devices reflect the need to limit the cost of processing messages about legal relations that are broadcast to wide audiences. If everyone in the world is expected to respect an owner’s right to Blackacre, the content of that right cannot be too

say that the principle of *numerus clausus* is an inherently politically conservative principle because it supports existing property forms is like saying that our linguist practice is inherently politically conservative because it supports existing usage and syntax. The existence of a system that limits our property forms no more causes particular distributions (or impedes redistributions) of resources than the existence of a limited set of usage and syntax causes us to express particular ideas. It would be ridiculous to say that Susan B. Anthony said: “Resistance to tyranny is obedience to God” *because the words existed*. Just as the existence of words enables (but do not cause) particular expressions, the existence of a system of fixed property forms enables the delivery of particular packages of distributions, but it does not cause them to be delivered.

Now it may be the case that we say certain things (and not other things) because *certain* words exist, and this, too, finds an analogical home in property forms. The existence of *certain* forms of property may hinder egalitarian or redistributive goals—here, the obsolete fee tail and the relatively “neologistic” (to extend the metaphor) “dynasty trust” come to mind. Both of these property forms have the potential to legally entrench resources beyond what we might consider to be a desirable span of ownership. Consequently, the *existence* of these two property forms potentially hinders egalitarian resource distribution. Yet, if we find this problematic, the solution is not to do away with *numerus clausus* and the system of fixed property forms altogether. The solution is to do away with *those* property forms (as most states have in the case of the fee tail).²⁴⁴

The point is, having a relatively stable compliment of property forms does not necessarily mean that the content of those forms will be inherently inclined to preserve existing resource allocations, or that the content of the forms will necessarily encourage inequitable (or equitable) resource distributions. The content of our property forms is (and will continue to be) what we have the political will to make it. Moreover, our broad property proscriptions (which in most instances are more important in terms of distribution than the content of our forms) are likewise perennially amendable by legislative realignment just as in other common law doctrinal areas. In this sense, our legal practice of property is at least as “democratic”

complicated or idiosyncratic without placing a large burden on many third parties. On the other hand, when two parties are deep within an ongoing relationship, their contractual language can be given substantial deference in all its idiosyncrasies. This even extends to a court’s enforcing such idiosyncrasies as long as a court’s efforts are likely to achieve accuracy at reasonable cost. Various situations fall between these extremes, and the law will accordingly adopt interpretive methods of an intermediate sort.”)

²⁴⁴ *Id.* at 1107–08.

an endeavor as any of the other doctrinal areas to which it is so frequently unfavorably compared.

IV. CONCLUSION

In sum, the conceptualist/non-conceptualist divide in property is not facile as conventional wisdom would suggest. Rather than reflecting differences in preferred value sets or favored outcomes for the distribution of assets, the conceptualist/non-conceptualist divide is centered on the significance of form restriction in property. Many conceptualists understand form restriction to be a criterial feature of property, while non-conceptualists reject this as a descriptive proposition.

Moreover, in addition to voicing skepticism about the description picture of *numerus clausus* that conceptualists have offered, non-conceptualists have worried that form restriction in property is unduly formalist. They have raised the concerns that *numerus clausus* is a manifestation of “empty” formalism, that the rule lacks the capacity to constrain judicial decision-making, and that emphasis on the rule serves only to obscure the actual dynamics of judicial decision-making.

However, these concerns are predicated on a misapprehension of *numerus clausus*. *Numerus clausus* does not exert pressure on a decision-maker to favor a particular distribution of the asset in question. Rather than purporting to guide a decision-maker to a uniquely justifiable classification of the asset in question (and thereby determine distribution), *numerus clausus* serves only to eliminate idiosyncratic interests. In this way, the principle of *numerus clausus*, although highly formalistic, avoids the problems of formalism generally because the function of form restriction is not to arrive at a *correct* or even a substantively justifiable outcome in a given dispute, but rather to arrive at *an* outcome. The function of form restriction is to eliminate idiosyncratic interests so that our property rights remain comprehensible.