Property and Collective Undertaking: The Principle of Numerus Clausus

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I Introduction

Property rights are subject to the principle of numerus clausus, which is a restriction that means that it cannot be up to the contracting parties—or private persons, more generally—to create new forms of property right, but only to trade rights that take existing forms.1 What can explain this peculiar limitation? All the answers offered so far by property theorists have marshaled functional explanations either in favor of or against the numerus clausus principle (hereinafter: NC). In this paper I shall set out to articulate a novel explanation of this principle. My argument develops two general claims. Negatively, explanations that emphasize the desirable effects—the functions—associated with this sort of limitation on the creation of new forms of property right cannot explain the principle in question. As I shall seek to show, this shortcoming is no mere explanatory gap. The NC principle, I argue, remains flatly indifferent to the functions advanced through property rights. Affirmatively, I shall seek to show that the principle of NC reflects a concern about legitimate political authority—that is, it gives a doctrinal expression to the question of how political authority is possible. The authority in question pertains to the normative power of legislating new property rights and their correlative obligations. The principle of NC, I argue, is a limitation on private legislation of new forms of property right. Most importantly, I shall argue that the underlying idea of political legitimation that grounds this principle is none other than democratic self-governance.

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1 For a familiar statement, see Hill v. Tupper, (1863) 2 H. & C. 121 (‘It is an old and well-established principle of our lacy that new estates cannot be created.’) (per Pollock CB). Cf. Stephen R. Munzer, ‘The Commons and Anticommons in the Law and Theory of Property’ Martin P. Golding and William A. Edmunson eds., in The Blackwell Guide to the Philosophy of Law and Legal Theory (Malden, Mass.: Blackwell, 2005) 148 at 156 [Munzer, ‘Commons’] (observing that the NC principle ‘states that the number of forms of property is closed and limited.’).
II. What is Numerus Clausus a Principle of?

I commence with elucidating precisely what it is in the principle of NC that calls for explanation. Clearly, an adequate explanation must account for the interference of this principle with the freedom of parties to a contract to establish novel forms of property right, rather than merely trade rights falling within existing forms. However, it is necessary in the first instance to render concrete the nature of this interference. Indeed, although the NC principle figures prominently in contemporary discourse about property, my elucidation of this principle reveals a recurring flaw in the way the question it raises has so far been posed and, therefore, addressed. As I shall seek to show, the formalism built into this principle is importantly underappreciated.

A. NUMERUS CLAUSUS: A PRINCIPLE OF RESTRICTION, NOT REDUCTION

Certainly, the principle of NC is a principle of restriction or limitation. But need it also be cast in terms of a principle of reduction? Almost all\(^2\) the accounts of the NC principle of which I am aware of have proceeded on the (implicit or explicit) assumption that a restricted number of forms of property right means ‘a small and very narrowly limited group’\(^3\) of property right or ‘a few basic categories of partial property rights.’\(^4\) This assumption cannot be grounded in a comparative claim, according to which there are far fewer property right forms than there are contractual rights. This is because comparing property right forms with contract rights, rather than their forms, is akin to comparing apples and oranges. The right comparison is between property right forms and the contractual obligation (or right) forms. Contract law recognizes one such general form of obligation, originating in reciprocal promises that take the bargain form, and (perhaps) contracts of adhesion represent one more.\(^5\) The comparative claim, therefore, is groundless.

\(^2\) I say almost all in recognition of accounts that may not turn on the reduction-base interpretation of the NC principle. It has been argued, for instance, that the NC principle is a doctrinal expression of property law’s function of enhancing human flourishing. On this view, the principle of NC outlaws property right forms that deviate from this goal. Accordingly, this principle insures that ‘there is some predefined “core” of minimal content, without which the property right cannot advance its owner’s well-being.’ Daphna Lewinsohn-Zamir, ‘The Objectivity of Well-being and the Objectives of Property Law’ (2003) 78 N.Y.U.L.Rev. 1669 at 1733. This, however, may not suffice as an explanation of the NC principle. In particular, this account cannot explain why private persons cannot create new property right forms even when these forms are fully consistent with, indeed conducive of, the values of human flourishing (whatever they are).


\(^5\) The general contractual obligation form can then be broken down into sub-forms (say, the obligation characteristically arising from a contract for the sale of goods) just as a lease form in property law can be divided into a term of years, a periodic tenancy, and so on.
Nevertheless, the assumption—that a restricted number of property right forms means few forms—is critical for all the accounts under consideration for reasons that do not turn on the comparison between property and contract forms. For instance, the economic analysis in support of the principle of NC suggests that property right forms should be both ‘fixed’ and ‘limited in number’ in order to economize on the costs of communicating the legal attributes of an object. Likewise, on the realist explanation of the principle, ‘property forms are justifiably limited in number,’ because they represent ‘default frameworks of interpersonal interaction.’ The logic of this argument—that an expansion of the number of forms will dilute their effective hold—applies, of course, to other functional explanations of the principle of NC in terms of its promotion of a plurality of values. Hence, by approving or disapproving of this principle, these accounts have taken their task to be that of assessing the case for the law’s preference for a small number of forms of property rights.

To render more vivid the argument I shall be making against this functional understanding of the NC principle, consider language by analogy. English consists of 26 characters, and suppose that Minglish—which is in all other respects identical to English—contains 260 characters. Both languages are subject to a ‘linguistic’ NC principle understood as a principle of character-restriction in the sense that individual speakers of these languages are not allowed to add more characters. However, only English may (at best) be associated with character-reduction. And to the extent this is so, the functions attributed to the NC principle—say, economizing on information costs or focusing on limited frameworks of interpersonal interactions—may succeed only insofar as there exists a significant overlap between character-restriction and –reduction. The contingency of this overlap, however, plagues the functional accounts just mentioned in a deep and significant way. Indeed, the great variance between English and Minglish shows that the benefits of a relatively small list are not a feature of the NC principle

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8 See Nestor M. Davidson, ‘Standardization and Pluralism in Property Law’ (2008) 61 Vand.L.Rev. 1597 at 1648 (2008) [Davidson, ‘Pluralism’] (‘When it limits the forms of property right, [the state] is preserving the conceptual space it needs to regulate property.’); Joseph W. Singer, ‘Democratic Estates: Property Law in a Free and Democratic Society’ (2009) 94 Cornell L.Rev. 1009 at 1051-52 (2009) [Singer, ‘Democratic Estates’] (arguing that the estate system and the NC principle ‘outlaw’ new forms of property right in order ‘to shape social life in a manner consistent with the normative commitments of a democratic society... Property law therefore both reflects and puts into practice value judgments about the appropriate contours of social, economic, and political life.’).

9 See generally Munzer, ‘Commons,’ supra note 1 at 156 who observes that ‘land law recognizes a handful of present estates … and a handful of future interests … a few nonpossessory interests in land … The law of personal property has even briefer catalogue.’ See also Merryman, ‘Policy,’ supra note 3 at 224; Merrill & Smith, ‘Optimal,’ supra note 6 at 5; Hansmann & Kraakman, ‘Verification,’ supra note 4 at 375; Dagan, ‘Craft,’ supra note 7 at 1558; Davidson, ‘Standardization,’ supra note 8 at 1650 (noting that the standardization of property right forms, the NC principle, amounts to ‘limited forms’).
(again, the principle applies just as vigorously to Minglish). This explanatory shortcoming is no less troubling when we return to the NC principle in property law. The question of whether a dozen or so forms of property right are more like English or, on the contrary, Minglish, remains conceptually open precisely because the NC principle cannot settle this question. The number of existing property right forms can be restricted (by the NC principle). But whether this number is sufficiently small to produce the functions imputed to it by lawyer economists or value pluralists is an entirely different question, not derivable from the principle of NC. Or so I shall argue.

At first blush, attributing a reductionist mind-set to the NC principle in property law may seem natural due to the fact that there are more or less dozen forms of property right. But this way of approaching the NC principle is just wrong. It is wrong because it is impossible to draw inferences with respect to how small or large the class of forms of property rights is simply by reference to an absolute number such as twelve (or so) forms. Any number bigger than zero and short of zillion may, in principle, be judged small or large, depending on the prior selection of a baseline against which to render this judgment plausible. The NC principle as such can shed virtually no light on this matter.

More specifically, a dozen forms of right may anyway be exceedingly excessive or disappointingly wanting. This is well reflected in the enduring debates over the consolidation and expansion of existing forms. The fee tail, for example, has been formally abolished by legislative fiat in many jurisdictions, though it died long before that day simply by virtue of non-usage. More generally, prominent Nineteenth century property lawyers have advocated on the grounds of simplicity the full or partial assimilation of the law governing real property into personal property law. The basic insight on this agenda called attention to the superfluous division of interests in land into several estates and remainders. In contrast, equity has been enlisted in the service of compensating for shortage in the existing menu of property right forms. A familiar example is equitable servitudes, especially restrictive covenants. There, equity does not so much follow the law as purport to correct the law due to its failure to acknowledge more forms of right than it does.

10 See, e.g., Rudden, ‘Economic,’ supra note 6 at 241.
11 Merrill & Smith argue that the emphasis on solving information costs externalities through the NC principle yields the conclusion that the number of forms of property rights must neither be zero nor unrestricted. Merrill & Smith, ‘Optimal’ supra note 6 at 40. But their analysis provides no guidance with respect to anything in between these two extremes. In particular, they can say absolutely nothing as to whether the number of forms recognized by the law at present (or in the future) meets the demands of efficient regulation of information costs. See ibid.
13 Whereas complete assimilation of realty into personality has not won the day, the call for simplification of real property law has culminated (in Britain) in the reduction of legal estates in the Law of Property Act of 1925.
15 See Tulk v. Moxhay, (1848) 2 Ph 774.
The illustrations just mentioned, historically important as they are, do not settle the question of whether in fact a dozen or so forms of property right represents a small number of such forms. Indeed, this is precisely their purpose—to illustrate the conceptual point that judgments concerning the smallness or largeness of a class of right forms cannot be determined by reference to the principle of NC. There is no rational connection whatsoever between this principle and the notion that it encapsulates a small constituency of forms. It is one thing to limit the number of available forms of right; quite another to determine whether this number is also small (or large). Bluntly put, numerous clausus is a principle of restriction, not one of reduction.

Against this backdrop, an account of the NC principle in property law must explain the point of form-restriction, rather than form-reduction. More precisely, it must explain the former independently of the latter; that is, without presupposing that by disapproving of contract-made forms of property right, the law thereby manifests its preference for a handful of forms. The arguments from information costs and value pluralism, because they confuse form-restriction with form-reduction, run afoul of this basic explanatory requirement. They seek, separately, to cast the principle in question into sharp relief by attributing to it functions—efficiency and plurality of value—that are foreign to its true nature (whatever it is). This is not to say that the principle of NC cannot promote these goals, but rather that it may do so only coincidentally insofar as the existing forms of property right also happen to be sufficiently small in number (judged by whatever standard of ‘smallness’ one invokes).

B. NUMERUS CLAUSUS: FUNCTIONLESS FORMALISM?

I have argued that there exists a critical gap between form-restriction and form-reduction and that the familiar functionalist accounts of the NC principle, because they neglect the truly formal aspect of this principle, fails to bridge this gap. However, nothing I have said so far establishes the precise connection (or disconnection) between form-restriction and the functions it could, nonetheless, serve. After all, unlike their contemporary counterparts, future functional approaches to the principle of NC need not develop their respective explanations by reference to there being a small number of property right forms. In other words, current approaches’ shared predilection for form-reduction leaves ample space, as it were, for functional accounts that do not turn on the reduction of available forms. Thus, other functional explanations of the NC principle could in principle succeed where the arguments from information costs and value pluralism have failed. For this reason it will prove helpful to elaborate on the possible functional properties of form-restriction, considered separately from form-reduction. As I shall seek to show, the principle of NC holds fast to its indifference to functional questions. The point of form-restriction, I shall argue, is to govern the creation of property right forms, regardless of their material effects on property right- and duty-holders. As I shall seek to show, the principle of NC in property law exerts no rational pressure toward any particular function except (of course) for restricting the forms of property rights.

Can the restriction-based principle of NC be cast in functional terms? I shall commence this investigation by considering extra-property instances regulated by this
principle. This consideration could render vivid what must be the case in order for the NC principle of property law to be a champion of desirable goals. As I shall explain, the NC principle of property law confounds functional articulations even when the principle is explained by reference to the notion of form-restriction. This is because, unlike its extra-property cousins, the NC principle of property law does not orient its restrictive force toward outcomes.

To begin with, the concept of NC reaches far beyond property law. To mention three paradigmatic instances, consider the notary profession in continental Europe, certain leading American medical Schools during the 1930s, and a capped-based immigration policy. All are subject to the principle of *numerus clausus*, the point of which is to restrict the number of eligible members in each of these cases. Thus, different European countries restrict the total number of practicing Latin notaries per district 16; medical schools once restricted the total number of Jews who may pursue a degree in medicine 17; and in some states, immigration is allowed up to a fixed quota. Consistent with the previous stage of my argument, the restriction they each pose may not—in fact, they have proved not to—reflect a necessary connection to reduction (however it is measured). 18

Whatever the purposes served by the NC principle in these cases is, there can be no doubt with respect to how this service is promoted through a NC principle of restriction. Indeed, the restrictions placed on prospective notaries, students, and immigrants are *categorical* in the sense that there is no way of getting around them once their respective quotas have already been met. I cannot become a Latin notary, medical student, or immigrant the moment the relevant quota has been filled; arguably, the relevant quota represents the (somewhat arbitrary) line beyond which additional Latin notaries, Jewish med students, and immigrants are not desirable. In this way, the principle of NC sustains goals, deplorable or not, that depend for their realization on placing categorical constraints on the freedom of individuals to decide for themselves whether to join the notary profession, study medicine, or immigrate. In short, it is functional through and through.

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18 The NC principle applied to prospective Jewish students during the 1930s placed a 12-14 percent limitation on admission to medical schools. Years after this limitation had been removed, the proportion of Jewish medical students amounted to about 8.6 percent. Sokoloff, ‘Rise,’ ibid. at 516. Likewise, immigration policy governed by the principle of NC may set the designated quota on new comers above actual demand on the parts of the immigrants. This could even be arranged for deliberately, as when the policymaker seeks to induce, within limits, the demand and so to affect an exogenous change in contemporary immigration patterns.

Unlike the extra-property cases just mentioned, property law’s version of the NC principle may not even be a principle of restriction properly so called. That is, property law does not feature the categorical restriction characteristic of those other cases. For it 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. Indeed, in denying private persons the freedom to create novel forms of property rights, the law does not thereby undermine these persons’ freedom to arrange for the ends they seek to bring about. Rather, it merely defines the available forms—the formal context—against which these persons could shape their transaction in a manner that best suits their preferred ends. Property scholars have observed that the restriction posed by the NC principle is insignificant because of their ability to ‘tinker with the specific content of each property form.’

To illustrate, consider two cases demonstrating, separately, the fungibility of property rights forms: the forms of mortgage and ownership. In both cases, even when the law for whatever reason does not acknowledge a particular form, mortgage and ownership, respectively, there still exists ample space to compensate for this shortcoming simply by using the existing forms. As I shall show, the fungibility of the forms does not imply absolute freedom to carry out transactions regardless of their consequences for society; rather, it implies that a principle of form-restriction remains indifferent as to the functional question concerning the goals of property law. Accordingly, the law may disapprove or simply fail to acknowledge a particular form of property right, but this is not the same as disapproving or failing to acknowledge the goals that are associated with this form. For these goals can be made good by deploying existing forms.

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Begin with the mortgage form. The historical development of this form has been told numerous times before. I shall not retell it, but rather seek to illuminate this development from a rarely considered perspective—namely, that of the NC principle. To begin with, a typical mortgage transaction consists in the conveyance of an interest in real property—a property right—for the purpose of securing the repayment of debt owed by the mortgagor, the owner of the property, to the mortgagee-lender. Whereas the mortgage transaction is and at least since the seventeenth century has been as simple as that, the

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19 Rudden, ‘Economic,’ supra note 6 at 239. See also Merrill & Smith, ‘Optimal,’ supra note 6 at 7.
20 See Dagan, ‘Craft,’ supra note 7 at 1566 who follows in this respect Hansmann & Kraakman, ‘Verification,’ supra note 4 at 416-17.
21 By property right I mean right in rem; that is, it is good against the world and runs with the asset. The security interest called mortgage features both elements of this rough definition of property rights.
mortgage form is a product of recent innovation on the part of Anglo-American legislatures and courts (of law and equity). Parties seeking to engage in a mortgage transaction—viz., to vest a security interest with the lender—had to manipulate existing forms of property rights to compensate for the missing form. Chief among the possible manipulations of existing forms was the sale-for-repurchase transaction—"the classical common law mortgage." There, the borrower conveys her land in fee simple to the lender subject to payment of the debt. In an effort to correct for the possible gross imbalance in power between borrower and lender, the Court of Chancery created the equity of redemption, conferring upon the former the equitable right to redeem her mortgaged land despite the passage of the due date in the conveyance agreement. Thus, in place of transferring a right over one’s property as security for a loan, the ownership form had to be invoked in order for borrowers and lenders to engage substantively, but not formally, in mortgage transactions. It is important to note, to forestall misunderstanding, that equity of redemption (or equitable ownership as it is sometimes called) was not required in order to make the so called ‘classical common law mortgage’ transaction possible in the first place, but rather to soften its harsh side-effects to borrowers. In other words, a sale-for-repurchase transaction does not depend on equity of redemption in order to proximate economically, in some measure, a mortgage transaction, although, once again, this equitable right may be necessary to secure the fairness of this second-best transaction.

As mentioned a moment ago, this somewhat artificial form of mortgage has given way to the current mortgage form. The important point concerning this statutory or judicial transformation is that it has been purely a formal one. As commentators have observed, '[t]he change is one of form rather than of substance, for it does not alter the rights of mortgagor and mortgagee; it merely makes the conveyancing machinery more logical.' Indeed, save for the creation of a novel property right form—the mortgage form—the mortgage transaction fulfills the same functions it served when it involved the transfer of ownership to the mortgagee subject to the retention of the equity of redemption. This uncomplicated move toward the current form of the mortgage demonstrates that the formal architecture of the transaction in question need not settle the question of whether or not to treat it for what it is worth, namely, a security transaction.

23 English common law prior to the Law of Property Act of 1925 and American common law mostly prior to the 19th century did not acknowledge a freestanding mortgage form.
25 As Lord Mansfield famously observed, ‘[i]t is an affront to common sense to say the mortgagor is not the real owner.’ King v. St. Michaels, 99 Eng. Rep. 399 at 400 (K.B. 1781).
27 In some U.S. jurisdictions, the two alternative forms of transaction remain equally available to the interested parties.
Now, my brief sketch of the development of the mortgage form is clearly anachronistic. However, the point I aspire to make in connection with this area of property law is conceptual, rather than historical or causal. And the point is that there exits a critical gap between the forms of property rights and the functions they could render those who invoke them. More specifically, there is no reason to suppose that the functions (whatever they are) associated with the mortgage form inhere exclusively in this form in the sense that they can find no breeding ground within another property right form or a combination of such forms. The absence of a particular property right form—say, mortgage—only means that private parties may not invoke this form in designing their transaction; this is precisely what the principle of NC stands for. But it does not rule out the employment of existing forms in the service of producing a substantively similar transaction. And although the employment of existing forms might not be a perfect proxy for the missing forms, it is nonetheless a quantitative, rather than a qualitative, shortcoming.

A similar lesson can be drawn from a case concerning the near-absence of the ownership form from the everyday life of the institution of private property. Indeed, the fungibility of property rights proves relevant even with respect to the ownership form itself, which is the single most important form in the sense that all other forms are derivative instances thereof. Consider the peculiar example of Israel’s system of private property. For political and ideological reasons, the State of Israel owns 93 percent of the land. More dramatically still, a constitutional law provision, Basic Law: Israel Land, entrenches an inalienability provision as regards all state-owned lands. Certainly, doing away with a robust form of private ownership may come at the expense of sustaining economic markets and freedom more generally, since private ownership is the substrate through which markets arise and through which private autonomy may flourish. Thus, to ameliorate these worries, the Israeli administration had to see to it that the functions associated with private ownership would not be forsaken even when the ownership form itself cannot be enlisted to sustain them. For this reason, the administrative agency responsible for the regulation of state property grants renewable leases for a term of years. This practice is widely considered by state officials, courts,
and commentators to depart from private ownership in land in theory only, since for most functional matters the rights of lessees and owners, especially of residential apartments and houses, are for most purposes indistinct.33

Of course, important non-theoretical differences may surely arise as circumstances change; for instance, if the state, the owner, retreats from its current commitment to treat long-term leases as half-way to granting complete ownership rights. However, this possibility only reinforces the wedge I have been seeking to drive between form-restriction and the principled or pragmatic ends served by property rights. The absence of the relevant property right form—here, ownership—says nothing concerning the pursuit of certain ends (say, market and freedom) through other forms. Whether or not an institution of private property aspires to such ends is an inference that cannot be drawn simply and solely by considering which forms have so far failed to garner official acknowledgment by the law. The absence of mortgage or ownership form is therefore just that; it says absolutely nothing with respect to what could be done using the existing forms. More generally, as the illustrations just mentioned suggest, the marriage between the form and the function of property rights is sufficiently loose to cast doubts over the plausibility of casting property law’s concern with the former in terms of the latter.

Against this backdrop, I can now offer a more precise answer to the question posed at the outset—that of what in the principle of NC it is that calls for explanation. According to the preceding argument, the widely neglected contradistinction between form-restriction and form-reduction turns out to be merely a surface manifestation of a deeper divide between the formalism of the principle of NC and the functions that may be attributed to this principle and to property rights, more generally. The only necessary restrictive force of the NC principle in property law is that which applies to the form that property rights can take (such as ownership, lease, easement, and mortgage), but not necessarily to the objectives, the end-results, for which these rights are enlisted. The legal regulation of the latter does not turn on the former, for it is one thing to intervene in persons’ freedom to shape the formal aspects of their transactions; quite another to see to it that the transactions are in line with the social purposes and human values that property law sanctions.

Form-restriction, then, stands for the proposition that private parties can design their transactions however they see fit to the extent they invoke existing forms of property rights. It follows that two substantively similar transactions could receive completely opposite treatment by courts simply in virtue of the property form they each invoke. That is, courts may enforce one, but not the other, for the sole reason that the former invokes an existing form of property right, whereas the latter fails to do so. But this sort of differential treatment cannot be grounded in the function that either form of property right may serve, since (once again) both forms allow substantively similar transactions to occur. What is the point of form-restriction, then, if it merely restricts the available forms of property rights, but does not target the substance of the transactions as such, however

33 See CA 355/76 Basso v. Mal’ach, [1977] IsrSC 31(2) 359, 361-2 (observing that ‘it is no secret that in the lived experience of Israel, most contracts for term of years made between the state and private individuals are like contracts for the transfer of ownership...’).
formally designed? The principle of NC appears to perform the function of restricting the forms of property rights for the sake of thus restricting—it is a purely formalistic device. And here I mean the notorious and unworldly view of the legal form as sufficient unto itself, which is to say completely shut off from the functions it may serve. Hence, the only live question for the principle of NC is whether there is any good—any value—in form-restriction quite apart from its desirable or undesirable effects. To this question I shall now turn.

III Outline of a Theory of the Numerus Clausus Principle

In what follows, I shall develop the insight that NC is at its core a categorical restriction on private legislation. The principle of NC is the negative aspect of the broader notion that the forms of property rights ought to be creatures of collective undertaking—viz., public legislation. The underlying problem of private legislation, I argue, is one of legitimate authority, which is essentially the same question that stands at the very center of classical liberal accounts of political power such as those developed, separately, by Thomas Hobbes and Immanuel Kant. Whereas these philosophers focus on the general question of how political authority is possible, the principle of NC picks out a concrete elaboration thereof. In contrast to both Hobbes and Kant, however, I shall argue that the NC principle insists that new forms of property right be the upshots of democratic legislation. That is, the restriction it imposes on private legislation takes sides on the debate over which sort of public legislation can overcome the problem of political authority. On the Hobbesian account, public legislation receives an authoritarian interpretation; the Kantian account sanctions legislation which partly shares in democracy’s formal features (especially, the separation of powers) but, nonetheless, falls short of acknowledging the freestanding authority of democracy. On my account of the

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34 As I explain in a moment, the restriction is categorical within the context of property rights. Private legislation is not, of course, globally restricted.
35 The resort to public legislation requires further elaboration. See section III.B.
36 I insist on the partial overlap between Kant’s republican regime and the lived experience of democracy (or, for this matter, any attractive account of democracy). For example, the Kantian form of democracy requires the separation of powers between the three branches of the government. However, it fails to acknowledge that at least the legislature must be elected by the people for a regime to qualify as democracy. The Kantian interpretation of democracy allows for the separation of powers to occur between three (unelected) princes, usurping, separately, the powers of legislating, administrating (or enforcing), and judging. Moreover, although the Kantian account acknowledges the need for ‘clarification and codification’ of the pre-political demands of right in statutory terms, it does so not so much for the sake of democracy, but rather in recognition of reason’s limitation.

Another point (to which I return more fully below) where my account sharply departs from Kantian political theory is worth emphasizing. My account shares the Kantian intuition that private individuals cannot unilaterally fix the terms of their interactions with others and that a formal democracy is required in order to set these terms legitimately. However, and this is where my account departs from the Kantian theory of political legitimation, it is also required that these terms are set together, not just formally or hypothetically (by asking, as Kant does, whether citizens could agree to these terms), but rather substantively through democratic politics. I set to one side the question of whether there is another necessary condition for democratic legitimacy, which is that these terms are set together, partly for the sake of togetherness. While I believe this last requirement is true, it is not necessary for the present
To forestall misunderstanding, two observations are in order. First, the nature of the argument I shall develop on behalf of the principle of NC is not historical or causal, although I believe it has ample support in history (a point to which I return below). Instead, the argument is conceptual and normative, seeking to explain the grounds for restricting private legislation in the context of property law. Second, the argument is not that the forms of property right produce collective goals or promote collective ends, but rather that they are in themselves collectivizing. This is because they represent society’s shared acknowledgement of the basic terms of interactions for private individuals seeking to trade property rights that arise under these forms.

A. PRIVATE LEGISLATION: FROM CONTRACT TO PROPERTY

The term private legislation stands for private persons creating norms of conduct—especially, imposing obligations and conferring rights upon people—enforceable by law. Although, as I shall argue, the principle of NC strongly resists this mode of lawmaking, private legislation is not globally impossible or otherwise unwarranted. The restriction expressed by the principle in question does not span the entire range of private legislation. Indeed, there are many different cases outside the context of establishing new...
property right forms that feature private legislation. A prominent example is the creation of contractual rights and obligations (say, those arising under a contract for the supply of services). To be sure, even private legislation through contract has given rise to suspicions concerning the possibility of creating obligations (to carry out the promise) by making a contractual promise. As David Hume famously observed, the creation of new obligation by promise is ‘one of the most mysterious and incomprehensible operations that can possibly be imagin’d, and may be even compar’d to transubstantiation.’ However, in contrast to property rights, which purport to obligate third parties, Hume’s skepticism is directed at the possibility of promisors obligating themselves. Accordingly, contract theorists have ever since emphasized the important values that ground the obligation to keep promises. These include (among other things) vindicating the promisor’s autonomy by obligating her to stand to her promise; sustaining the ‘special bond’ formed by the promise between promisor and promisee; and protecting the expectation (or reliance) of promisees not to be harmed by promisors who decline to perform the promises.

The case of contract may help in teasing out the precise line between legitimate and illegitimate private legislation. Consider colleagues who enter into a contract that, among other things, calls for exercising vigilance so as not to offend one another. In that, they

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42 See generally W. David Slawson, ‘Standard Form Contracts and Democratic Control of Lawmaking Power’ (1971) 84 Harv.L.Rev. 529 (arguing for tighter regulatory control of contracts of adhesion, because this ‘law-making power’ is inconsistent with democratic values).
43 I say contractual promise, rather than mere promise, in recognition of the special requirements placed on promisors by contract law—in particular, the promise takes the bargain form and is reciprocated by a promise made by the other part to the contract. That said, the basic difficulty mentioned in the main text—of how a promise can create an obligation—might plague both mere promises and contractual ones.
48 Even practice-based explanations of promise-keeping (such as those proposed by Hume, John Rawls, or H.L.A. Hart) do not purport to turn promisory obligations into in rem rights. It may be the case, though, that these explanations create such rights, since the obligation to keep a promise on these accounts is owed to the practice of promising, rather than to the promisee in particular. But this unintended consequence—viz., that the promise is not owed to the promisee but rather to the practice—is precisely what renders these explanations counterintuitive. See, e.g., the discussion in Markovits, ‘Contract,’ supra note 46 at 1443-4.
seek to fix the legal terms of their interactions. In particular, they extend the duty of due care they already owe one another as a matter of tort law to include mockery and social insult. The law sustains this contract-made legal norm in a variety of ways including, most basically, by awarding a remedy for the breach of this contractual obligation. Moreover, it protects the co-legislators of this norm, the contracting colleagues, from foreign interference in the form of the tort of inducement of breach of contract.

To be sure, this tort does not treat the content of the agreement as though it is obligatory upon third parties (i.e., non-colleagues). No one beside the parties to the contract must forbear from committing mockery and social insult simply by virtue of the inducement tort. The inducement of breach of the contract counts as tortious only because, and only insofar as, that activity seeks deliberately to cause one colleague not to abide by the norm (against mockery) she herself has co-authored as a party to the contract. Thus, the inducement tort reinforces, rather than expands on, the narrow scope of contract’s private legislation by shielding parties to the contract from the intentionally wrongful pressure to breach—to break their private law—exerted on them by someone standing outside the purview of the legislation in question. Furthermore, the very same thing which leads us to distinguish the inducement tort from property right protection brings home three more widespread doctrinal features that are worth reporting in brief. First, the tort in question is predicated upon intent of procuring a breach of contract, whereas the tort of trespass against property (land or chattels) grounds liability without fault (however defined). Second ly and relatedly, the general rule against recovery for pure economic loss—viz., financial loss without antecedent harm to the plaintiff’s person or property—applies to cases whereby the defendant negligently harms the person or property of another, thereby carelessly causing this other to breach a contract with a third person. A famous illustration is the case of Robins Dry Dock, in which the defendant’s dry dock negligently damaged the propeller of a ship while it was being refurbished, inflicting financial loss on its charterer. There, the U.S. Supreme Court (per Holmes J.) endorsed the general rule against recovery for pure economic loss and so ruled for the defendant. In contrast to the pure economic loss rule, negligently damaging the property (or person) of another is, all else being equal, recoverable. Thirdly, inducing the breach of a contract as such has no criminal implications despite the wrongful intentions on the part of the tortfeasor. Wrongful interference with the property of another, by contrast, may count as a criminal act, not only a tortious one.

49 No doubt, the legal terms of their interactions may affect the social and moral dimensions of these interactions.
50 The extension is needed as there is no general duty of care in these matters.
51 Thus, in seeking to ground the inducement tort in property-like protection, Richard Epstein has proposed a shift from intentional wrongdoing to mere causation as the basis of liability for the tort. See Richard A. Epstein, 'Inducement of Breach of Contract as a Problem of Ostensible Ownership' (1987) 16 J.Legal Stud. 1.
53 Ibid. at 309.
54 For discussions of criminal trespass, see Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies (New York: Foundation Press, 2007) at 393-408.
Against the backdrop of the distinction between the protection of contract and property rights as reflected in the inducement tort (and beyond), the private character of legislating through contract-making can be made more precise. It is not only a feature of the private persons who enter the contract, in particular, their being non-officials who, nonetheless, author legal norms. Rather, it also reflects the private sphere within which this legislation can be made legally binding—that is, a sphere that singles out the parties to the contract from third parties and, indeed, society as a whole. By implication, the private legislation associated with contract loses entirely its obligatory force with respect to people who stand beyond the privity of contract. It would otherwise be odd to believe that an agreement between the colleagues mentioned above could put the rest of society under an obligation to exercise reasonable care not to insult others. Even though the duty may express desirable or morally compelling ends, parties to a contract lack the legitimate power to compel other free and equal persons to act in certain ways—say, refrain from insulting—merely by announcing that they ought so to act as a matter of law.

The principle of NC, I argue, is a doctrinal expression of that thought in the arena of property (arguably, along with several other different legal arenas such as enterprise organization law, labor law, and criminal law). It repudiates private legislation made by some purporting to govern the practical affairs of others, including society at large, in matters pertaining to external objects. To see the extent to which invoking new property right forms replicates the same difficulty observed in connection with the social insult illustration, the argument going forward must leave behind the abstract concern for private legislation and move inward, to make good on the principle of NC in the special case of property.

B. PARTITIONING PRIVATE OWNERSHIP

A restriction on private legislation in the context of property rights arises against the backdrop of a system of private, rather than state or common, property. More

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55 For a thorough analysis of the (private) community that contracts engender between their participants, see Markovits, ‘Contract,’ supra note 46.
56 This obligation, recall, must not be confused with the one arising from the inducement of breach of contract. On the latter, third parties have a duty not to induce a party to the contract to breach it.
57 Contract is a paradigm case of private legislation, but as I have observed above it is not unique. For example, a will is another site of private legislation (by one person with respect to herself and her property) which suffers from a similar legitimation difficulty once its private enactments are applied to the rest of society.
58 In future work, I shall seek to develop an integrated account of the NC principle in those different arenas. The focus of this account will be the question of whether this principle is a feature of legality as such. I say more about this (in connection with tort law) below. See infra note 110.
59 The need for a property-specific doctrine to restrict illegitimate private legislation arises from the peculiar subject matter—property law. Indeed, while this restriction is a surface manifestation of a more general concern, the legitimacy of political authority, it is, nonetheless, a special manifestation thereof. As I shall seek to show, the (il)legitimacy of private legislation in matters of external objects cannot be specified adequately without drawing on concepts that figure distinctively in the institution of property.
specifically, it arises when private persons seek to partition private ownership into discrete incidents or sticks which could then be traded as separate property rights in the owned object. For example, the lease represents a property right to the exclusive possession of an object for some specified duration, and thus it picks out the ‘use’ part in the ownership whole. For this reason, the principle of NC as a restriction on private legislation requires its own elaboration by reference to the idea of private ownership properly conceived.

On the account I have articulated elsewhere, private ownership presents a three-place relation of authority between owner, non-owner, and object. Being an owner involves a special normative power—that is, the power to change (in some, non-trivial measure) the rights and duties which non-owners have toward the former with respect to an object. More precisely, private ownership comes into being when society vests practical authority in an individual (the owner) to fix, in some measure, the normative standing of others in relation to an object.

In the course of defending this articulation, I have argued that the most familiar theory of the idea of private ownership—the right to exclusive use—cannot but fail to provide a sufficiently precise explanation of this idea. In particular, I have shown that the right of exclusive use fails to do the following: distinguish ownership from possession; account for the private legal ordering characteristic of the rights exercised by owners; and explain the qualitative difference between private and what Karl Marx dubbed as personal ownership. The present analysis of the principle of NC only adds to these shortcomings. This is because a theory of exclusive use denies the fundamentally relational form of ownership—it emphasizes the thingness of ownership, which marks the special connection of the owner to an object, rather than to non-owners. However, the principle of NC can be approached only insofar as the owner’s exclusive (or the exclusivity of) use of an object takes the back seat, leaving the center stage to normative relations that ownership can establish between owners and non-owners.

Furthermore, ownership divided and traded among different persons exerts pressure against the notion that the right to exclusive use is the single most important aspect of ownership. By contrast, the idea of private ownership that I prefer—the authority to fix the normative standing of others in relation to an object—fits naturally with the power of owners to confer rights upon non-owners (such as giving a mortgage, granting an easement, and so on). In fact, it is precisely this normative power that renders private

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60 Of course, lease rights are not distinctive of private property, as the state can lease its owned land. However, lease (or any other property right) becomes relevant to the discussion of private legislation only insofar as it derives from a leasing contract between private owner and a lessor. The NC principle, recall, is a limitation on the creation of property right forms by private persons, rather than by the state.


62 Ibid. at 5-16. As I have observed (ibid. at 20-3, 24), these shortcomings also plague, to an important extent, a modified variation on the exclusive-use theme developed in Larissa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58 U.T.L.J. 275.

legislation possible in the first place. At the same time, however, the existence of such power or authority gives rise to the question concerning its limits, especially the legitimate limits of private legislation, which issue is key to the explanation of the NC principle. Put differently, in addition to characterizing the idea of private ownership (as I have just done), there exists a separate question pertaining to the scope of ownership's authority. And this scope question is just another way to approach the need for an explanation of the principle of NC.

Indeed, rights and their correlative obligations represent the normative materials, as it were, by which an owner could exercise ownership at all—that is, to fix the normative standing of others in relation to an object. By rights (and correlative obligations) I do not mean any particular right by which an owner X determines the status of a person Y in relation to an object Z, say, by granting Y a leasehold in Z. Rather, it is the property right form within which particular rights can be created by owners and traded with non-owners. Ownership is of course one such right form, but it is also important to recall that it empowers its holder to deploy all other property right forms (such as mortgage, leasehold, easement) in order to fix the normative standing of others. Accordingly, the special authority vested in owners operates on property right forms. As I shall seek to show presently, the legitimate scope of ownership's authority is determined by the menu of publicly recognized forms of property right. Private legislation involving the creation of particular property rights that take publicly recognized forms is, therefore, legitimate. By contrast, creating particular rights that take a novel form amounts to illegitimate legislation on the part of owners because it involves fixing the scope of ownership's authority itself. A restriction on private legislation intervenes at this point, seeing to it that private persons would not usurp the authority normally vested in legitimate government. That is, the authority to determine the scope of ownership's authority, which reflects the power to decide what third parties—in principle, anyone—legally owe property right-holders.

To unpack the claim just made, it is necessary to distinguish between the (only) three possible modes of engaging in private legislation in the context of private property at common law: conferring in personam rights in relation to an object; trading particular property rights that take existing forms; and trading particular property rights that take, and therefore require the creation of, a novel right form. Each mode features an

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64 I do not deny that the normative power of owners (to fix the normative standing of non-owners) may not be sufficient for creating new forms of property rights. Owners may also need to employ some mode through which to legislate (i.e., to create new forms of property rights)—for example, contracts, wills, or other forms of conveyancing. My point is that ownership's power is necessary for this matter.

65 Fixing the scope of ownership's authority can be made by either extending or reducing the available property right forms. Needless to say, the most important question pertains to extending, rather than reducing, the scope of ownership's authority. That said, the difficulty about owners fixing the scope of their authority renders suspicious even the case of self-made reduction of property right forms. It is not clear, in other words, how an individual owner can eliminate a given right form merely by pronouncing that it is no longer an existing or otherwise valid qua legal form.

66 As just noted, the discussion focuses on the common law of property. I set to one side the creation of new forms of equitable rights and duties that may be attached to property rights. For a recent account that emphasizes the distinctiveness of equitable property rights (rights against other rights, rather than a hybrid
authority relation between private owners and others; namely, the power to affect a change in the normative standing of non-owners in relation to an object. But only the third mode of private legislation, the creation of novel property right forms, gives rise to the principle of NC. This is because the private creation of a new form of property rights, as I shall argue presently, is tantamount to an illegitimate exercise of political authority. In elaborating on the tripartite distinction just mentioned, I shall very loosely draw on the historical development of certain property right forms. I do that for the purpose of exposition only, as my argument is not historical; its point is to flesh out the normative implications of owners (or other property right-holders) engaging in fixing the normative standing of others by means of conferring upon them rights in relation to an object.

Begin with property rights that take existing and, therefore, publicly acknowledged forms of property right. On this mode of private legislation, a property-right holder conveys or otherwise assigns her right to another. The transaction at stake may give rise to any number of concerns, including the general one regarding alienation itself. However, none of them involves the authority of private individuals to determine the scope of their own authority and, by implication, create ex nihilo a new form of property obligation which is necessarily binding upon the rest of society. To set the stage, consider a mortgage transaction occurring prior to the invention of the mortgage form in England’s Law of Property Act of 1925 or in the shift made in many U.S. jurisdictions from title to lien theory of mortgage. In the absence of a freestanding mortgage form, recall, a mortgage transaction often involved a conveyance in fee simple with a covenant or a contractual obligation to reconvey upon discharging the debt. The right in question—ownership itself—merely changed hands, moving from the mortgagor to the mortgagee. Accordingly, the duties once owed by third parties to the mortgagor in virtue of her ownership shifted their point of reference to the mortgagee, again in virtue of the ownership assigned to him.

The creation of a mortgage form by the law, by contrast, extends the scope of ownership’s authority by vesting the owner-mortgagor with the power to place third parties under a new form of obligation owed to the mortgagee, quite apart from the one owed to the owner-mortgagor—for instance, an adverse possessor may oust the original owner-mortgagor, but his acquired ownership remains just as subjugated to the mortgagee’s property right. More generally, a mortgage is a form of a property right associated with the power of a lender, the mortgagee, to employ an object as a security for the repayment of the loan. As a distinct form of property right, this power runs with the land, placing the rest of the world under an obligation to respect its holder qua mortgagee. This generic obligation turns particular in many different cases ranging from subsequent owners, to other right-holders of the mortgaged land (such as lessees), to


68 Of course, the required date of payment determined by the contract between mortgagor and mortgagee was, in fact, fixed by the equity of redemption.
creditors, to adverse possessors, and in principle to anyone whose right (whatever it is) may run into conflict with the burden posed by the property right of the mortgagee.\textsuperscript{69} Furthermore, according to a growing trend in different U.S. jurisdictions, this property right form may also underwrite an \textit{in rem} duty to refrain, in some measure, from impairing the property value of the security, empowering the mortgagee with the freestanding right to sue third parties for its violation.\textsuperscript{70}

The preceding analysis focused on ownership which, unlike the mortgage form, is a special form of property right. It is, to draw again on the familiar metaphor mentioned above, at once a stick and a bundle of the remaining sticks. Nevertheless, the same point applies to each of the other sticks—that is to say, property rights that take other forms (such as a lease, easement, mortgage, and so on). A transaction concerning a particular property right that takes an \textit{existing} form does not create new obligations on the part of third parties. Rather, insofar as third parties are concerned, it results in a personal change—the identity, face and name, of the holder of the right to whom they owe the same duty they owed the prior right-holder. Indeed, by assigning a property right in her object to an assignee, the owner alienates both the right that falls within the scope of her ownership’s authority \textit{and} the duty that correlates with it. Put differently, by allocating to a purchaser one chunk, as it were, of her entitlement to exert control over the object, the owner thereby repurposes the duties third parties had all along in connection with this particular entitlement to the purchaser.

For instance, an owner leasing her object for a term of years affects a change in the normative status of the would-be lessee in relation, say, to a piece of land. The latter thereby comes to have a leasehold estate, which is to say a property right to the exclusive possession of the land for a term of years. Now, this right correlates with a duty of non-interference with the exclusive possession of the lessee owed by the rest of society. And this duty is precisely the same one owed by third parties to the owner prior to the partitioning of ownership by means of granting a lease.\textsuperscript{71} Thus, rather than creating new obligation for third parties or changing the basic terms of the obligation already owed the owner \textit{qua} possessor, creating a property right that takes an existing form (the lease form) merely directs these parties’ attention to another person—the lessee—whose exclusive possession commands the same respect claimed in the past by the owner \textit{qua} possessor. Tort law tracks precisely the transition in identity from owner-possessor to lessee-possessor when it gives standing to bring a suit for trespass to land to the lessee, but denies the same position to the owner insofar as, indeed \textit{because}, she leases her land.

\textsuperscript{69} I take issue with the question of notice and its effect on the \textit{in rem} character of the mortgage form below. See infra text accompanying notes 81-82.

\textsuperscript{70} See \textit{Restatement (Third) of Property: Mortgages} (St. Paul, MN: American Law Institute, 1997) at cmn. h.

\textsuperscript{71} Note that the duty in question does not span the full range of obligations owed by non-owners to owners \textit{beyond} the context of the right to exclusive possession.
Alienating rights that take existing forms, then, amounts to no more (and no less) than trading in third party obligations already attached to and, so, run with such forms. And insofar as this trade aims at replacing the person to whom these obligations are owed, as opposed to constituting the basic terms of these obligations anew, the mode of private legislation under consideration usurps no more authority than that initially vested in owners by the public acknowledgment of the scope of ownership’s authority; namely, the scope determined by reference to the publicly acknowledged property right forms. Ownership’s authority, because it operates within this scope, remains true to its core idea—the power to determine the normative standing of others in relation to an object by way of attaching to these others rights and duties that take publicly acknowledged forms only. Naturally, therefore, the mode of private legislation under consideration does not warrant the intervention of the principle of NC.

The remaining two modes of private legislation in the arena of property are conferring in personam rights and creating novel property right forms. Both can arise from a single causative event (such as a contractual promise to grant a right of way made prior to the historical creation of the easement form). For this reason, it will prove helpful to analyze them together. In particular, I shall seek to render vivid the concerns for legitimate private legislation to which creating novel property right forms gives rise, but which the other mode easily escapes. I shall mostly deploy the easement form to illustrate the general source of the departure between the two modes—the bounds of legitimate political authority. I focus on this property right form partly because it figured prominently in an attempt to refute the sort of connection that I shall seek to establish; namely, that which links private legislation of novel property right forms with political illegitimacy.

Consider the owner of a property called Blackacre, making a contractual promise to her neighbour, the content of which is granting a right to lay, maintain, and operate an underground pipeline across Blackacre, the servient tenement. Further suppose that a right that takes the easement form has never before been enforced at law against third parties. The reason for this is not necessarily that the law self-consciously rejects this form (for whatever reason), but rather that a claim for enforcing a right of way against third parties has simply never been made. There must be some point in history where a claim grounded in easement was made for the first time. Against this backdrop, I can

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72 See, e.g., Winfield and Jolowicz on Tort, ed. By W.V.H. Rogers, 16th ed. (London: Sweet & Maxwell, 2002) at 489 (noting that ‘a lessor of land gives up possession to his tenant so that the tenant alone can bring trespass during the currency of the lease—even against the lessor...

73 I say more about the basic terms of property obligations below. In the meantime, it would be helpful to understand these basic terms to mean, roughly: first, the kind of obligations at stake, whether they are in rem or in personam; second, the basic requirements and tort liability imposed through these obligations on third parties.

74 Rudden, ‘Economic,’ supra note 6 at 251-52.

75 For a historical explanation as to why this could have been the case, see Simpson, Introduction, supra note 24 at 101-2.
now investigate the private legislation of easement without pre-judging the actual law’s position with respect to this form of right; in particular, whether it can give rise to obligations beyond the privity of contract and, more broadly, whether the owner can determine the scope of her own authority to fix the normative standing of others.

To begin with, there are any number of ways in which a right that takes the easement form exerts pressure toward conflict with the rights or activities of third parties. To develop this point, consider the following examples. The owner of Blackacre hires a constructor to level the land, including the land below which the pipeline lies; leveling therefore threatens the risk of breaking the pipeline. A future purchaser of Blackacre builds on the land, rendering access to and maintenance of the pipeline practically burdensome; the successors of the current owner can run into the same difficulty. Finally, a squatter whose adverse possession endows her with ownership of Blackacre is likewise burdened by the existence of the pipeline.

Of course, there are many other instances involving the different possible effects on third parties of a right created by a contract between the owners of adjunct lands. That said, the cases just mentioned pick out the special effect of being legally obligated to a right that takes a property right form created by a contract without being a party therein. To be sure, a property right that takes the form of an easement is no mere replica of existing property rights, nor does it clone, as it were, the obligations already due to other property right-holders. 76 In fact, there are two senses in which the obligation that could be imposed on the constructor, purchaser, successor, or squatter by virtue of the neighbour’s right to the pipeline is indeed freestanding: One pertains to the structure, the other to the content of the obligation. On the former sense, the obligation to respect the right to maintain and operate the pipeline, because it sounds in private law, runs separately from each duty-holder to the right-holder in particular. Accordingly, it specifically empowers the right-holder to compel each one of the duty-holders to respect the right by whatever means designated by the law (such as self-help, injunction, or damages). On the latter and much more important sense, the obligation to respect the easement right-holder demands that others adjust their conduct (including by forbearing from certain acts) in ways they would not have been required to do, save for the easement. 77


78 In his magisterial article on the principle of NC, Burnard Rudden has argued to the contrary. Rudden, ‘Economic,’ supra note 6 at 251-52. But as I show in the main text above, his argument fails to account for the freestanding obligation that the right of easement generates for third parties. The source of the mistake lies in overemphasizing obligations that overlap completely with obligations that are already owed by third parties to owners. Note that even then, even when a perfect overlap obtains, third parties owe their duties to the easement-holder and the owner, taken severally. Thus, each right-holder holds distinct legal power to vindicate her right against third parties.

79 Thus, for example, the constructor may be required to exercise reasonable (or, perhaps, utmost) care whenever her bulldozers come near the pipeline, even when this care is not required for the purpose of respecting the rights held by the owner of Blackacre (since she retains no claim with regard to the pipeline).
Moreover, and more importantly, the examples mentioned a moment ago demonstrate that an attempt at private legislation of the kind discussed at present implicates ownership’s authority not merely in the business of determining which rights and duties others will hold in relation to an object. Rather, this act of legislation involves making a legally authoritative decision concerning the different question of what these rights and duties are to begin with—that is, the form that they take. In particular, it involves a determination as to the nature of the rights and duties in question, namely, whether they are in rem or in personam. Furthermore, it likewise involves a decision concerning the basic features of these rights and duties. Indeed, for these rights and duties to be intelligible at all, their (private) legislator must determine, at least in general terms, their basic structures. For instance, what these rights entitle their holders to do and claim, on the one hand, and what these duties demand from their addressees, on the other. The latter set of determinations includes the liability regime underlying these duties. Thus, the private legislation characteristic of contract involves specifying the appropriate regime of liability against which to judge what counts as a breach of the duties that take the novel form of the easement. Thus, the owner of Blackacre and her neighbour can specify in their contract whether liability for violating the (in rem) duty owed by third parties to the neighbour by virtue of his easement is strict or less than strict (say, best effort or reasonable care). Against this backdrop, insofar as a private owner can create rights and duties that take a novel form, ownership’s authority outstretches to include fixing the scope of this very authority, rather than merely fixing the normative standing of others using rights and obligations that take publicly recognized forms.

It is important to note, to forestall misunderstanding, that the creation of a novel property right form does not involve the fixing of the entire content of this right form. Indeed, the creation of the easement form does not (necessarily) mean specifying all the details that will figure in this or that particular transaction that takes the easement form. Rather, the distinctive legitimacy questions that arise from the private creation of this form relate to the basic features thereof (for example, its in rem nature and the liability regime it unfolds). There may be any number of concerns which are more general and might therefore justify legal intervention of some sort. In fact, the basic features of a property right form (such as an easement) need not in themselves be a source of concern in the same manner as race-based exclusion provisions usually are. Rather, it is their being creatures of private legislation by private owners that render their legitimation suspicious.

The preceding analysis returns me to the point from which my analysis began: the legitimacy of private legislation in the arena of property. Recall that in the hypothetical case under consideration, the contract between the owner of Blackacre and her neighbour seeks to create a novel form of property right—an easement. Certainly, it can establish a contractual (or, more generally, in personam) obligation on the part of the owner. But the crucial question, once again, is how the authority of private parties over third parties can possibly be exercised by an owner (and her contract partner) merely by claiming that these third parties have an obligation that takes the form of ‘easement’? To this extent,

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80 Familiar examples from the case law are race-based discrimination in public accommodation and ‘no-pets’ provisions in closed communities.
this attempt at exercising political authority through contractual engagement runs into precisely the same trouble as a duty to forbear from social insult established through contract between two private persons with the intention to bind the rest of society. The proposed idea underlying the principle of NC rules out the possibility of private individuals authoritatively compelling people in the positions of the constructor, purchaser, successor, and squatter—in short, the world—to comply with this form of obligation as though they just are parties to the contract between the owner and her neighbour. The principle of NC, therefore, holds the authority characteristic of private ownership to the scope—viz., the various sticks—determined by the public legislation of property right forms.

Perhaps it is tempting to resist the analogy to the social insult case as well as the preceding discussion, saying that third parties take the right (of ownership) as they find it; in particular, the burden posed by the neighbour’s easement. However, this move merely begs the question by assuming the neighbour holds a right in rem, that is, a right running with Blackacre. Missing here is an account of what could turn the contract as such into a source of legal obligations on non-parties.\textsuperscript{81} Certainiy, notice and other requirements of publicity cannot make good on this shortcoming. These requirements have a point only insofar as the obligations in question take the form of in rem obligations to begin with. Thus, a person cannot put the world under an obligation merely by rendering public her command, however morally sound or economically desirable this command is. It is one thing to require notice as a condition for the in rem status of an obligation; quite another to render it the ground thereof.\textsuperscript{82} Accordingly, a notice may count as a reason for enforcing a contract-borne obligation against third parties with actual or constructive knowledge of the contract. But it can do so only to the extent that there exists a logically and normatively prior reason to enforce publicly-accessible contracts upon third parties. In property law, this reason amounts to a piece of public legislation, the content of which both establishes the relevant form of property right and renders permissible the alienation of rights that take this form, say, by means of contract. In enforcing the principle of NC, therefore, the law ensures that private legislation is deployed by persons in the service of allocating particular property rights and obligations (that take existing form) from current right-holders to others, which is the first mode of private legislation discussed above.

IV Numerus Clausus and the Authority of Democracy

Earlier in the argument, I announced that the principle of NC presents a concrete manifestation of a basic question in political and legal philosophy concerning the possibility of political authority. The argument I have been developing ever since has now reached the point where the explanation of the principle of NC must engage this

\textsuperscript{81} As I mentioned above, the standard reasons for the obligatory nature of contractual promises do not lend support to this extension.

basic question directly. Indeed, although private legislation—any private legislation—lacks the legitimate authority to establish novel forms of property right, it does not follow that public legislation—any public legislation, however defined—possesses the requisite authority. There arises a separate question, to which I shall now turn, concerning the conception of legitimate authority picked out by the principle of NC: what renders private legislation of property rights illegitimate, on the one hand, and endows public legislation of such rights with legitimacy, on the other? It is important to note, to forestall misunderstanding, that the ambition of the argument going forward is not to adjudicate between competing conceptions of legitimate authority in the abstract. Instead of a top-down approach, I shall seek to explicate the conception of legitimate authority that is immanent in the principle of NC, properly reconstructed.

A. THE IMPOSSIBILITY OF THE CONSENT CONCEPTION OF LEGITIMATE AUTHORITY

As just explained, an adequate account of the NC principle must explain, negatively, precisely what renders this mode of private legislation illegitimate; and affirmatively, what could legitimate public legislation in its stead. An answer to the former question must contain the normative materials, as it were, to resolve the latter. Otherwise, the principle of NC may be straightforwardly incoherent and, indeed, arbitrary. To illustrate the tight connection between the negative and affirmative elements just mentioned, consider a familiar conception of legitimate authority that emphasizes the express or tacit consent of those who are subject to its rule. One could argue negatively, based on this conception, that private persons do not possess the authority to establish new forms of property rights through contract absent the consent of third parties, the would-be duty-holders. Hence, the argument goes, the restriction on private legislation put forward by the principle of NC expresses a consent-oriented conception of legitimate political authority. By implication, the authority to legislate property right forms overcomes the legitimation difficulty by securing the consent of the would-be duty-holders. But this last requirement is flatly inconsistent with the lived experience of property law, no matter how the forms of property rights come about—either through public or private legislation. More specifically, seeking the express or implied consent of third parties may not only be prohibitively costly, but simply impossible. Indeed, subsequent generations are literally borne into preexisting obligations to respect the preexisting property rights of others. This embarrassment, then, fails the consent conception of legitimate authority in explaining the reasons for restricting private legislation of property rights, which is the point of the principle of NC on my proposed account. Bluntly put,

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84 As Rudden justifiably wonders, ‘why the singular successors of lessors and lessees are bound by onerous duties-to, to which they certainly did not consent.’ Rudden, ‘Economic,’ supra note 6 at 252. Rudden attributes the consent requirement to possible ‘Philosophical reasons’ for the principle of NC such as Kant’s doctrine of right. See ibid at 249. In my view, however, it is implausible to cast Kant’s attempt at articulating a legitimate legal order based on reason (and reason alone) in terms of consent. I say more about the Kantian conception of legitimate authority below.
were consent necessary to render legitimate the creation of property rights, absolutely no such rights could ever legitimately be had.

This conclusion reflects the broader theoretical ambition of the argument: that of emphasizing the tight connection between the general question of political philosophy concerning political authority and property law’s concrete elaboration thereof. As the preceding paragraph illustrates, the same familiar problematics of the consent conception of political authority also manifest themselves in the more particular case of property right forms.

Moving past consent, I shall focus my attention on the two most prominent conceptions or clusters of conceptions of legitimate authority in Western thought. That is, conceptions that ground legitimate political authority in reason and in will, respectively. I shall argue that the principle of NC originates in the latter conception, in which case democracy sustains the legitimacy of making new forms of property. To set the stage for these discussions, I begin by taking stock of another approach to the explanation of the NC principle, one which emphasizes pragmatic, rather than legitimacy, concerns.

B. NUMERUS CLAUSUS AND THE INSTITUTIONAL SETTING: COURTS VERSUS LEGISLATURES

The principle of NC restricts private parties to enact new forms of property right, say, through contract. It is a logical implication of being governed by this principle that courts lack the authority to enforce these forms on third parties as part of enforcing the terms of the contract in question. Indeed, the principle of NC would become redundant whenever courts launder the private creation of property rights by treating their enforcement as a matter of course, that is, as though they represent a usual term of a contract.85

That said, a restriction on private legislation is logically compatible with courts drawing selectively on private attempts to legislate new property right forms in order to fashion such forms by judicial fiat. On this view, the court does not engage in the enforcement of the contract which happens to stipulate a new form of property right. Rather, it considers whether there are compelling contract-independent reasons to incorporate into property law a new form of property right which happens to reside in a contract brought to its attention by litigants. And insofar as a court is moved by these reasons, the creation of new forms of property rights becomes a joint legislative enterprise featuring private persons and official courts as co-legislators. In other words, this enterprise is not, strictly speaking, private legislation, pure and simple. Thus, the basic argument from which my account began—that private persons lack the authority to

85 I do not deny that courts exercise some discretion over the enforcement of contract terms (including by awarding remedies short of injunctive relief). But this discretion commonly runs out very quickly, as it were, since its concerns are with external limitation on freedom of contract (as in the cases of fraud or mistake).
establish legal obligations for the rest of the world merely by so pronouncing—need not be detrimental to court leadership through crafting the forms that property rights can take.  

Nevertheless, even though judicial lawmaking is not inconsistent, conceptually speaking, with a restriction on private legislation, the principle of NC is commonly understood to apply to courts as vigorously as it does with respect to private persons. The mirror image of a restriction on private legislation appears to be an authorization for public legislation by legislatures. The question, of course, is why vesting the authority to create forms of property right resides in legislatures only?

Merrill & Smith have explained this mystery, employing a purely functional argument cast in terms of the superior institutional capacity of the legislature over the judiciary—that is, legislatures can produce changes in the forms that property rights take at a lower (information) cost than courts could. The criteria by which they support the claim include clarity (of statutes vis-à-vis court decisions); clearly defined domain of law application; comprehensive treatment of all the implications of creating new form of property right; temporal stability; prospective application of the norm; and implied compensation. The resort to this ‘functional explanation’ implicitly presupposes that, in principle, courts do possess the legitimate authority to legislate new forms of property right, but that for the functional reasons just mentioned this authority would, on balance, better be vested exclusively in the able hands of the legislators. It is an open question, and one that Merrill & Smith clearly admit, whether functional assessment of legislative quality yields any victory to the legislature, never mind a decisive one.

If anything, the lived experience of democratic politics, on the one hand, and courts’ self-conscious attempts at garnering legitimacy based on professionalism and superb reasoning skills, on the other, might cast doubts over the functional preference for the legislature as the only guardians of the NC principle. Surely, no one consideration mentioned by Merrill & Smith—clarity, clearly defined jurisdiction, comprehensiveness, stability, prospectivity,

\[86\] I use crafting as an allusion to an argument made by Hanoch Dagan, according to which judicial legislation of new property right forms is not only possible, but also desirable. See, most recently, Hanoch Dagan, Judges and Property (August 2010) (unpublished manuscript, on file with author).

\[87\] As Merrill & Smith correctly observe, ‘common-law courts behave toward property rights very much like civil-law courts do: They treat previously-recognized forms of property as a closed list that can be modified only by the legislature.’ Merrill & Smith, ‘Optimal,’ supra note 6 at 10-11. This is certainly true in Britain at least since the Law of Property Act 1925 § 1(1)-(2) and insofar as equitable rights of property are set to one side (recall infra note 66). But even with respect to the pre-1925 legislation, it has been observed that ‘[t]he most recent example of judges [adding new forms of property right] occurred ... no more recently than the end of the 15th century.’ Ben McFarlane, The Structure of Property Law (Oxford and Portland, Or.: Hart Publishing, 2008) at 343. There are, of course, exceptions to the legislature-centered approach (including even jurisdictions which give no express affirmation to the NC principle, though it is still an open question whether there exists no implicit recognition to the contrary). On my account of the NC principle, these exceptions feature a less strict adherence to the principle of NC properly conceived.

\[88\] Merrill & Smith, ‘Optimal,’ supra note 6 at 61-66.

\[89\] Ibid. at 58.

\[90\] Ibid. at 58, 66.
and implied compensation—seems to make a categorical case for the legislature.\textsuperscript{91} And it is a mystery, therefore, why this functional analysis cannot allow, at least in certain cases, for the courts to exploit their far superior familiarity with the nuts and bolts of property law. As Merrill & Smith concede, ‘[t]he balance of merits and demerits between common-law courts and legislatures obviously entails a complex judgment as to which no definite answer can be offered.’\textsuperscript{92} And yet, in sharp contradistinction to the ambiguity of the functional approach just mentioned, the principle of NC seems to work out a definite answer, namely, the legislature, tout court.

Moreover, and more importantly, the resort to functional explanation begs the important—normative—question: even if a restriction on judicial legislation of property rights cannot be derived as a matter of pure logic from a restriction on private legislation, it is not clear whether the concerns for legitimate authority that inform the restriction on private legislation should not apply to judicial legislation. Moving quickly to functional analysis of institutional capacity presupposes that the reasons for which the NC principle restricts private legislation exert no similar pressure with respect to judicial creation of new property right forms. And this presupposition forces one to grapple with putting together an equivocal functional explanation of institutional competency and a clear-cut principle of NC.

A better approach to explaining the connection between restricting private legislation and singling out the authority of the legislature, rather than the court, returns to the normative question of legitimate authority. As I shall seek to show, democratic co-authorship is the only ground of legitimate authority which may strike a qualitative, indeed categorical, distinction between the creation of property right forms by the legislature and by any other entity (including courts and/or private persons).\textsuperscript{93} It would prove helpful to begin this showing by exploring another conception of legitimate authority—the reason-based conception.

C. \textit{NUMERUS CLAUSUS} AND THE DENIAL OF REASON’S LEGITIMATE AUTHORITY

The most important competitor for democracy’s freestanding authority is the rule of reason.\textsuperscript{94} There are many different arguments that cast the legitimacy of authority in terms of reason. To fix ideas, I shall very briefly outline the general themes of two such familiar arguments. Thus, Joseph Raz has emphasized the ability of legitimate political authority to guide persons in conformity with the demands of the balance of right

\textsuperscript{91} Ibid. at 58 (noting that ‘this consideration [of institutional capacity to lower information cost to third parties] does not establish that legislated rule change is superior to judicial rule change.’).
\textsuperscript{92} Ibid. at 66.
\textsuperscript{93} I borrow the term co-authorship from Robert C. Post, ‘Democracy and Equality’ (2005) 1 L.Culture & Human. 142 at 145.
\textsuperscript{94} Democracy and reason can be made perfectly consistent only insofar as we take the general will to reflect the universal reason, which is the view adopted by Jean-Jacque Rousseau.
reasons. Accordingly, an authority is normally justified, and in this way can garner its legitimacy, insofar as a person ‘is likely better to comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.’ Another familiar example is found in Kant’s articulation of legitimate political authority by reference to the demands of freedom, the divination of which can be sought only through appeal to (a priori) reason alone. On this pre-political account of legitimate authority, laws made by the legislature can legitimately bind citizens whenever citizens could give their consent to these laws, regardless of whether and for whatever reason they actually disagree and irrespective of whether the legislature is democratically elected.

As I observed a moment ago, these are only two very brief descriptions of a larger class of prominent theories of legitimate political authority that turn on reason (whatever it is). I shall not discuss any one of them in depth since the point of the present argument is narrowly directed at elucidating the nature of the connection between reason and democratic processes of collective decision-making. Recall that a legitimation-based account of the principle of NC must explain what distinguishes the legislature from all other potential creators of property right forms (including, in particular, courts). A reason-based conception of legitimate political authority cannot but fail to provide this explanation. This is because determining the demands of reason both in general and in particular does not require any specific process of decision-making, so that this process can be arranged in any number of ways, for example through individual deliberation, professional examination, philosopher-king’s wisdom, or popular participation. Indeed, reason seems to cut across the distinction between the legislature and the court (and across any other institutional setting, more generally). There is no relationship of entailment between the workings of democratic politics and the demands of reason; similarly, there is no reason to believe that courts can never champion these demands. The conventional wisdom among liberal thinkers goes even further than this, casting the court and the judge in terms of the institutional and personal loci of reason, respectively. The grounds for this wisdom may not be merely contingent, but rather

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95 To be sure, the balance of right reasons consists of reasons that objectively apply to persons. On this point, see Kenneth E. Himma, ‘Just ‘Cause You’re Smarter than Me Doesn’t Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis’ (2007) 27 Oxford J.Legal Stud. 121 at 122.


reflect a fundamental difference between courts and legislatures. Robert Burt made this point in the U.S. context of anti-discrimination jurisprudence:

Congress is less burdened by the principled constraints under which courts labor... Congress can make distinctions among classes that the Court would itself be hard to put to explain on principled grounds ... [partly] because the institutional legitimacy of a legislative act depends not so much on the rational persuasiveness of its decisions as on the simple fact that a majority of “responsible” elected officials were willing to vote for the proposition.99

This wisdom has recently been subject to attacks on theoretical and empirical grounds.100 In essence, the attackers’ claim is that legislatures and the collective decision-making processes they underlie are no less skilled than courts of meeting the demands of reason. That said, my point does not turn on whether or not the conventional wisdom (concerning the tight relation between courts and reason) actually holds. Rather, the point is that reason is not a distinctive feature of legislatures. They may of course act in conformity with reason, but so can courts do. Thus, grounding the legitimacy of political authority in the authority’s compliance with the demands of reason (whatever they are) cannot render the connection between reason and the principle of NC sufficiently precise. Were reason to underwrite the authority of political institutions to create new forms of property right, there would be no point in drawing a clear line between legislatures and courts. And to the extent that the attacks against associating courts with reason departs significantly from the lived experience of constitutional democracies, the NC’s preference for legislatures seems not only normatively groundless but also flatly undesirable.

D. COLLECTIVE UNDERTAKING AND LEGITIMATE AUTHORITY

The failure of the reason-based conception of legitimate authority to explain the principle of NC gives way to the collective will conception of legitimate authority.101 Unlike the

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101 I borrow the term collective will from moral psychologist Jean Piaget whose exposition of this conception of legitimate authority is perhaps the best there is. According to Piaget: ‘The essence of democracy resides in the attitude toward law as a product of collective will, and not as something emanating from a transcendent will or from the authority established by divine right. It is therefore the essence of democracy to replace the unilateral respect of authority by the mutual respect of autonomous wills.’ Jean Piaget, The Moral Judgment of the Child, trans. by Marjorie Gabain (New York: Free Press, 1965) at 362-63.
reason-based conception of legitimate authority, the collective will conception of legitimate authority is under-developed, perhaps because it is still in search for a way out of Rousseau’s excessively fanciful elaboration of this conception. Nevertheless, the main insights behind this conception are straightforward enough. Indeed, the collective will conception picks out the special, indeed freestanding, authority of democratic politics over the citizens by virtue of their being the co-authors of the laws. To this extent, a democratic process of decision-making can garner legitimation even when the decisions it yields cannot be justified by reference to the demands of reason (whatever they are). This is true not only in trivial matters, but also in a wide variety of issues, including even disagreements about justice and the general good. As Madison bluntly observed more than two centuries ago, the authority of democracy can arise even as ‘our governments are too unstable … the public good is disregarded in the conflicts of rival parties … measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.’

The ground of democracy’s independent authority lies in the special connection—co-authorship—that democratic politics seeks to establish between each participant and the outcome of the participation. In particular, those subject to political authority have a reason to understand themselves, by virtue of their participation, to be the co-generators of this authority. For this reason, the official pronouncements of this authority—laws giving rise to new rights and obligations—are at bottom self-given. They reflect a shared responsibility for settling together the terms of our political life. This is especially important in the case of outvoted participants who are, nonetheless, required to display allegiance to these new rights and obligations, and thus to recognize the collective will as authoritative over their own personal (and outvoted) wills. The force of the democratic process, in other words, permits the dissenting citizen to fully respect the legitimacy of the solution produced by this process, to regard it as the solution we, rather than they, reached.

Now, by vesting the power to create new property right forms in the democratic process, the principle of NC expresses the special conception of legitimate authority that originates in the very idea of democratic decision-making as collective undertaking. On this conception, a democratic process is itself collectivizing in the sense that independent

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102 Of course, there may be limits to the freestanding authority of democracy (such as in the case of the tyranny of the majority). It is a separate question, however, as to what grounds these limits—reason or will conceptions of legitimate authority.


106 See Waldron, Dignity, supra note at 156 (referring to the complicated, democratic procedures of the legislation process as ‘the grounds of [the statute’s] authority’). A central theme in the constitutional development of the U.S. along republican lines, as discussed in the text above (i.e., the freestanding authority of the democratic process, especially the process that Ackerman dubs ‘higher-law-making’ and ‘higher politics’) is found in 1-2 Bruce Ackerman, We The People (Cambridge, Mass.: Belknap Press, 1991 & 1998).
citizens (as well as legislators) stand to one another as co-authors of the norms by which they live—they form a polity in which persons respect and recognize one another as free and equal citizens. Accordingly, property right forms, because they are creatures of collective undertaking, represent a publicly shared understanding of, indeed an openly acknowledged commitment to, the basic terms of interaction between property right- and duty-holders.\textsuperscript{107} The regulation of the creation of property right forms by the principle of NC ensures that these forms embody the shared understanding and commitment characteristic of the collective undertaking facilitated (only) through democracy.\textsuperscript{108} This explains why the legislature is the only possible entity (in a representative democracy) to overcome the restriction placed by the NC principle.\textsuperscript{109}

By contrast, private engagements (such as contract) fail to collectivize on an all-encompassing scale. Likewise, the processes underlying the judicial creation of new property right forms are necessarily parochial and exclusive. After all, they feature the involvement of private persons—plaintiff and defendant—aspiring to persuade the judge to transform a private arrangement into a generally-applicable legal norm; to have their preferences binding upon the citizenry as a matter of law. This law is neither co-authored (as the entire citizenry remains outside the judicial process) nor self-given (as the final decision is made by an unelected judge).\textsuperscript{110}

\begin{footnotesize}
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\item \textsuperscript{107} Clearly, the notion of \textit{shared understanding} in the text above implies a thicker conception of \textit{publicity} than the one ordinarily assumed in discussions of notice, registration, and recordation in property law. In future work, I shall seek to argue that the distinction between the thicker and thinner conception of publicity has important implication for the understanding of the nature of rights \textit{in rem} vis-à-vis rights \textit{in personam}.
\item \textsuperscript{108} To be sure, according to the lived experience of democratic politics, the shared understanding formed through democracy’s collective undertaking may—indeed, will likely be—contested and often unstable.
\item \textsuperscript{109} As it should be apparent from the argument in the main text, by singling out the legislature I do not mean to reduce the democratic process of will- and opinion-formation to the rule of elected representatives (or legislators) only.
\item \textsuperscript{110} Is my account in tension with the lived experience of court innovation in the arena of torts? To begin with, the historical development of the common law tort through the writs system, trespass and case in particular, renders plausible a theoretical account of the principle of NC in early modern tort law. However, the last two centuries have given rise to judicial innovation that seems to depart substantially from early modern practice. The key question concerns the \textit{measure of comparison} between judicial practices in tort and in property (bearing in mind that tort and property are, to in important extent, two perspectives over a similar domain of action). Indeed, not every instance of an innovative tort law decision is equivalent to judicial creation of novel property right forms. Importantly, many leading pioneering cases in common law tort do not involve the creation of new forms of tort duty, let alone new tort. Rather, their innovation is in extending tort liability for breach of preexisting duties (such as duty of care). Consider, for example, the landmark decision in \textit{Dillon v. Legg}, 441 P.2d 912 (Cal. 1968), one of the most celebrated innovations in the area of negligence in decades. The innovation in this case lies in extending negligence liability to capture emotional injuries that have befallen certain bystanders, not just the direct victims. The duty of care and the tort (negligence) remain precisely the same—risk-creators must take reasonable precautions so as to not to risk harming direct victims. \textit{Dillon} (as further modified by \textit{Thing v. La Chusa}, 771 P.2d 814 (Cal. 1989)) merely renders liability for failing to take these precautions more extensive. Other landmark cases feature similar pattern of extending liability, rather than imposing new form of tort duty or creating new tort. The partial repudiation for tort purposes of privity of contract (such as in the pre-product liability case of \textit{MacPherson v. Buick Motor Co.}, 111 N.E. 1050 (N.Y. 1916)) turns a preexisting duty of care owed to persons in privity into something more (but not quite) universal in its application. Even the
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To be sure, I do not mean to suggest that courts are illegitimate, undemocratic, or both. As friends of the common law tradition have famously observed, judges are no mere private persons seeking to impose their sectarian values and subjective preferences. Moreover, litigants on both sides of a legal dispute, while naturally seeking vigorously to advance their self-interests, also participate in the court-run process of articulating the basic concerns and aspirations that lie beneath the surface of legal doctrine. That said, these two observations do not establish the democratic legitimacy of courts; they are better seen as supporting the reason-based conception of legitimacy. An additional stage in the argument is still missing which is needed if we are to transform courts into champions of collective undertakings. Two alternatives are worth noting: the first seeks to establish a direct connection between courts and democratic co-authorship; by contrast, the second settles on an indirect, and somewhat contingent connection, but may prove more congenial to casting judicial creation of property right forms in democratic terms in certain exceptional cases. I take each in turn.

According to the former, adjudication fosters a ground-up framework of political participation through courts. Courts, on this view, are public forums of grassroots democracy. That said, it is not clear how this showing can be made. Once again, enlisting courts in the service of creating new such forms produces legislation that is neither co-authored nor self-given in the sense explained a moment ago. Furthermore, the grassroots democracy thesis seems to be motivated by the suspicion that some issues of public concern are likely to be neglected by both citizens and legislators (otherwise, the

most familiar judicial innovation in recent decades—the creation of product liability law in *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-444 (Cal. 1944) (Traynor J., concurring in judgment)—can be approached more modestly than is commonly done. The creation of product liability law, as Traynor J. self-consciously observes, renders more systemic the de-facto strict tort liability that has already existed (in a primitive and less effective form) in negligence law due to the doctrine of res ipsa loquitur (i.e., establishing an inference of negligence on the part of the defendant without direct evidence about her actual conduct). See id. at 441 where Traynor J. observes that ‘[i]t is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.’

That said, it is not clear how this showing can be made. Once again, enlisting courts in the service of creating new such forms produces legislation that is neither co-authored nor self-given in the sense explained a moment ago. Furthermore, the grassroots democracy thesis seems to be motivated by the suspicion that some issues of public concern are likely to be neglected by both citizens and legislators (otherwise, the

This is not to say that products liability or other cases are not innovative. Rather, the point is that innovation can play out in any number of ways, including in ways that are irrelevant to judicial creation of novel forms of right or duty (in tort as well as in property law). Here, again, comparing tort-related innovation with the NC principle in property is akin to comparing apples and oranges. Of course, there are judicial innovations in common law tort that are sufficiently analogous to the creation of new property right forms. The creation of a tort against the invasion of privacy under the influence of Warren & Brandeis’s magisterial article is perhaps the best example. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). But, to the extent that not all sorts of innovation in and around torts are of this order—viz., involving the creation of novel torts or duty forms—it is not implausible to suppose that the tension between the NC principle in property law and judge-made tort law is far less troubling than initially thought. Against this backdrop, instances of judicial creation of genuinely novel torts do not so much prove the inexistence of a NC principle in tort law (whatever it is). They may well be exceptions that prove the rule. As mentioned above (supra note 58), I shall leave this investigation for another occasion.


112 I owe this way of putting the point to Hanoch Dagan.
entire thesis might collapse). This is especially true, one may speculate, for the creation of novel property right forms, which evokes little attention from citizens and legislators (partly because it requires legal expertise). Assuming, for the sake of the argument, that this observation obtains, the grassroots thesis at best demonstrates that the ordinary democratic process falls short of an ideal one. However, it does not follow that the solution to this shortcoming must come from outside, as it were, and, in particular, from courts. That the democratic process underperforms is not in itself reason enough to bypass it.

The more promising alternative, the one which seeks to establish an indirect connection between courts and democratic legitimacy, does not attempt to square the circle: adjudication is in its very structure inconsistent with co-authoring and self-giving laws. Nevertheless, democracy might suffer from deficits in virtue of which a process of collective decision-making may not only underperform, but rather be incapable of performing at all. Against this backdrop, courts may intervene in the service of democracy even if not in democracy’s own formal name. Consider interest groups dominating a majority of legislators or even a powerful legislative committee acting to the critical point of blocking effective deliberations by representatives concerning a pertinent property matter. This is not a case of factions failing to enlist sufficient voices in their cause through the democratic process of will-formation, to be sure. Indeed, the failure is of democracy itself, since the said cause has lost its day outside the democratic process at the hands of a captured body of single-minded politicians. Thus, the failure is not one of outcome, where unfortunate consequences are an ineliminable aspect of democracy, but rather of process. Accordingly, there are compelling democratic grounds to address the deficit just described, to show democracy a way out of the dead-end, so to speak. Of course, there may well be other democratic deficits that are just as problematic as the case of capture mentioned in the main text. One familiar example is the so-called tyranny of the majority, resulting in the elimination of any sense of co-authorship. The argument in the main text applies, mutatis mutandis, to these other deficits. Moreover, since these forms are ordinarily not considered to represent constitutional norms, intervention by courts is necessarily vulnerable to the democratic process. Judge-made forms of property right can be embraced, modified, or repudiated by the legislature at will, as it were.

Of course, a complete second-best or non-ideal explanation of the democratic grounds of a court’s (limited) activism in matters of property law must specify the criteria by which to determine what counts as democratic deficit of the kind and magnitude just mentioned—that is, the criteria that inform the distinction between under- and non-performing democratic processes. It must also provide intelligible ways to assess the

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113 Of course, there may well be other democratic deficits that are just as problematic as the case of capture mentioned in the main text. One familiar example is the so-called tyranny of the majority, resulting in the elimination of any sense of co-authorship. The argument in the main text applies, mutatis mutandis, to these other deficits.

114 I say could supplement since the preceding argument (concerning legislative capture) does not entail court intervention, let alone judicial law-making. To this extent, the connection between courts and democracy is indirect, as mentioned in the main text above.

appropriate mode of intervention by courts, including in particular cases—that is, whether the judge should force the legislature to consider the matter or decide it by herself. I set these difficult questions to one side, for the more important point at this stage of developing a theory of the NC principle is to emphasize the important (but indirect) connection between courts and democracy and its potential to provide an adequate source for legitimizing judicial creation of property right forms in exceptional cases. Insofar as skepticism concerning the very possibility of distinguishing between the under- and the non-performance of democracy or between one and another mode of intervention by courts is avoided (as it should be), these questions can properly take the back seat. It is one thing to understand what, in principle, can render legitimate court intervention in the ordinary democratic process of creating new property right forms; quite another to disagree on the application of this understanding to particular cases.

E. THE RISE (AND FALL?) OF THE NUMERUS CLAUSUS PRINCIPLE

The preceding analysis marries the principle of NC with democracy. The nature of this marriage is normative, to be sure, but my argument has been for the most part reconstructive. Rather than arguing from moral first principles, I have sought to make sense of an existing legal doctrine, among other things, by drawing on normative theories (of political authority) that may illuminate its point. This reconstructive approach as it now stands is incomplete in (at least) two respects: one, normative; the second, historical. I shall take each in turn.

First, the proposed reconstruction of the principle of NC does not provide a defense of the collective will conception of legitimate authority, nor of the value of legitimate authority, more generally. At first blush, my non-committal account of the principle of NC as an idea of democratic legitimacy leaves me in the awkward position of not being able to justify the principle. Any serious such attempt must take up political philosophy’s ultimate question, which is, to repeat, that of how authority is possible, and to explain why democracy forms a necessary part of the answer.116 And this is precisely the point of my argument: to show that the resolution of this question is an ineliminable aspect of the justification of the NC principle (and in future work I shall seek to radicalize this showing, arguing that this ineliminability pervades the deep structure of property law as a whole). Thus, my ambition is not to settle the case for the principle of NC by developing an account of the good of democracy understood as a valuable form of collective undertaking. This I leave for another occasion. Rather, I seek to advance the analytical insight, according to which an important question in property theory—concerning the NC principle—is in essence a concrete manifestation of a fundamental question of political theory.

116 Because this inquiry arises in connection with the principle of NC, it may have a narrower scope than the more general inquiry that commonly interests political philosophers. However, the basic inquiry remains the same whatever its scope may be. It is the character of authority, not merely its scope, that in the first instance gives rise to the issue of legitimation.
Second, in articulating the proposed account of the principle of NC, I self-consciously kept critical distance from history and, indeed, from the causal development of the different forms of property right. However, democracy—at least in the robust sense required by the collective will conception of legitimate authority—is a recent achievement, while property law for the most part is not. This seeming tension might suggest that my reconstruction of the Principle of NC is not only anachronistic, but also actually false (even if theoretically plausible). Against these worries, I shall argue that in fact there may be a historical correlation between the NC principle and democratic legitimacy. It turns out, I argue, that my account could help solving the historical mystery concerning the rise and persisting endurance of the principle.

The conventional historical account of the principle of NC can be summarized into two stylized observations.\textsuperscript{117} First, this principle is a feature of post-feudal societies developing into the (early) modern states.\textsuperscript{118} And this raises the question of why then. Second, the principle of NC persists vigorously even to this day. And this observation seems counterintuitive to some lawyer economists\textsuperscript{119} as well as to friends of the liberal society (libertarians and liberals alike).\textsuperscript{120} There are reasons to believe that my proposed account can help in resolving the mysteries that arise in connection with the two stylized observations just mentioned.

Begin with the first observation. Why would post-feudalism warrant, perhaps even necessitate, the principle of NC? Perhaps the (different) question of why feudal society could not care less about the principle of NC is easy to answer. But the former question requires more than that. The answer, I argue, is that the notion of legitimate authority animates the transition to post-feudalism. Indeed, the post-feudal modern state represents an innovative approach in the basis of its claim to exercise political authority which marks a radical departure from feudal society. Unlike the feudal order, the modern state does not resort to the hierarchical structure of society in order indirectly to exert influence


\textsuperscript{118} Were there pre-modern societies which enforced the principle of NC? I have no evidence for answering this question, either affirmatively or negatively. The Roman law of servitudes, though not Roman law of property as a whole, may have come close to enforcing the principle of NC. That record, however, is at the very least disputed among leading Roman law scholars. Compare Alan Watson, The Law of Property in the Later Roman Republic (Oxford: Clarendon Press, 1968) at 176-9 with Fritz Schultz, Classical Roman Law (Oxford: Clarendon Press, 1951) 383. Jewish law contains scattered discussions on the subject of time-sharing and other possible forms of property right, but these are hardly sufficient to account for a freestanding concern for the NC principle. See, e.g., Babylonian Talmud (Sukkah 41b) (analyzing the property law implications of a gift made on condition it be returned). At any rate, I follow the conventional wisdom according to which an articulated idea of NC in property law was self-consciously born in post-feudal societies and, in particular, in concert with the French revolution.

\textsuperscript{119} Rudden, ‘Economic,’ supra note 6 at 262; Hansmann & Kraakman, ‘Verification,’ supra note 4 at 417. But see Merrill & Smith, ‘Optimal,’ supra note 6 at 24-42.

over people. Thus, religious communities and local collectives no longer mediate between the state and members of the former groups, as the modern state claims the allegiance of each person who happens to be living within its jurisdiction, irrespective of religious or any other affiliation. Simply put, the modern state ‘bears the entire burden of legitimation,’ because it claims to hold the authority to address each individual person unmediated. Moreover, it is telling that an articulated idea of the NC principle is no mere product of post-feudal rule, *tout court*. Rather, it is a distinctive child of none other than the French Revolution.

Of course, this rough sketch does not and is not intended to provide a historical account of the NC principle (or of post-feudalism, more generally). My ambition in discussing the transition from feudalism to post-feudalism and the consequent rise of the NC principle is to point to a very rough correlation, rather than causal connection, between my theoretical explanation of the principle and its history. To this extent, the historical rise of the principle of NC seems much less mysterious than before—or so the theory of this principle I have developed entitles one to believe.

Moving to the second observation mentioned above, the endurance of the NC principle is indeed surprising given the skepticism with which it has mostly been approached. The economic justification of this principle has been convincingly criticized, including on economic grounds. Indeed, advances in technology (the *technology of notice*, as it were) suggest that what may have been an appropriate strategy for economizing on information costs several centuries ago is no longer required. Legal realism’s cautious support of the principle of NC is belied (perhaps self-consciously so) by its own Hohfeldian denial of a qualitative distinction between property and contract rights. Add to this the increasing tension between the NC principle and a highly regarded idea in modern capitalist societies, freedom of contract, and the result is an awesome explanatory gap: what accounts for the effective hold of a post-feudal achievement on the law of modern society?

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124 Furthermore, I disavow any attempt to explain how the principle in question became diffused across many different legal systems, including systems of flatly undemocratic states. After all, despots may want to control the forms of property as much as democratic governments do. The moral legitimacy of thus controlling is, of course, a different question altogether. My argument does not focus on actual control, but rather on *morally legitimate* control.

125 See especially Hansmann & Kraakman, ‘Verification,’ supra note 4.

126 See Dagan, ‘Craft,’ supra note 7 at 1570.
My proposed account, because it focuses on political legitimation as the underlying grounds of the principle of NC, can explain the continuous preference of the law to restrict private legislation of property rights. Changes in notice technologies, the decline of the property/contract divide, and the rise of freedom of contract do not change the legitimation difficulty that arises in connection with subjugating everyone to new forms of property obligations. Moreover, the explanation I offered above emphasized that the basic concern that historically gave rise to the principle of NC—viz., legitimate authority—remains the same as the modern state developed from its early start to its current multi-national stage. According to prominent political philosophers, this concern has only intensified in character and in degree, as usefully depicted by John Rawls as the ‘fact of pluralism.’ Furthermore, because the problem of legitimate authority is inherent in the political organization of a free society, my proposed account implies that the principle of NC may not wither away anytime soon.

**V Conclusion**

In these pages I have sought to reclaim the characterization of the NC principle. I have identified certain structural deficiencies in contemporary functional approaches to the explanation and justification of this principle. On my proposed account, the NC principle is a strict limitation on private legislation of novel property right forms. The underlying theme that both explains and gives structure to this limitation is one of political legitimation. The principle of NC picks out a robust conception of legitimate authority that emphasizes the special authority of democracy—democracy as collective will. Accordingly, the creation of a new property right form is itself collectivizing because it is co-authored by the citizenry under a common framework of decision-making; bluntly put, the point of the NC principle is the sustaining of collective undertaking.

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