Democracy and Trusts

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PART I INTRO

In 1998, Kyle Krueger sexually assaulted a minor child, videotaped the act and circulated the videotape on the internet, for which he was criminally convicted.1 The child’s mother, Lorie Scheffel, filed a civil suit on behalf of both herself and the child seeking damages, and was awarded $551,286.25.2 The defendant’s assets, however, were in the form of a trust with a spendthrift clause, which barred the trust assets from attachment by creditors.3 The trust assets were worth about $12,000,000.4 The law of the state upheld the validity of such clauses.5 The mother argued for a public policy exception to the law because it prevented tort victims, who, unlike voluntary creditors, had no choice in the matter, from being compensated for harm.6 This, she argued, contravened the state’s strong public policy of having victims of crimes compensated by the perpetrator.7 The Court refused to make this exception, however, citing a long held policy not to “question the wisdom or expediency of a statute.”8 In another case, a drunk driver who left a victim paralyzed was also the beneficiary of a spendthrift trust, in this case, specifically designed by his mother, who was aware of his alcoholism, to protect his assets from his potential victims.9

Spendthrift trusts like the ones above which shield assets from creditors have been an ongoing problem for the law since their advent in the nineteenth century. Other, very recent, forms of trust are an even bigger

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1 Scheffel v. Krueger 782 A 2d 410 (NH 2001). For criticism of the decision in this case, see, e.g., Kent Schenkel, Exposing the Hocus Pocus of Trusts, 45 Akron L rev. 63 (2012) (observing that outcomes like this increase insurance costs); John K. Eason, Developing The Asset Protection Dynamic: A Legacy Of Federal Concern, 31 Hofstra L. Rev. 23, 45 n. 94 (2002) (noting the injustice of the spendthrift provisions when applied to involuntary creditors, such as tort creditors).


4 1998 WL 35390969 (NH Super) (Plaintiff’s Trial Motion, Memorandum and Affidavit).


6 1998 WL 35390969 (NH Super) (Plaintiff’s Trial Motion, Memorandum and Affidavit).

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problem: they take the notion of asset protection much farther, allowing settlors to protect not only the beneficiary’s assets, but their own, from creditors; these are called “self-settled asset protection trusts.”10 Moreover, more and more states allow so-called “dynasty trusts” which allow settlors and beneficiaries to maintain assets in trust tax free for generations, overturning long-settled principles of the common law such as the Rule Against Perpetuities. All of these trusts represent bad public policy: they disrupt contracts by allowing debtors to avoid their debts, they disrupt the tort system by denying victims compensation and removing deterrents to high risk behavior, and they withhold vast tax revenues from the public fisc.11

Most efforts to reform trust law to alleviate the problems of these trusts have been statutory - and unsuccessful, for reasons I explain below. No one has looked to principles in the law itself for a brake on their proliferation. This is a serious oversight because property law itself does offer a solution in the obscure but important doctrine of numeros clausus. Students in common law jurisdictions do not study this doctrine, and few academics pay attention to it, but it is nonetheless a foundational principle of the law and one which unequivocally bars the types of trusts discussed above.

Numerus clausus, which means “the number is closed,” refers to the idea that there are a limited number of forms property rights can take in a given society, and that the legislature, not private parties, determines what those are. Its value today lies in its restriction of the creation of property forms which limit the rights of third parties to those which arise from the democratic decision making process.12 This process makes citizens the “co-authors of the norms by which they live” – including the norms embodied in property law.13

Historically, trusts have escaped the restrictions of numeros clausus for highly formalistic reasons: the trust form of ownership separates legal from equitable title, and, traditionally, numeros clausus has applied only to forms of legal title, ignoring all the forms the equitable interest of trusts can take.

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11 It would be an understatement to say that these trusts – especially their most recent iterations – have failed to find favor with legal academics. As one scholar puts it: “throw a stone into a room full of law professors, and it is virtually impossible to hit someone who will defend perpetual trusts.” Writers have referred to these trusts as harbingers of the trust’s “race to the bottom,” “loony,” and “folly” (that last from Lawrence Waggoner, Professor Emeritus at the University of Michigan School of Law and Reporter for the Restatement (Third) of Property: Wills and Other Donative Transfers.) The criticism targets, among other things, the perpetual trusts’ avoidance of taxes on huge fortunes, the long-term removal of trust assets from the stream of commerce, their exacerbation of wealth inequality, and the sheer impracticality of managing and distributing assets over multiple generations. Stewart Sterk has identified asset protection trusts as harbingers of “trust law’s race to the bottom.” Kent Schenkel decides the spendthrift clause’s bar on recovery by tort victims as “fly[ing] in the face of [] foundational legal-economic principles of tort law.”
Thus, the equitable interest of trusts can take an almost infinite variety of forms which would be barred if they were attached to title. As Kent Schenkel points out, this artificial distinction makes little sense: title only has worth because of the benefit it provides, and enjoying the benefit is equivalent to enjoying the property. To free trusts from numerus clausus ignores the fact that they create an almost infinite variety of property interests which should concern us as much as those formally attached to title. The beneficial interests in trusts trigger exactly the concerns animating numerus clausus: they impair the rights of members of society at large, people who were not parties to the agreement and who are not even aware of the existence of the property right. Once we free ourselves to apply numerus clausus analysis to trusts, it becomes clear just how troubling recent developments in trust law are for democratic principles.

This article proceeds in three parts. Part II presents the history of numerus clausus and two main justifications proposed for it: efficiency and democratic governance. Part III explains why numerus clausus should apply to trusts and shows how recent trust forms violate both its principles of efficiency and of democratic decision making. Created by lobbying groups and special interests, these trust forms impair third party rights by depleting the public fisc of tax revenue, depriving tort victims and other creditors of compensation, and exacerbating wealth inequality. Part IV identifies a few encouraging trends in state and bankruptcy law. Ultimately, I argue that recent trust proliferation represents the failure of democratic decision making about property, a failure we ignore it at our peril.

**PART II: NUMERUS CLAUSUS: HISTORY AND JUSTIFICATIONS**

A. History

Numerus clausus literally means “the number is closed.” It limits the number of property forms in a given legal system to those the legislature authorizes. Many authors imply that numerus clausus was a principle of Roman property law. This is not correct. The term was the invention of early twentieth century German jurists reading principles into Roman law in a cultural context of their own. Roman judges – praetors – were always

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15 See, e.g., Anna D. Robilant, Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law, 62, 62 Am. J. Comp. L. 416 n. 2 (2014) (referring to tracing the history of the numerus clausus principle from Pre-Classical Roman law to the French Code Napoleon”); Nestor Davidson, Standardization and Pluralism In Property Law, 61 VAND. L. REV. 1597, 1600 (stating that “versions of the numerus clausus are found in Roman law and recur throughout the history of feudal and post-feudal English common law”).
16 Bram Akkermans, The Numerus Clausus of Property Rights, Maastricht Private Law Institute working
willing to hear property claims that sounded in equity and which did not fall under the strict legal categories for property rights under Roman law.

When the French Revolution abolished feudalism in 1799, it got rid of all fragmented property interests and reinstated what it thought had been the Roman law of numerus clausus; this idea thus became the basis for civilian property law.\(^{17}\) This upheaval of property law was not simply the product of a drive toward efficiency, although it did seek to release land from long-held servitudes: rather, it was based on Enlightenment political philosophy about the role of property in creating free individuals in a free society.\(^{18}\) This notion of numerus clausus, then, became the basis for property law in the French Civil Code and, through the proliferation of the Code, for most European Civil Law regimes. Although more explicit in civil law, NC also operates in common law property regimes.\(^{19}\) With respect to interests in land, for example, the basic forms under the common law are, indeed, limited: they are the fee simple, the defeasible fee, the life estate, and the lease.\(^{20}\)

The rationale for limiting the forms property rights can take – i.e., applying NC – to property and not contracts is that property laws bind parties not in privity with the contracting parties – in fact, everyone else in society – while contracts do not.\(^{21}\) Parties to a contract are free to devise whatever contract terms they wish – within the limits of legality and public policy - because they are the only ones affected by those terms. By contrast, forms of property limit the rights of everyone in society; they travel with the asset, thus binding future buyers and sellers, and potentially, everyone else – without these parties’ consent or even knowledge. In Blackstone’s words, property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”\(^{22}\) Thus, the rationale goes, there should be a limit to how many such forms exist to prevent the rights of third parties from being undermined in unforeseeable, inefficient and unfair ways.

The early cases explaining the doctrine base it, at least in part, on

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\(^{17}\) Alan Simpson, 18


\(^{19}\) Thomas W. Merrill and Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L.J. 1, 3 (2000).


\(^{22}\) 2 William Blackstone, Commentaries at *2.
efficiency. In the 1834 English case of Keppel v. Bailey an owner of land tried to enforce an agreement on subsequent buyers of the land to pay a certain price for transporting coal across it. The issue in the case was whether the owner of land could create a burden which would obligate future buyers of the burdened land with what the court called “novel rights” – that is, rights which were unprecedented in such transactions and which no purchaser would likely anticipate attaching to land. The Court declined to uphold such burdens, saying

[i]t must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy and caprice of any owner. It is clearly inconvenient both to the science of the law and the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves. To answer in damages for breach of their obligations. But great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property.

The Court’s objection to these “incidents of a novel kind” is that they would cause much “confusion of rights,” that is, no subsequent buyers would be sure what burdens they were taking on with the purchase of land. For this reason, the Court explained the parameters of permissible burdens: a burden that could run with the land – i.e., bind future owners – had to be “of such a nature as ‘to inhere in the land’” and “concern the demised premises, and the mode of occupying them.” This is the origin of the “touch and concern doctrine,” which means that a burden which runs with the land must affect how the land is used or occupied. This is because such a burden is both more likely to be visible to inspection, and because, in a related vein, it is more likely to fit with expectations of the kind of burden that attaches to land. Nineteenth century courts in England and the United States invalidated such easements as walking for pleasure, boating for

\[23\] Keppel v. Bailey, 47 ER 106, [1834].
\[24\] Keppel v. Bailey, 47 ER 106, [1834].
\[25\] 'It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy and caprice of any owner. It is clearly inconvenient both to the science of the law and the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves. To answer in damages for breach of their obligations. But great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property.'
\[26\] concern the demised premises, and the mode of occupying them,'
\[27\] For discussion of the touch and concern doctrine, see generally Ursula Tracy Doyle, Evidence of Things Not Seen: Divining Balancing Factors From Kiobel’s Touch and Concern Test, 66 Hastings L.J. 443 (2015).
\[28\] Dyce v. Hay, 1 MACQ, H. L. Cas. 305 (1852).
pleasure,\textsuperscript{29} withdrawing subjacent support,\textsuperscript{30} opening sluices of a reservoir when its level rises dangerously,\textsuperscript{31} maintaining bathhouses,\textsuperscript{32} because, as one of the opinions observed, “[n]one of the cases cited are at all analogous to this, and some authority must be produced before we can hold that such a right can be created.”\textsuperscript{33}

The burden in the \textit{Keppel} case – an agreement to pay a specified price for transporting material over the land – did not meet this requirement; it was not tied closely enough to the actual use of the land. A burden not closely tied to the use of the land would be a “novel fancy” and enforcing it would wreak havoc on both “the science of law and the public weal.”\textsuperscript{34}

Because the rights sought to be enforced were “novel” there was a notice problem: no subsequent buyer who was not privy to the contract would have had any reason to suspect such an agreement. Second, the Court seemed to fear that allowing such agreements to run with the land would choke off commerce in land: potential buyers would be discouraged by the possibility that any land they bought might be encumbered by a vast array of unpredictable obligations, making it unattractive as an investment. Both factors seem to relate to the idea of fairness and notice: potential buyers should be able to discern what burdens they were taking on with the land, and those that were too “novel” would be too hard to discover.

For an early American explanation of the “novelty” of easements, we can turn to the following remark of Judge Bryson in \textit{Clos Farming}, 2001 N.S.W.S.C. para. 40:

> These observations illustrate that novelty has several aspects. An easement may be novel in that it accommodates the dominant land in a way which only became possible or useful because of some relatively recent invention; and the easements for electricity supply and telecommunications services furnish ready examples. Easements for services of kinds which arise from new technology are novel in the sense that technology is new and until it was invented land was not accommodated by it, but if the dominant land is accommodated and the servient land is burdened in ways analogous to the operation of easements which were earlier known novelty could not be an obstacle to the validity of an easement. Another aspect of novelty is novelty in respect of

\textsuperscript{29} Hill v. Tupper, 159 Eng. Rep. 51 (1863).
\textsuperscript{30} Richards v. Harper, L. R. 1 Ex. 199 (1866).
\textsuperscript{31} Simpson v. Mayor of Godmanchester, 1 Ch. 214 (1896).
\textsuperscript{32} Eckert v. Peters, 36 Atl. 491 (1897).
\textsuperscript{34} Keppel v. Bailey, 47 ER 106, [1834].
the manner and degree of intervention in the rights of the servient owner. Evaluation of the degree of intervention will be required. Novelty presents difficulty for the validity of an easement when the intervention with the servient tenement differs from the interventions which are already known, and does so markedly as to bring under consideration the question whether it creates an interest of a new kind outside the known concept of easement. What cannot be done is to create new kinds of interests in land.

This is an expression of numerus clausus, although the Court does not name it as such. It enforces the rule, however, that there is a limit to the number and types of burdens which will attach to land. It limits the types of ownership interests which the law will allow to “run with the land,” i.e., bind successors in interest, to those which are analogous to commonly existing forms. Parties may create burdens which expand upon existing forms in scope; what they cannot do is create completely new kinds of burdens.

The numerus clausus governs leases as well. American leases fall into four recognized types: the term of years, the periodic tenancy, the tenancy at will, and the tenancy at sufferance. A lease “for the duration of the war,” for instance, would almost certainly not be enforced according to its terms. Seeking to place such a lease within one of the four recognized “boxes” of ownership, a court would probably shoehorn the lease into category of periodic tenancy or a tenancy at will. There is no such thing as a lifetime lease at common law, so such an interest would fall outside the recognized categories and so constitute a departure from the numerus clausus.

Changing times require changing property forms, and numerus clausus does not hinder this evolution: as industrialization and the development of the United States continued apace, courts, American courts steadily expanded the list of permissible easements to include, among other things, conservation easements. The basic principle remained: limiting the burdens that can be passed on to third parties to those already in existence or codified by the legislature through a democratic process.

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37 Nat’l Bellas Hess v. Kalis, 191 F.2d 739 (8th Cir. 1951); Starneyer v. Davis, 53 N.E.2d 22 (Ill. App. Ct. 1944); Luce v. Chandler, 1 All E.R. 305 (K.B. 1944). But cf. Smith’s Transfer & Storage Co. v. Hawkins, 50 A.2d 267, 268 (D.C. 1946) (concluding that a term of years requires only that the lease be certain to end, not that it have a definite calendar ending, and thus that a tenancy until the termination of “the present war” was a term of years).
38 For the history of conservation easements, see generally Connie Kertz, Conservation Easements At The Crossroads, 34 Real Est. L. J. 139 (2005).
B. Justifications

Contemporary scholarship reflects two schools of thought as to the justifications for numerus clausus. On the one hand, there is the efficiency school of thought, most notably endorsed by Merrill and Smith argue that limiting property forms reduces information gathering costs – i.e., the cost of finding out what burdens attach to a particular asset thus enabling market transactions. If property forms were infinitely variable, the list of burdens could be endless, and the costs of ascertaining them for any given form of ownership would be prohibitive and thus reduce efficiency. In a related vein, the cost of providing notice in such a complex system would be equally prohibitive, with the same result. Hansmann and Kraakman argue that numerus clausus aids the potential purchaser of property rights to verify the content of those rights as part of a market transaction. But the duty to understand property rights is not personal, that is, it is not limited to those involved in the transaction. Rather, it is the duty of everyone in the society to understand property rights and to arrange their economic plans accordingly.

It’s not clear that efficiency makes sense as a rationale for numerus clausus in American property law today. If the purpose of the numerus clausus is to reduce information gathering costs, or verification gathering costs, there are many failures in the system. In essence, the efficiency rationales turn on the need for actors in property transactions to be able to discover what property interests are at stake in a given transaction without expenses so prohibitive that they discourage market participation. The logic is that, by limiting the number of forms property interests can take, the numerus clausus simplifies the process of discerning what interests are the subject of the transaction. The chaotic and variable recording system for real property, and the lack of any recording system for trusts, however, undermine the notion that numerus clausus has done anything to streamline the process of information gathering.

First, there is a huge amount of variability in the terms and forms of

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40 See, e.g., Thomas W. Merrill and Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1 (2000) (arguing that “by permitting a significant number of different forms of property but forbidding courts to recognize new ones, the numerous clausus strikes a balance between the proliferation of property forms, on the one hand, and excessive rigidity on the other”).
documents vesting title to real property – deeds – throughout the country.\textsuperscript{44} There are three thousand counties in the Unites States, each with its own idiosyncratic recording system, language and documents to describe property interests.\textsuperscript{45} This system does not make ascertaining types of property interests easy or efficient. For example, some states use an instrument called a “deed of trust” instead of a mortgage to secure an interest in real property;\textsuperscript{46} this instrument differs crucially from a mortgage because it allows for non-judicial foreclosure, a fact which might be of significant interest to a potential purchaser.\textsuperscript{47} A buyer from a jurisdiction unfamiliar with deeds of trust would have to expend additional resources to decipher such foreign terms, terms which could affect her property interest in important ways. Numerus clausus does nothing to alleviate this; the problem persists even if the number of actual forms of property is limited, the costs of information gathering can still be burdensomely high.

Another example which undermines the efficiency rationale for any current role of numerus clausus is the Mortgage Electronic Registration System (“MERS”). About twenty years ago, the mortgage industry began to separate the servicing of loans and the ownership of loans from each other and to further separate the ownership of loans from the holder of the underlying note, thus dividing the ownership of a loan, or a bundle of multiple loans, among various owners in a way associated with the creation of mortgage backed securities.\textsuperscript{48} Separating ownership from form in this manner would normally cause difficulty because the parties would have to prepare and record a security instrument for each assignment in the appropriate recording office.\textsuperscript{49} This was cumbersome, costly, and often caused confusion and chain of title problems.\textsuperscript{50} MERS streamlined and simplified the process by eliminating the need for a new assignment each time a secured obligation was sold, traded, or securitized: it created a privatized system that tracked ownership information for these loans for its members.\textsuperscript{51} This system both arguably created new property interests, and simultaneously made information about them inaccessible to those affected by them. If the numerus clausus in American law today produced

\textsuperscript{44} Chad J. Pomeroy, A Theoretical Case For Standardized Vesting Documents, 38 Ohio N.U. L. Rev. 957. 961 (2012).
\textsuperscript{47} See generally Chad J. Pomeroy, Ending Surprise Liens on Real Property, 11 Nev. L.J. 139, 162-164 (2011).
efficiency, foreclosed homeowners would have been able to find out who owned their mortgages in 2008.\textsuperscript{52}

Moreover, as Anna Di Robilant points out, recent decades have seen a proliferation of property forms which undermine the efficiency rationale because they are “governance based” rather than “exclusion based,” such as Common Interest Communities, Community Land Trusts, and the public trust doctrine.\textsuperscript{53} Di Robilant calls these “informationally inefficient property forms” because “they involve multiple entitlement holders and, second, they regulate in a fine-grained manner the internal relations among entitlement holders.”\textsuperscript{54} These two features increase information costs; Di Robilant asks, if the numerus clausus exists to lower information costs and increase efficiency, how could legal systems constrained by the numerus clausus have approved these forms?\textsuperscript{55}

Finally, all the problems with information gathering listed above concern real property: so far, those writing about the numerus clausus and efficiency have ignored the problem of trusts. Trusts, unlike deeds to real property and wills, are completely private; this is one of the advantages they offer to those seeking to avoid the public disclosure of probate. There is no public registry of trusts in the United States.\textsuperscript{56} Federal law requires banks which manage trusts to make reports about the assets they manage, but private trust companies are under no such obligations.\textsuperscript{57} Uncovering the interest holders and determining the terms of the trust – important information for putative creditors – can be daunting, or impossible. And of course, there is no reason for involuntary creditors, such as tort victims, to seek the information. Theoretically, discovery might allow access to this information, but this assumes that the parties had some evidence of the existence of the assets in the first place.

None of this is to say that efficiency fails as a justification for numerus clausus. Rather, if its purpose is low cost information gathering, there are many areas in the recording system where it is failing. A number of writers have pointed to another, compatible rationale for it – namely, democratic decision-making about property rights. Joseph Singer, Avihay Dorfman and Anna Di Robilant all connect numerus clausus to democratic decision making and property’s role in ensuring individual freedom. Dorfman in particular focusses on the rationale of democratic decision making about


\textsuperscript{56} There is one in the European Union; it lists settlors, trustees and beneficial interest holders of EU trusts, and is open to national officials responsible for anti-money laundering and tax evasion efforts.

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He argues that it goes to the heart of the legitimacy of political authority and offers an answer to the question of how laws can exert authority and engender obedience. According to Dorfman, there are two models to explain this, the liberal model and the republican model. The liberal model bases the legitimacy of authority on the appeal to reason: “[l]iberals demand that social order should in principle be capable of explaining itself at the tribunal of each person's understanding.” The republican model rests authority on the democratic process: because the members of society have faith in the fairness and transparency of the political process, even the dissenter whose views do not prevail in a given set of circumstances respects the law’s authority.

Under either of these models, decision making about property rights must carry legitimacy. Because property rights, unlike contract rights, affect everyone in society, the only forum that should be able to create new ones is a democratically elected legislature, in a process which must be able to “explain itself at the tribunal of each person’s reason,” and/or receive the input of the whole spectrum of social interests and groups. Thus, numerus clausus legitimates government by guaranteeing that forms of ownership which affect everyone will be created only through the process of democratic decision making. As Dorfman explains, it is “a categorical restriction on private legislation” in the area of property rights; it is an affirmation that, for government to have legitimacy, forms of property must be the products of collective decision making which reflects the input of all whom they obligate. Without this principle, government loses legitimacy because the public perceives that obligations and restrictions are being imposed on it without their consent. For democratic government to have authority, members of society must see themselves as “generators of that authority” through the democratic process.

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62 Jeremy Waldron, “Theoretical Foundations of Liberalism” (1987) 37 Phil. Q. 127 at 149. See also Jürgen Habermas, The Inclusion of the Other, Ciaran Cronin & Pablo De Greif, eds. (Cambridge, MA: MIT Press, 1998) at 100 (noting that “moral commands [extending, in Habermasian terminology, to principles of political-moral conduct] must be internally related to the life-plans and lifestyles of affected persons in a way they can grasp for themselves”).  
63 For an account of this theme in the American context, see Robert Post, Constitutional Domains: democracy, community, management (Cambridge, MA: Harvard University Press, 1995) esp. at 185-86.  
authority is what allows the dissenter to respect the outcome of the legislative process. This requirement for what Dorfman calls “democratic co-authorship” as the basis for the creation of property necessitates that their only source can be the legislature, not courts, and not private actors. This allows citizens to be “co-authors” of the norms by which they live.

Joseph Singer broadens the discussion of numerus clausus by arguing that the system of estates not only fosters efficiency, but also “shape[s] social life in a manner consistent with the normative commitments of a democratic society composed of free and equal individuals who treat each other respectfully.”68 Thus, he explains, “[p]roperty law therefore both reflects and puts into practice value judgments about the appropriate contours of social, economic, and political life.”69 I would include in this the idea that the numerus clausus limits the burdens which can be imposed on third parties to those that comport with social expectations and fairness. In other words, the numerus clausus – what Singer calls the system of estates – controls the proliferation of property rights in accordance with the principles and expectations of a democratic society whose market actors are expected to treat one another with mutual decency and respect.70 Singer illustrates this notion with the examples of Fair Housing laws, consumer protection laws, and Economic Recovery Act of 2008, which allowed homeowners to renegotiate their mortgages.71 The basic idea the estate system embodies, in Singer’s view, is that property ownership comes with responsibility toward others in society, and property use must conform the basic expectations about market interactions.

Anna Di Robilant similarly justifies numerus clausus by referring to democratic decision making.72 Affirming that property rights have an “inherent public quality,” because they impose duties on non-owners, she asserts, like Singer and Dorfman, that they must be the product of democratic deliberation.73 But she goes on to credit the principle with allowing for significant experimentation in property, in a process by which citizens develop new property forms to respond to emerging social concerns and then submit them to legislative approval.74 As examples of ownership

forms which this process has produced, Robilant cites Common Interest
Communities, Community Land Trusts, and the public trust doctrine in the
United States, as well as several emergent property forms in the E.U.\footnote{Anna Di Robilant, Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism In Property Law, 62 AM. J. COMP. L. 367, 373-397 (2014).}

III APPLYING THE NC TO TRUSTS

A. Rationale for Applying NC to the Equitable Interests of Trusts

It makes little sense to let the equitable interests created by trusts off the
NC hook. As much as title interests, they implicate NC by impairing the
rights of everyone society at large. Both efficiency and democratic
principles require the application of NC to trusts.

As Kent Schenkel has noted, exempting trusts from NC because of the
formalistic distinction between title and beneficial interest makes little
sense. Title to property is meaningless without the enjoyment: Schenkel
cites takings law to show that once the government takes all economic value
from property, it has committed a taking; the fact that the owner may retain
the empty shell of title is meaningless. The point of NC is to limit the types
of rights one can enjoy in property because property rights affect society at
large. Whether one bases this on efficiency or democracy, there is no basis
for leaving equitable interests out of the calculation. All the rights attaching
to beneficial interests in trusts – the right not to pay creditors, not to
compensate those one has harmed, not to pay taxes – all affect everyone
else: the failure to pay creditors puts the burden of higher costs on everyone
else; the right to “opt out” of tort law disrupts the economy of the tort
system, creating public charges and increasing insurance costs; not paying
taxes adds to the tax burden on everyone else and/or decreases the public
weal.

But, one might argue, all these new forms of trust have emerged from
the legislative process, as NC requires. Granted, they impair the rights of
others, but as products of democratic decision making, must they not, by
definition, have legitimacy?

B. The Failure of the Democratic Process

Sadly, the ideal of property forms emerging from democratic decision
making presents an overly rosy picture of the legislative process in the
United States. The increasing influence of money in elections and of the
power of lobbyists and special interest groups raises concerns that new
forms of property ownership voted in by a legislature might be more
responsive to the interests of those members of society with assets, connections and influence than to those of society at large. The proliferation of new forms of trust passed by state legislatures in the past decade implicates some of the concerns underlying the numerus clausus in the first place, despite their appearance of democratic legitimacy.\textsuperscript{76}

The legislative process for making determinations about dynasty and asset protection trusts does not embody the ideals put forth by the proponents of deliberative democratic decision making. Despite being passed by legislatures, these new forms of property ownership often are not the products of democratic decision making. To the contrary, the rush by state legislatures to repeal the rule against perpetuities and pass dynasty trusts has been the result of lobbying by the wealthy, their lawyers, bankers, and trust managers,\textsuperscript{77} at times in the face of popular rejection of these innovations.

Typically, the special interests who stand to benefit from these new trust control the drafting, introduction and debate about them. For example, the Maine dynasty trust bill passed “after a lopsided debate whose key contributors were members of the banking lobby and attorneys in private practice who stood to gain the most from its passage.”\textsuperscript{78} Nevada offers another example of this lack of democratic process: when proponents of perpetual trusts in that state held a state-wide referendum to repeal the state constitution’s anti-perpetuity provision, voters rejected it by a margin if 60 percent.\textsuperscript{79} Nonetheless, the state legislature passed a law – drafted by a committee which included members of a Nevada trusts and estates law firm - allowing trusts to endure for 365 years.\textsuperscript{80} In Michigan, the Greenleaf Trust Company, represented by a local law firm, seems to “spearheaded” perpetual trusts passage in that state.\textsuperscript{81} In Connecticut, local banks and lawyers argued that “people who want to set up dynastic trusts for their grandchildren, great-grandchildren and down the line of generations, are doing them in other states.”\textsuperscript{82} Indeed, the lawyer who headed the lobbying efforts in the Connecticut Legislature reported that the at the hearing on the


\textsuperscript{77} See, e.g., Grayson M. P. McCouch, \textit{Who Killed the Rule Against Perpetuities?} 40 \textit{P.E.P.P. L. REV.} 1291, 1295 (2013) (noting in 2013 that In the space of less than twenty years, at least half the states, responding to intense lobbying by lawyers, bankers, and financial planners, have enacted statutes authorizing perpetual trusts, with the express goal of attracting trust business from other states”).


\textsuperscript{79} \textit{Election 2002}, RENO GAZETTE, Nov. 8, 2002 at 3C.

\textsuperscript{80} Steven J. Oshins, \textit{Nevada Becomes a Leading Dynasty Trust State}, Communique March 2006.

\textsuperscript{81} N.R.S. 111.1031(1)(b).


bill “a kind of bidding war ensued as legislators extended the time period from 90 to 100 to 360 years, finally ending at a 2000 year period limitations.”84 The New Jersey legislature passed the Trust Modernization Bill overturning the ban on perpetuities which was sponsored by the New Jersey Bankers Association.85 There have also been efforts, so far unsuccessful, to repeal state constitutional bans on perpetuities in North Carolina and Texas.86 As Sitkoff and Horowitz note, “lawyers and bankers have lobbied for perpetual trusts to attract, or at least retain, trust business.”87

A contributing factor to the influence of special interests in the creation of new trust forms is that much of the decision making takes place behind closed doors. Ray Madoff calls this “the stealth nature” of these changes to trust law: “The larger picture has gone unnoticed because change has occurred within [discrete] areas of the law, and often at the state level.”88 As Mark Ascher elaborates, “[w]hen the relevant committee of the local bar association recommends a package of proposed changes to the probate code, no bells begin to ring and no warning lights begin to flash. The committee states truthfully that it has vetted the proposed changes with all of the “relevant” groups, like the local bankers' and accountants' groups, and the legislature rubber-stamps the changes, probably without hearings.”89 Madoff sums up the process this way:

Finally, the story of the American law of the dead would not be complete without recognition of the effect of money on legislation. It is significant that the areas in which American law has grown most dramatically . . . not only appeal to individuals' desire to exert posthumous control but also appreciably benefit corporate interests. By using interests of the dead as a decoy, these entities have succeeded in enriching their own property interests. Although financial gain may be the driving force behind these changes, corporations are not the ultimate villains. Businesses are amoral, simply doing what our society tells them to do: maximize profit. The blame lies with legislators, who have responded to corporate demands even

84 Thomas Sheffey, Is Immortality Just Around the Corner? THE CONNECTICUT LAW TRIBUNE March 4, 2002, at ???
85 Rachel Wolcott, New Jersey Poised to Allow Dynasty Trusts, in PRIVATE ASSET MANAGEMENT, May 17, 1999 at 6,10.
89 Mark L. Ascher, But I Thought the Earth Belonged to the Living, 89 Tex. L. Rev. 1149, 1174 (2011).
when they have not best served the needs of American society at large.\textsuperscript{90}

As Sitkoff and Schanzenbach suggest, local interest groups such as banks, members of the estate planning bar, and trustees, “benefit from, and hence lobby for” laws that increase the state’s trust business.\textsuperscript{91} Indeed, abolition of the Rule Against Perpetuities “has been pushed by banking associations *** [that] wish to remain competitive with banks where perpetual trusts are permitted.”\textsuperscript{92} The annual trustees’ commissions alone are worth about of one billion.\textsuperscript{93} In short, Sitkoff and Schanzenbach’s empirical study concluded that “[t]he story of jurisdictional competition in trust law is a story of successful lobbying by local banks and trust lawyers, the principal beneficiaries of attracting new trust business to the state.”\textsuperscript{94} The story of the genesis of the Alaska dynasty trust illustrates Sterk’s point that “[j]urisdictions seeking to become trust havens . . . appear content to draw business to local financial institutions and lawyers, even without direct benefit to the public fisc.”\textsuperscript{95}

Jonathan Blattmachr, a prominent New York estate planning lawyer, drafted Alaska’s dynasty trust statute to “funnel [the assets of] his wealthy clients to The Alaska Trust Company” which his brother owned.\textsuperscript{96}

The proliferation of these instruments underlines both American law’s drift away from the numerus clausus principle – and thus from democratic decision making in property law - as well as the principle’s importance. These new trust instruments serve the needs of wealthy families by allowing for the multi-generational accumulation of wealth and the interests of banks, fund managers and trusts and estates attorneys who profit from their creation and management. They offer a prime example of how legislative capture can negate the numerous clausus principle, and, ironically, why it and the democratic decision making about property it seeks to preserve are important for social welfare.

Both efficiency and democracy require the application of NC to trusts. Spendthrift trusts have always impaired third party rights, as the introduction to this article illustrated. New forms such as the self-settled asset protection trust and the dynasty trust, which violate basic principles of trust law, implicate the rights of third parties, sometimes in egregious ways which undermine both efficiency and democratic property law.

Today, spendthrift clauses are boilerplate in trust instruments; all but three states enforce them. Some states allow exceptions for certain creditors: spouses or children with support orders and suppliers of necessaries, but none allows general creditors, or tort victims to recover from trust assets. These clauses are problematic enough. Historically, the one thing they could not do was allow the settlor to protect his assets from his own creditors: the traditional view was that these clauses existed to protect the vulnerable, and this was a far cry from allowing a settlor to enjoy his assets while putting them beyond the reach of his creditors.

Beginning in 1997, however, when New York attorney Jonathan Blattmachr persuaded the Alaska legislature to pass legislation authorizing “self-settled asset protection trusts,” more and more states have opened their doors. At the time, Joel Dobris summed up the emerging trend this way: “The view that trusts are there to beat somebody out of something is in the ascendancy.” Pointing to the proliferation of creditor, spousal and child support avoidance trusts, he elaborates “the notion that the people who occupy the world of a given trust have “civic” responsibilities to those outside that world is essentially dead” and that “trust business is booming because a lot of people do not want to pay their bills.”

These trusts, by impairing third party rights, implicate both rationales for NC. With respect to efficiency, they allow beneficiaries, and now settlors, to “opt out” of both the contract and tort systems. Both these systems are based on economic efficiency. Contract law is based on the idea that people should be able to enter into agreements to reap benefits they want, and the law encourages people to do this by giving them remedies for breach if those bargained-for benefits are not forthcoming. Similar, economic efficiency underlies the tort system: by compensating the

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98 Austin Wakeman Scott at al *SCOTT AND ASCHER ON TRUSTS* § 15.4 (5th ed. 2006).
100 Joel C. Dobris, *Changes In The Role And The Form Of The Trust At The New Millennium, Or, We Don’t Have To Think Of England Anymore*, 62 Alb. L. Rev. 543, 550 (1998).
injured, spreading risk, and deterring high risk behavior, tort law works overall to “encouraging socially optimal choices between risk and safety” to the benefit of society at large. Allowing certain members of society to act outside of the constraints is both inefficient and unjust.

Nor do these new forms of trust benefit society at large by increasing state tax revenue, although it is a common assumption that states compete for business to bolster the tax base. Rather, these trusts are situated in states which have no income tax: Sitkoff and Schanzenbach found that “the only states that experienced an increase in trust business after abolishing the Rule [against Perpetuities] were those that did not levy an income tax on trust funds attracted from out of state.”

Some people try to justify the creation of these trusts by arguing that, in an overly litigious society, professionals should have a right to protect their assets from frivolous damages awards – and that they will find ways to do this anyway, so American jurisdictions might as well benefit from their business. The reality is, however, that most unjustified or egregiously large damages awards are reduced on appeal, and the filing of frivolous lawsuits is greatly exaggerated.

As for the perpetual trust, a 2003 study estimated that the amount of capital these trusts shelter from taxes was around one hundred billion (then), and this may drastically undervalue the true amount. What this means is that settlors and beneficiaries of these trusts avoid their obligations to participate in a progressive tax system, leaving others to foot the bill, or do without. Because every property right necessarily implies a corresponding obligation, dynasty trust beneficiaries’ “right” to avoid taxes triggers an obligation on the part of everyone else to make up the difference. Most commentators agree that its catalyst was the “generation-skipping tax,” (GST), or more, accurately, the one million dollar exemption Congress wrote into the law before it passed. A taxpayer who can afford

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106 Staff of Joint Comm. on Taxation, 112th Cong., Description of Revenue Provisions Contained in the President’s Fiscal Year 2012 Budget Proposal 522 (2011) at 526.
it can use this exemption amount to fund a trust whose assets will remain untaxed no matter how large they subsequently grow. This desire to use the GST exemption to shield assets from taxes far into the future seems to have set off a frenzied jurisdictional competition for states to pass laws getting rid of the limits on the amount of time assets could remain in trusts, historically embodied in the Rule Against Perpetuities. Mary Louise Fellows describes the GST exemption as a “spark” falling on the “dry tinder” of “an historic tolerance for dead-hand control, donor-centric trusts laws, legislative simplification of the common-law rule against perpetuities, and the commercialization of estate planning.” In addition, the growing number in the post Reagan years of the ultra-rich who welcomed the opportunity to shelter assets from taxes for their descendants amidst an environment of growing anti-tax feeling and increasing awareness of the importance of tax exemptions. So at the new millennium we have one old and two new forms of trust which burden the rights of creditors and taxpayers by protecting their beneficiaries – and now settlors – from both sets of claims. What this means is that settlors and beneficiaries of these trusts avoid their obligations to participate in a progressive tax system, leaving others to foot the bill, or do without. Because every property right necessarily implies a corresponding obligation, dynasty trust beneficiaries’ “right” to avoid taxes triggers on obligation on the part of everyone else to make up the difference.

IV. BUCKING THE TREND

There is some hope at both the Federal and state level. The Federal Bankruptcy Code, and courts applying the Code, have viewed APTs with skepticism. In Battley v. Mortensen, a case which, according to one
estate planning attorney, “reverberated throughout the trust and planning world,” a Bankruptcy Court voided Mortensen’s transfer of property to the APT under Section 548(e), the Code’s fraudulent transfer provision. In doing so, the Court noted that this section “was enacted to close this ‘self-settled trust loophole.’” This is a significant development: fear of bankruptcy is one of the main reasons people seek APT protection. At the state level, significant precedent indicates that states hostile to APTs will decline to enforce spendthrift provisions in foreign APTs. These two trends are encouraging. APT-hostile states especially must assert that not only APTs, but perpetual trusts as well contravene state policy. This article shows how this is a numeros clausus argument, and a democracy argument. States must also recognize the inadvertence by which spendthrift clauses became boilerplate in trust instruments, and reassess them in light of the numeros clausus arguments I present here.

CONCLUSION

The forms of trust I discuss here present serious problems with respect to numeros clausus, properly understood. Indeed, they threaten to eviscerate property’s role in a democratic society: the role of allowing some degree of equal access to material self-expression, opportunity, remedies and input into ownership norms. All of the trusts I present here work against these aims by increasing inequality in access to resources, depriving creditors, both voluntary and involuntary, of their right to a remedy, and avoiding the proportional payment of taxes. Unsurprisingly, and unlike other forms of liability “trade-offs” like the limited general liability and conservation servitudes, these trusts did not emerge from decision-making in which the full range of social interests had voice and in which the overall interests of society were a factor. Rather, they emerged from behind closed doors where bankers, lawyers and fund managers persuaded legislators to sign off on already-drafted laws designed solely for their personal gain.

Courts in states which not passed this kind of trust legislation must fight back by declining to enforce the terms of these trusts as against their public policy. A few, as noted, are already doing so. This article offers a

121 Stewart E. Sterk, Asset Protection Trusts: Trust Law’s Race to the Bottom?, 85 CORNELL L. REV. 1035, 1051 (2000) (listing cases which indicate that that courts in states that are hostile to self-settled spendthrift trusts are unlikely to enforce the spendthrift provisions in self-settled asset protection trusts, regardless of the effect that those provisions might have under the law of the trust situs.”).
broader rationale than those courts have so far used: not only do these trusts violate the public policy of states which have not passed them into law, they violate democratic norms for the creation of property rights.