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The Shape of Property

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The Shape of Property

*Chad J. Pomeroy**

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I. INTRODUCTION

"Shape" means "a mode of existence or form of being having identifying features" or the "form or embodiment" of something.[1] Form and feature, in turn, arise from pressure and time. Property law has a shape all its own: it exists as a unique body of law, with distinctive conventions and rules. And that shape, those conventions and rules, derive from a variety of pressures that have, over the centuries, molded property law into its present form. This Article seeks to understand and explain the shape of a particular area of property law—that of property forms.

Of course, this attempt does not exist in a vacuum. Indeed, the shape of property law and the source of that shape has received quite a lot of attention recently, and this Article is a direct response to that discussion. In particular, Thomas W. Merrill and Henry E. Smith have written extensively about the numerus clausus principle, a term which means "the number is closed."[2] This is a shorthand way to

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[1] For these, and other, definitions of "shape," see *Shape*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/shape (last visited Jan. 28, 2014).

[2] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000).

describe the fact that property can only exist in certain standardized forms.[3] Merrill and Smith have done much to popularize this concept as a unique and "deeply entrenched" element of property law.[4] They argue that this limitation on the number of property forms has always existed in the underlying fabric of our common law and take the term from civil law countries, in which forms of ownership are clearly limited to those permitted under civil code.[5] They claim that the numerus clausus describes and explains why property law is so narrowly proscribed when it comes to common law restrictions on property types.[6]

Further, Merrill and Smith have discussed, at great length, their view of what has led to this underlying limitation in property law. They argue that the pressure that created the numerus clausus effect comes from a self-imposed informational cost-benefit analysis wherein courts habitually focus on whether a new property type provides informational benefits that exceed the marginal informational costs thereof.[7]

This description of and explanation for property law has generated significant interest over the last decade or so. Many recent articles have focused on the concept of the numerus clausus, and either built upon or criticized the informational burden analysis developed by Merrill and Smith to explain it.[8] Among those articles are two of mine, which built upon the numerus clausus as posited by Merrill and Smith.[9] In *A Theoretical Case for Standardized Vesting Documents* ("SVD"), I first argued that this same cost-benefit analysis should apply to vesting documents, a very specific area of property law.[10] Later, in *Why is Property so Hard?* ("WPH"), I expanded the

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[3] *See generally id.*; Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

[4] *See* Merrill & Smith, *supra* note 2, at 20.

[5] *See id.* at 4.

[6] *See id.* at 3–4. This is in stark contrast to many other areas of property law. *See infra* notes 29–36 and accompanying text.

[7] Merrill & Smith, *supra* note 2, at 68–70.

[8] *See, e.g.*, Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517 (2003); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002); Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003); Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235 (2013).

[9] *See* Chad J. Pomeroy, *Why is Property so Hard?*, 65 RUTGERS L. REV. 505 (2013) [hereinafter Pomeroy, *WPH*]; Chad J. Pomeroy, *A Theoretical Case for Standardized Vesting Documents*, 38 OHIO N.U. L. REV. 957 (2012) [hereinafter Pomeroy, *SVD*].

[10] *See* Pomeroy, *SVD*, *supra* note 9, at 985. Therein, documents that pass title

argument, contending that the informational burden analysis proposed by Merrill and Smith ought not to be limited to vesting heterogeneity.[11] The argument was that the informational pressures identified by Merrill and Smith are present in all areas of property law and, therefore, the informational benefit analysis driving the numerus clausus ought to act on the many, many areas of variability laced throughout property law.[12]

I continue to believe in the validity of these normative arguments. I have come to believe, however, that the contrast between these arguments and the actual shape of property law belies the underlying validity of Merrill and Smith's theses regarding the numerus clausus. More specifically, the informational burden analysis propounded by Merrill and Smith does seem to explain the peculiar homogeneity associated with the fixed number of property forms available throughout our system. But that analysis should also have the same effect on other areas of property law, and it clearly has not.[13]

I believe that this failure to affect other areas of property law indicates that the numerus clausus does not arise due to the type of informational burden analysis propounded by Merrill and Smith. In other words, if the courts truly adopted and applied the type of informational burden analysis described by Merrill and Smith, then they would do so in all areas of property law. Property law is notoriously haphazard, in contrast to other areas of the law,[14] and courts' failure to remedy this heterogeneity (despite the same efficiency pressures extant in connection with property form issues) indicates that this judicial weighing of informational benefits and burdens simply does not occur in any area of the law. Part II lays the foundation for this argument in greater detail by reviewing the

from one party to another were referred to as "vesting documents," and I focused on the similarity between the informational burdens associated with new property types and the heterogeneity costs associated with the many types of vesting documents that exist throughout the country ("vesting document heterogeneity"). *See id.* at 985–87.

[11] *See* Pomeroy, *WPH*, *supra* note 9, at 538–40.

[12] 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." 2 WILLIAM BLACKSTONE, COMMENTARIES *382. And the heterogeneity of property law—that is, the different shape of the law in different jurisdictions—interferes with one's ability to exclude because it creates confusion and interferes with the informational role of property. *See* Pomeroy, *WPH*, *supra* note 9, at 521.

[13] *See* Pomeroy, *SVD*, *supra* note 9; Pomeroy, *WPH*, *supra* note 9.

[14] Property law is a jumble of rules that have "been heaped one upon another for a course of seven centuries, without any order or method . . . ." 2 WILLIAM BLACKSTONE, COMMENTARIES *382–83.

numerus clausus and contrasting Merrill and Smith's contentions with my own previous analyses.

So if the pressure to create informational efficiencies does not lead to the numerus clausus, what does? Part III answers this question by focusing on the historical setting in which property law developed. Often overlooked, legal history frequently explains why and how the law developed.[15] I believe that is the case here. Rather than arising from subtextual analyses regarding informational burdens, homogeneity of property forms arises from a series of ancient statutes meant to protect governmental revenue.[16] These statutes narrowed the type of property that one could create in order to restrict the manner in which people were able to transfer land, thus ensuring that the English crown's transfer tax stream would not be jeopardized.

The Article concludes that our property system, inefficient as it is, has been shaped by organic forces over the centuries. The numerus clausus, then, is a valid description of the current shape of property law, but it does not arise in the manner that many academics and commentators claim.

II. VARIATION IN PROPERTY LAW AND THE NUMERUS CLAUSUS

In understanding the shape of property law, particularly as it has been studied and discussed recently, it is important to set the numerus clausus in its proper context. In particular, property law is a varied and confused area of the law, and the numerus clausus is a peculiar exception to this.[17]

A. Heterogeneity in Property Law

As I discussed in WPH, property law is a difficult and somewhat dry subject because of its heterogeneity—there are numerous rules, and most of these rules differ from jurisdiction to jurisdiction. In that article, I created a taxonomy that expressed this unique level of variability and described how it manifests itself.[18] In particular, a cohesive taxonomy allowed me to identify categories of property law

[15] *See, e.g.*, Randall T. Shepard, *The Importance of Legal History for Modern Lawyering*, 30 IND. L. REV. 1 (1997).

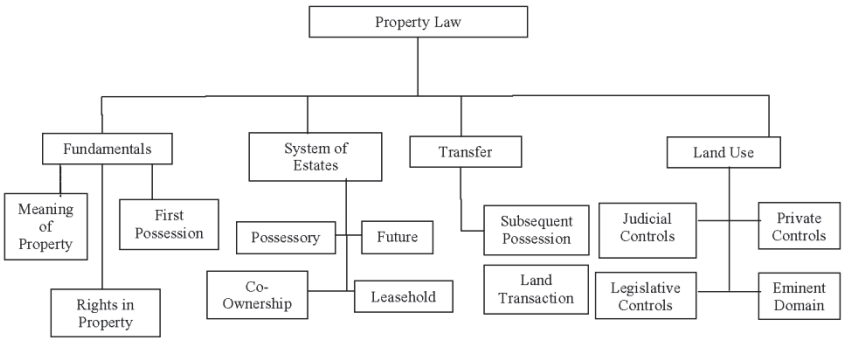
[16] Aside from historical support, *see infra* Part III, this proposition is also simple and logical. *See id.* I am, indeed, tempted to propose a sort of legal Occam's Razor stating that, among competing hypotheses, the hypothesis that is attributable to governmental desire for revenue should be selected.

[17] *See* Pomeroy, *WPH*, *supra* note 9, at 525.

[18] *See id.*

and to examine how that law fractured throughout common law jurisdictions, a fruitful assessment, particularly when contrasted with other areas of the law.[19]

The taxonomy I created was no great feat of originality and attempted to balance simplicity with depth by focusing on most lawyers' shared background arising from first year property class.[20] It did so in chart form, setting forth the basics of property law as follows:[21]



This framework creates a consistent basis for comparison of the defined elements of property law. For example, Merrill and Smith, in their discussions of the numerus clausus, focus on the uniformity of the "system of estates" (i.e., the types of property that are

[19] *See id.* Creating a taxonomy of this sort is admittedly problematic, as the law is constantly changing. *See, e.g.*, John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 1–5 (1986). *See also* Amnon Lehavi, *The Taking/Taxing Taxonomy*, 88 TEX. L. REV. 1235, 1242 (2010) (citing Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74–75 (2005) (discussing the types of pressures that cause different jurisdictions to promulgate and enforce different property laws)). Nevertheless, I created such a structure, believing that "a conceptual taxonomy of property law is 'analytically and jurisprudentially essential' for an analysis [involving] a wide-reaching examination of a potentially vast body of law." Pomeroy, *WPH*, *supra* note 9, at 509 (quoting Amnon Lehavi, *The Taking/Taxing Taxonomy*, 88 TEX. L. REV. 1235, 1242 (2010).

[20] *See* Pomeroy, *WPH*, *supra* note 9, at 510.

[21] This chart is taken directly from WPH. *See id.* It brings together many of the basic elements of property law, from the fundamentals through land use. *See id.* (citing JESSE DUKEMINIER ET AL., PROPERTY 18 (7th ed. 2010)). Of course, there are many other legal concepts that could be included, and some of the concepts identified could arguably be place elsewhere. But, ultimately, "perfection is not necessary." *Id.* at 511. All that is necessary is a consistent attempt to give "a substantially coherent sense to what is undoubtedly a very muddy world." Lehavi, *supra* note 19, at 1278.

permitted).[22] Similarly, in WPH, I examined the heterogeneity of "land transactions"[23] and of "fundamentals."[24]

Engaging in this type of analysis, using the taxonomy presented above as a consistent backdrop, crystallizes the contextual setting of Merrill and Smith's arguments and helps to explain why property law is such a difficult area of the law.[25] Simply put, property is a mishmash of rules, with little consistency and no real guiding principles tying together the various jurisdictional rules and preferences.[26] This is despite the central role that property plays in

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[22] *See* Merrill & Smith, *supra* note 2, at 23.

[23] *See generally* Pomeroy, *WPH*, *supra* note 9, at 512–13. The discussion in WPH regarding vesting documents was, in turn, based upon SVD. SVD focuses on vesting documents, which would conceptually fall under "land transactions," along with other concepts like brokers, contracts of sale, and financing. *See, e.g.*, DUKEMINIER ET AL., *supra* note 21, at xviii–xix.

[24] In particular, I examined "rights in property," which is classified under "fundamentals," above. *See* Pomeroy, *WPH*, *supra* note 9, at 514–16. The concept of "rights in property" pertains to the claims that accrue to individuals based upon their ownership of property and is distinct from "system of estates," which focuses on the accepted characteristics of particular property types. *See id.* at 514 (citing Merrill & Smith, *supra* note 2, at 5–6). I make this point in WPH by focusing on third party creditor rights in property. *See id.* at 514–16. That is, all common law jurisdictions recognize roughly the same suite of property types (possessory interests, concurrent interests, future interests); but there is significant variation from jurisdiction to jurisdiction with respect to a creditor's right to execute upon those acknowledged property types. *See id.*; *see also* COMM'N ON THE BANKR. LAWS OF THE UNITED STATES, H.R. REP. NO. 93-137, pt. 1, at 16 (1973); R. Paul Barkes, Jr., *Untwisting the Strong-Arm: Protecting Fraud Victims from Bankruptcy Courts*, 31 LOY. L.A. L. REV. 653, 671 (1998) ("Relying on state law also resulted in inconsistent treatment of property in different states. Because each state had its own property laws, certain categories of property would become part of the estate in one state but not in another.").

[25] It has been said that the study of property may "afford[] the student less amusement and pleasure" than other areas of the law. 2 WILLIAM BLACKSTONE, COMMENTARIES *382.

[26] *See* Pomeroy, *WPH*, *supra* note 9, at 509. Both the examination of land transactions (i.e., vesting documents) and fundamentals (i.e., rights in property) strongly support this statement. With respect to vesting documents, there simply is no consistency from jurisdiction to jurisdiction. *See generally* Pomeroy, *SVD*, *supra* note 9. There are more than 3,000 counties, or county equivalents, where documents can be recorded. *See How Many Counties Are There in the United States?*, USGS MULTIMEDIA GALLERY, http://gallery.usgs.gov/audios/124 (last updated Jan. 09, 2013). Each of those has their own recording system and customs. *See* Dale A. Whitman, *Are We There Yet? The Case for a Uniform Electronic Recording Act*, 24 W. NEW ENG. L. REV. 245, 269 (2002). This is due to the historical development of the American recording system and has resulted in a very clear, and very costly, example of widespread variability in property law wherein different jurisdictions permit the recording of different types of documents governed by different rules of construction and creation. *See* John H. Scheid, *Down Labyrinthine Ways: Recording Acts Guide for First Year Law Students*, 80 U. DET. MERCY L. REV. 91 (2002); *see also* 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.01(1)(a) (Michael Allan Wolf ed., 2009); Ray E. Sweat, *Race, Race-Notice and Notice Statutes: The American Recording*

our economy and the enormous amount of money involved. [27]

This heterogeneity is notable, in and of itself, and also because it is so unlike other areas of the law. Contract law, for example, exhibits far more uniformity than property law.[28] This makes the study and the practice of property law difficult; it is also problematic in that it creates a lot of cost.

The broad-based heterogeneity described above compromises the efficiency of property law by undercutting the core function of property, which is to provide ready, relevant information to interested parties.[29] Property rights exist with reference to a thing that is possessed or owned, and that "thing" communicates a bundle of information about itself, and about its owner's rights and obligations, "to the world."[30] This communication, however, suffers (or disintegrates) if nobody can understand what property rights exist because there are no clear and consistent rules governing property.[31]

And this is precisely what happens, time and again, with property law. For example, with respect to vesting document heterogeneity, the certainty and confidence promoted by the American Recording System[32] is significantly undermined because different jurisdictions

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System, PROB. & PROP. 27–28 (May–June 1989). Similarly, with respect to rights in property, heterogeneity prevails. *See, e.g.*, Pomeroy, *WPH*, *supra* note 9, at 514–16. WPH focused on one aspect of this larger issue: that of creditor rights in debtor property. *See id.* at 523. Time and again, jurisdictions came to different conclusions based on different rules. *See id.* at 516 (citing Harms v. Sprague, 473 N.E.2d 930, 932–34 (Ill. 1984); Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 430 (2001)).

[27] *See* Pomeroy, *WPH*, *supra* note 9, at 516 n.48 (pointing out that, in the context of creditor rights, more than $1.2 trillion of residential mortgages were extended to borrowers in 2011 alone).

[28] In WPH, I created a taxonomy similar to that shown above, and examined how the structure of contract law varies from jurisdiction to jurisdiction. *See* Pomeroy, *WPH*, *supra* note 9, at 518–21. In short, there is not much variation. *See id.* (examining the concepts of modification and unjust enrichment, reviewing numerous cases from varied jurisdictions, and concluding that the doctrines are largely consistent from jurisdiction to jurisdiction).

[29] *See* Pomeroy, *WPH*, *supra* note 9, at 512.

[30] Merrill & Smith, *supra* note 3, at 359.

[31] *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988) (indicating that property law functions properly when its rules "signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests").

[32] *See, e.g.*, Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 183 (1983) (indicating that the manner in which the Recording System forces parties to record transfers of property interests creates certainty by ensuring recording and the concomitant propagation of information); *see also* Dan S. Schechter, *Judicial Lien Creditors Versus Prior Unrecorded Transferees of Real Property: Re-Thinking the Goals of the Recording System*

have different rules regarding which documents can, or must, be recorded and how those documents must be drafted and executed.[33] This makes title issues difficult and expensive to resolve, and so retards economic activity.[34] Similarly, the heterogeneous nature of third-party creditor rights in debtor property also undercuts economic efficiency. Just as a potential buyer or seller's inability to determine title will prevent some transactions from occurring,[35] a potential lender's inability to forecast his remedies will prevent some loans from occurring.[36] These are just a few examples of how the overriding goal of property—to provide information—is continually undermined by its heterogeneity.

Contrast this with contract law. Contract law is meant to ensure that parties can negotiate, act, and reach agreement with certainty. Jurisdictional uniformity supports this because parties have confidence that their contracts will be enforced, regardless of what jurisdiction controls—and this, in turn, stimulates positive market activity.[37] When it comes to property law, however, parties cannot

and Their Consequences, 62 S. CAL. L. REV. 105, 109–19 (1988) (examining and refining, but ultimately supporting, this informational role of the recording system).

[33] *See* Pomeroy, *SVD*, *supra* note 9, at 968.

[34] *See* Pomeroy, *SVD*, *supra* note 9, at 969–71.

[35] The cost of the lack of certainty described herein can be described either with reference to the transactions that do not occur or to the increased cost of those that do ultimately occur. What is relevant is the loss of economic activity, however articulated.

[36] *See* Pomeroy, *WPH*, *supra* note 9, at 516. A creditor's need to understand its potential rights in a potential debtor's property is clear. Potential lenders must continually assess the credit risk of every loan, and one of the ways they do so is to evaluate their ability to pursue non-performing debtors and their assets. *See id.* at 514–16 (noting that this is so regardless of whether the loan is secured or unsecured). This is a matter of common sense, and any failure by a lender in doing this is likely to have significant, negative costs. *See, e.g.*, RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 18–29 (2009). Unfortunately, this task is difficult because the law varies so much from jurisdiction to jurisdiction. *See* Pomeroy, *WPH*, *supra* note 9, at 515. As such, lenders will fear the sorts of mistakes that may result from their ignorance of the different laws that prevail in different jurisdictions. Accordingly, some lenders will end up not making loans that they would otherwise make, and some lenders will end up charging higher rates or fees than they would otherwise charge. Again, what is relevant is the loss of economic activity, however articulated.

[37] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 117 (Aspen 8th ed. 2011) ("The basic aim of contract law . . . is, by deterring people from behaving opportunistically toward their contracting parties, to encourage the optimal timing of economic activity and (the same point) obviate costly self-protective measures."); Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1525–26 (2006) ("The purpose served by third-party enforcement [of contracts] is to provide stability and predictability as incentives to parties to engage in non-simultaneous exchanges.").

have that sort of confidence, which thus dampens market activity and economic growth.[38] This is suboptimal—or, more simply put, it is very expensive.[39]

Why, then, is property so inefficient and so costly in comparison to other areas of the law? There are a number of historical and substantive reasons that contribute to this heterogeneity.[40] More than any other reason, though, the fixed nature of real property probably plays a significant role in encouraging different jurisdictions to play by different rules.[41] Land does not move, so it is forever subject to a single jurisdiction. This means that jurisdictions have had no

[38] *See* Pomeroy, *WPH*, *supra* note 9, at 520–21. "[I]nter-jurisdictional clarity of property law would permit parties to engage in property transactions without fearing unknown or unclear standards or rules." *Id.* at 520–21 n.64. The current lack of clarity, then, "undermines commercial activity to the extent that it prevents anyone from engaging in a transaction they otherwise would have engaged in and to the extent that it imposes additional transactional costs on commercial activities." *Id.* at 521 n.64; *see also* Trebilcock & Leng, *supra* note 37, at 1525–26.

[39] The costs associated with this inefficiency should not be underestimated. *See* Pomeroy, *WPH*, *supra* note 9, at 525. As discussed therein, the title industry may serve as a rough proxy for these costs. *See id.* Title insurance indemnifies against the loss associated with nonconforming title. *See* John C. Murray, *Title and Survey Issues in Commercial Real Estate Transactions*, *in* UNDERSTANDING THE SOPHISTICATED REAL ESTATE TRANSACTION 55, 57–58 (Practicing Law Institute ed. 2003). Title can be nonconforming for a variety of reasons, but the confused status of property law likely represents some part of the problem, so it seems reasonable to cite title insurance expenses in gauging the magnitude of cost involved here. And that outlay is significant, with the title industry generating $8.7 billion in fees in 2010 alone. *See* Press Release, A.M. Best Co., A.M. Best Special Report: Despite Economic Turbulence, Title Industry Outlook Remains Stable (Oct. 10, 2011), *available at* http://www3.ambest.com/press/framepress.asp (accessed by selecting "October 2011" from "View by Month" menu, then selecting article). "In other words, the wide-ranging nature of property law, so hated by students, is also ultimately hated by market participants and practitioners." Pomeroy, *WPH*, *supra* note 9, at 521.

[40] *See, e.g.*, Pomeroy, *SVD*, *supra* note 9, at 964–67. The role of property in our economy has changed over the years, and the law has had to change to keep pace. *See id.* at 963. This sort of transformation leads to variability. *See also* Dean Arthur R. Gaudio, *Electronic Real Estate Records: A Model for Action*, 24 W. NEW ENG. L. REV. 271, 272–74 (2002); *see* Pomeroy, *SVD*, *supra* note 9, at 965 n.45 ("At the time of America's founding, land was shifting from its static role of wealth production to the dynamic role of a commodity to be bought and sold."). The basic nature of property is, itself, problematic in this context. "By virtue of its durability, land invites an intricate layering of rights over time." Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 614 (1998). "Land, on the other hand, sticks around indefinitely, while claims against land can go on and on, in layer after layer, to be lost, found, banished, restored, relished, then lost again to longstanding practice and prescription." *Id.* A tort or a contract exists, is adjudicated, and then goes away. There is no need to revisit the specific issues and facts over time. This is not the case with property. Its infinite existence means that claims pile up, year after year, and that the laws and rules created to address them do the same.

[41] *See* Merrill & Smith, *supra* note 2, at 62.

incentive to accommodate stakeholders or to evolve in an attempt to "attract" real property commerce.[42] There, is, however, a notable exception to this generally confused status.

B. *The Numerus Clausus*

As discussed in the introduction, when it comes to property forms, the law is narrow and reliable across jurisdictions.[43] No matter where they are, people cannot create different, or "new," types of property because courts consistently refuse to recognize all but a limited number of property types.[44] Understanding the numerus clausus theory is important to understanding this Article; however, while important, this theory is ultimately unpersuasive for the reasons discussed below.

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[42] *See* Pomeroy, *WPH*, *supra* note 9, at 517 (citing 8 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-102:1 (2012) and contrasting the wildly fluctuating law for real property with "the relatively uniform law relating to personal property fostered by the Uniform Commercial Code," which arguably resulted from states' fear of capital flight to more accommodating jurisdictions).

[43] *See* Pomeroy, *WPH*, *supra* note 9, at 526–27 (discussing the accepted suite of property forms, comprised of a discrete number of present property interests, future property interests, and non-possessory property interests). *But see* Abraham Bell & Gideon Parchomosvsky, *Of Property and Federalism*, 115 YALE L.J. 72, 75–76 (2005) (arguing that "the numerus clausus description of property law as limited to [a] short menu is only partly accurate, because menus differ from state to state"); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1600 (2008) ("[A]lthough standardization is a stable feature of property law, the particular list of forms and their internal substance have always been dynamic . . . [yielding a] wonderful variety in the content of the list and in the substance of the forms at any given time and legal culture.").

[44] *See* Pomeroy, *WPH*, *supra* note 9, at 526–27; *see also* Keppell v. Bailey, (1834) 39 Eng. Rep. 1042 (Ch.) 1049 ("[I]ncidents of a novel kind [cannot] be devised and attached to property at the fancy or caprice of any owner."). "Historically, the courts have enforced this rule either by striking down parties' attempts to create new interests or by recasting any attempted 'fancy' as something else that qualifies as a more traditional property form." Pomeroy, *WPH*, *supra* note 9, at 526 (citing Merrill & Smith, *supra* note 2, at 11–12). Merrill and Smith believe that our legal system honors this conception of property as a static catalog not subject to parties' creativity. "They treat previously-recognized forms of property as a closed list that can be modified only by the legislature." Merrill & Smith, *supra* note 2, at 11. This inelasticity holds true for virtually all categories and subcategories of "property form." *See* Pomeroy, *WPH*, *supra* note 9, at 526–27 (discussing the closed nature of possessory estates, future interests, concurrent interests, personal property, intellectual property, and creditor property rights). Indeed, almost all attempts to exercise creativity in terms of property types arises in the context of trust law, in an attempt to work around the courts and their unwillingness to honor parties' attempts at imagination. *See id.* at 527. Of course, while Merrill and Smith's view on the numerus clausus "phenomenon" is widely cited, it is not the only explanation for the numerus clausus. *See, e.g.*, *infra* note 63.

1. The Numerus Clausus as an Exception to Heterogeneity

Merrill and Smith's numerus clausus theory attempts to explain why property law is uniquely uniform when it comes to the types of estates that courts will recognize.[45] Merrill and Smith claim that this is a "stealth doctrine"[46] and have largely developed it based on the case of *Johnson v. Whiton*.[47] Therein, Royal Whiton left some land to his granddaughter "and her heirs on her father's side."[48] The court treated this as an attempt to create a new property form and disallowed it, refashioning the devise as a fee simple absolute.[49] Merrill and Smith view this as a seminal case, as it fits their view of the numerus clausus as a widely applied, but never articulated, doctrine.[50]

The reason for this doctrine, Merrill and Smith claim, is that new property types create costs in excess of their benefits and that courts can, and should, refuse to recognize them.[51] More specifically,

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[45] *See* Merrill & Smith, *supra* note 2, at 69; *see also* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5 (2009). *See generally* Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165–66 (1999) (describing a "boundary principle," which funnels property ownership into well-known forms in order to keep "property categories from each other and help to keep resources well-scaled for productive use"). Heller ultimately diverges from Merrill and Smith in a number of specifics, *see infra* note 63, but his explanation of the resistance to unending property types is helpful. He speaks in terms of "legal things." *See id.* at 1176. According to Heller, "[w]ith legal things, it is the fee simple in Blackacre, not Blackacre itself, that is the core of private property. Halved, the legal thing may yield a present and a future interest, or a freehold and a non-freehold estate." *Id.* This fragmentation and sub-classification is fine, to some extent. However, "[a]s with physical fragmentation, at some point, preserving fragments of legal things as private property diminishes the productivity of resources even though each fragment may still have some positive economic value." *Id.*

[46] *See* Merrill & Smith, *supra* note 2, at 20–23.

[47] 34 N.E. 542 (Mass. 1893).

[48] *Id.* at 542.

[49] *See id.*

[50] *See* Merrill & Smith, *supra* note 2, at 69. Another widely cited example involves a testator attempting to leave a kind of "hybrid life estate," involving a life estate with the power to transfer the property in fee simple. *See id.* at 13. Courts have been hostile to this, construing the property as either a life estate or a fee simple, but not a hybrid of both. *See, e.g.*, Smith v. Bell, 31 U.S. (6 Pet.) 68 (1832); Sumner v. Borders, 98 S.W.2d 918 (Ky. 1936); St. Louis Union Trust Co. v. Morton, 468 S.W.2d 193 (Mo. 1971).

[51] *See* Merrill & Smith, *supra* note 2, at 3–5. According to Merrill and Smith, our courts do this sub silentio, without articulating or even acknowledging the numerus clausus doctrine. *See id.* at 9. Civil law countries are different in that they clearly recognize and label the numerus clausus doctrine, which is where Merrill and Smith get the name. *See id.* at 4 (citing Bernard Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem*, *in* OXFORD ESSAYS IN JURISPRUDENCE: THIRD SERIES 239, 241 (John Eekelaar & John Bell eds., 1987); KARL-HERMANN CAPELLE, BÜRGERLICHES RECHT: SACHENRECTH 13 (1963) ("Numerus Clausus, Typenzwang oder

they claim that new types of property create *informational* costs and burdens.[52] This is so because of the in rem (as opposed to in personam) nature of property.[53] Property rights are defined in the context of the thing, which is owned, as opposed to being defined in the context of the owners of the property.[54] Accordingly, items of property must effectively communicate an owner's rights and obligations to the world at large.[55]

The problem with new types of property is that they make this communication process difficult and costly.[56] "[T]hird parties have to expend time and resources to gain this knowledge, and unusual property forms increase the cost of doing this."[57] According to Merrill and Smith, it is this marginal informational cost that drives courts to apply the numerus clausus.[58] By limiting new forms of

Typenfixierung"); KLAUS SCHREIBER, SACHENRECTHT 28–29 (1993) ("Typenzwang und Typenfixierung")); *see also* J. Michael Milo, *Property and Real Rights*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 587, 593–600 (Jan M. Smits ed., 2006); Roderick R.M. Paisley, *Real Rights: Practical Problems and Dogmatic Rigidity*, 9 EDINBURGH L. REV. 267, 267 (2004). *But see infra* note 63 (discussing this phenomenon in other, though related, terms).

[52] *See* Merrill & Smith, *supra* note 2, at 39.

[53] *See* Merrill & Smith, *supra* note 3, at 359.

[54] This conflicts with the view of property rights as a "bundle of rights." *Compare* ADAM SMITH, LECTURES ON JURISPRUDENCE 9–86 (R.L. Meek et al. eds. 1978), *and* JEREMY BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 164 (Charles Warren ed., 1945), *with* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 370 (1954) (characterizing property as an "exclusive right to control an economic good").

[55] *See* Merrill & Smith, *supra* note 3, at 359. "In order to avoid violating another's property rights, [individuals] must ascertain what those rights are. In order to acquire property rights, [individuals] must measure various attributes, ranging from the physical boundaries of a parcel, to use rights, to the attendant liabilities of the owner to others (such as adjacent owners)." Merrill & Smith, *supra* note 2, at 26.

[56] *See* Pomeroy, *WPH*, *supra* note 9, at 529.

[57] *Id.* Heterogeneity of property forms would create higher cost because it would require both the parties to a given transaction and third parties to process and understand additional information. *See* Merrill & Smith, *supra* note 3, at 359; Merrill & Smith, *supra* note 2, at 26–27 (citing Henry Hansmann & Reinier Kraakman, Unity of Property Rights 5–6 (Nov. 17, 1999) (unpublished manuscript) (on file with the Yale Law Journal)). Indeed, it is the costs borne by third parties that Merrill and Smith focus on. They claim that property owners will not take account of these costs because they do not bear them. *See id.* at 27. Accordingly, property "works" only when it is simple and standardized enough that all third parties can understand the rights that flow from property easily and with little or no cost. *See id.* at 28.

[58] *See* Merrill & Smith, *supra* note 2, at 25–26 (relying upon Keppell v. Bailey, (1834) 39 Eng. Rep. 1042 (Ch.) 1049). *But see* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 442 (1998) (casting some doubt on Merrill and Smith's views of the numerus clausus doctrine as a coherent response to systemic costs by claiming that that the numerus clausus theory, as developed in civil law France, "was largely the product of

property, then, courts guard against the informational burdens that would proliferate if parties could create whatever property form they wanted to create.[59] Of course, this limitation of freedom causes frustration to society because people cannot create whatever property form they would like and are instead forced to conform their affairs and actions to the relatively limited suite of property forms that courts acknowledge and permit.[60]

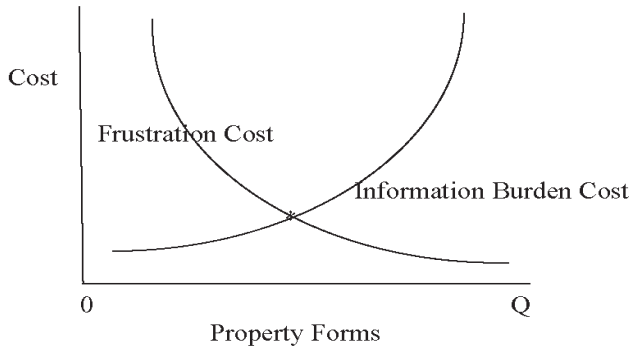
These opposing forces drive property law toward what Merrill and Smith call "optimal standardization," wherein the frustration costs and the information burden costs are balanced and so result in an "optimal" level of homogeneity.[61] This can be represented in graphic format:

the folklore and ideology of the French revolution and lacked a well articulated general rationale").

[59] This judicial limitation permits everyone "to limit his or her inquiry to whether the interest does or does not have the features of [pre-existing] forms." Merrill & Smith, *supra* note 2, at 33. "Perhaps the key point about the numerus clausus is informational: The forced standardization of property forms creates a kind of shorthand which, in turn, reduces information costs." Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 EMORY BANKR. DEV. J. 421, 497 (2005). This prevents everyone from "mistakenly mak[ing] inconsistent uses of the asset or underus[ing] the asset." Hansmann & Kraakman, *supra* note 8, at 382.

[60] *See* Merrill & Smith, *supra* note 2, at 35. Another way to understand the numerus clausus doctrine is to again compare contract and property law. *See, e.g.*, Mulligan, *supra* note 8, at 237–38. One of the most noticeable differences between the two is that contractual arrangements are highly customizable, while property arrangements are not. *See id.* This is because the default rules that govern contract law are generally alterable, whereas "a transfer of real or tangible property is forbidden unless the transfer is permitted by law and within one of 'a limited number of standardized forms.'" *Id.* at 238 (citations omitted). When a court reviews a highly negotiated contract, it endeavors endlessly to divine the parties' intent. *See* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. REV. 161, 162 (1965). But "[w]hen parties try to enforce property rights that lie outside of the recognized forms, courts shoe-horn those rights into one of the existing forms." Mulligan, *supra* note 8, at 238. It is this built-in restriction on imaginative customization, so easily discerned when contrasted with contract law, which exemplifies the essence of the numerus clausus.

[61] *See* Merrill & Smith, *supra* note 2, at 40.



"Here, the x-axis is the number of property forms allowed, the y-axis is cost incurred by society, and the two cost curves measure the social cost caused by unfettered freedom and the frustration costs caused by limits on agency."[62] The numerus clausus, in theory, balances these curves and so creates the "optimal" number of property forms that minimize the overall costs experienced by society at large.

This theory is, then, an excellent explanation for a relatively narrow area of the law (property form) that seems uniquely restrictive.[63] The only problem is that, upon further examination, the numerus clausus is not a very persuasive explanation for property form heterogeneity.

[62] Pomeroy, *WPH*, *supra* note 9, at 533. This graph is derived from one created by Merrill and Smith, and I have utilized it in both SVD and WPH.

[63] I have generally referred to the "numerus clausus" doctrine and have, more or less, entirely attributed it to Merrill and Smith. I think that is fair, given the enormous amount of attention they have brought to this concept. It is also reasonable, given that the thesis of this paper is that Merrill and Smith are, in essence, wrong. It is worth mentioning, however, that theirs is not the only justification for the widely accepted idea that there is a "closed number" of property forms in the common law system. Some believe that this minimization ensures the alienability of property. *See* Carol M. Rose, *What Government Can Do for Property (and Vice Versa), in* THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 214–15 (Nicholas Mercuro & Warren J. Samels eds., 1999); Heller, *supra* note 45, at 1176–78. Others claim that it arises from a need to facilitate the verification of ownership rights. *See* Hansmann & Kraakman, *supra* note 8. In truth, these three explanations are highly interconnected; however, throughout this paper, I shall primarily address the writings of Merrill and Smith.

2. Shortcomings of the Current Numerus Clausus Theory

Like many commentators, I initially reacted very positively to the numerus clausus doctrine.[64] The doctrine seemed to me to be a very cogent and helpful explanation of an interesting area of the law, and I began to consider very carefully what other applications it might have. To begin with, in SVD, I argued that the numerus clausus should apply to vesting documents, which drive much of the logistics of property transfer.[65]

I did this by focusing on the cost of vesting document heterogeneity and viewing these costs in the context of Merrill and Smith's informational burden analysis.[66] In brief, although the costs of heterogeneity are not possible to pinpoint precisely, they can be conceptualized. The difficulty with allowing any sort of document to be recorded is that doing so may ultimately confuse interested parties who attempt to utilize the recording system to ascertain title and ownership information.[67] In other words, "a wide range of potentially recordable documents negatively affects informational certainty."[68] This cost, then, is the same type of informational burden Merrill and Smith described when looking at property form.[69]

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[64] *See generally* Pomeroy, *WPH*, *supra* note 9,; Pomeroy, *SVD*, *supra* note 9. And there are many other examples of other positive reviews and commentaries on this iteration of the numerus clausus. *See, e.g.*, Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 317 (2009) (discussing the "recent wave of articles on the numerus clausus principle"); Mulligan, *supra* note 8, at 235 (discussing numerus clausus and listing other articles doing the same).

[65] *See* Pomeroy, *SVD*, *supra* note 9, at 992–93. Vesting documents are those that pass title from one party to another. *See id.* at 966 n.53 (citing MICH. COMP. LAWS § 554.13 (2012); OHIO REV. CODE § 5302.171 (West 2011); Sintz v. Stone, 562 So.2d 228 (Ala. 1990); Dixon v. Still, 121 A.2d 269 (D.C. 1956); Sun Valley Land & Minerals, Inc. v. Burt, 853 P.2d 607 (Idaho 1993); BLACK'S LAW DICTIONARY 1083 (abridged 6th ed. 1997)).

[66] *See* Pomeroy, *SVD*, *supra* note 9, at 992–93.

[67] *See id.* at 971. This is, of course, inimical to the recording system, which exists primarily to communicate clear and concrete information. *See id.* at 970. Recording statutes ensure this clarity by incentivizing title claimants to file vesting documents so that later-interested parties can review all relevant vesting documents and thereby understand chain of title. *See id.* (citing Dan S. Schechter, *Judicial Lien Creditors Versus Prior Unrecorded Transferees of Real Property: Re-Thinking the Goals of the Recording System and Their Consequences*, 62 S. CAL. L. REV. 105, 109 (1988); Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 183 (1983)).

[68] *See* Pomeroy, *SVD*, *supra* note 9 at 971.

[69] *See id.* at 975. This parallel here is not exact in that the exogenous costs identified by Merrill and Smith in the property form context probably do not apply to the vesting context. *See* Pomeroy, *WPH*, *supra* note 9, at 530. Exactitude is not necessary, however. So long as there is theoretical pressure to eliminate heterogeneity, the same analysis should apply, even if a theoretically lower burden

As such, I reasoned, the same countervailing forces should be brought to bear in the vesting document context as have been brought to bear in the property form context.[70] That is, courts should push back against new or unique types of vesting documents in the same way they have traditionally pushed back against inventive or "fancy" property forms.[71] This would have the effect of seeking an "optimal" number of types of vesting documents.[72] Additionally, I believed that the reasoning used to make that claim further validated the effectiveness of the numerus clausus doctrine as a powerful tool to understand property law generally.

Flush from that conclusion, I began to wonder just what area of property law could not be viewed through the lens of the numerus clausus. Ultimately, I concluded that the answer was none. In WPH, then, I expanded the informational burden analysis of SVD, arguing that it should apply to all of property law.[73] In other words, all areas of property law exhibit "a failure in the broadcast that systemically flows from property, creating difficulty both for the immediate parties concerned and for all parties, who must always be on the lookout for new, or different, rights that upset standardized calculations."[74]

The additional examples I used to make this point related to the areas of co-ownership, and third party property rights and the heterogeneity built into the American common and statutory law governing them.[75] Heterogeneity in all of these distinct areas of property law creates confusion and makes it difficult for people to understand the rights that flow from property.[76] And, returning to

results in a theoretically more diverse optimum.

[70] *See* Pomeroy, *SVD*, *supra* note 9, at 992–93.

[71] *See id.* at 995.

[72] *See id.* at 992–93 (citing Merrill & Smith, *supra* note 2, at 40).

[73] *See generally* Pomeroy, *WPH*, *supra* note 9(arguing that the informational burdens that are key to Merrill and Smith's theory, and the push for optimal simplification that arises therefrom, exist in all areas of property law).

[74] *Id.* at 524 n.79.

[75] *See id.* at 514–16. Co-ownership refers to the laws governing the concurrent ownership of property by more than one party, and third party property rights refers to the potential rights of non-owners to property, primarily arising in the creditor-debtor context.

[76] *See id.* With respect to third party rights, consider the varying state laws regarding creditor rights in debtor property. Creditors can seize debtor assets throughout the country, but the rules governing how they do so change from state to state. *See id.* at 514–15 (citing numerous, differing state statutes regarding exemptions and differing case law regarding creditor rights in concurrent and marital property). This means that creditors and prospective creditors cannot uniformly understand and assess the property rights and the potential risks and

Merrill and Smith, heterogeneity in these other areas creates the same kind of burden that the numerus clausus is supposed to be preventing in the context of property form.[77] This is especially notable, given that the numerus clausus could seemingly apply to all areas of property law in the same way it has, according to Merrill and Smith, been applied to property form.[78]

This, I now think, is a problem. If the numerus clausus so nicely justifies homogeneity due to the problems and costs that arise from

rewards inherent in the extension of credit, thereby affecting an enormous part of the economy. *See id.* at 516 (pointing out that "more than $1.2 trillion of residential mortgages were extended to borrowers in 2011 alone"). With respect to co-ownership, there is widespread variability among different jurisdictions in that the states often treat the well-known, traditional suite of co-ownership interests differently in numerous ways. *See id.* at 535 (citing Riddle v. Harmon, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980) (recognizing differing law as to existence of unities of title necessary to creation of joint tenancy)). Without a set of standard rules or laws, it is not possible for any party to know precisely what characteristics attach to a given property interest.

[77] Take, for example, the area of third party property rights. In this context, different states grant different rights in debtor property to creditors. *See, e.g.*, Pomeroy, *WPH*, *supra* note 9, at 515. This means that creditors to a particular transaction must take extra care to fully understand their potential creditor property rights (i.e., their remedies). It also means, however, that *all creditors* everywhere must take extra care every time they enter into, or evaluate entering into, a transaction. This is because the mere potential for uncertainty infects non-parties. *See* Merrill & Smith, *supra* note 2, at 27 (citing Hansmann & Kraakman, *supra* note 57, in discussing how permitting new, or "fanciful," types of property interests in a watch would make all potential watch-buyers anxious about buying a non-uniform watch and would cause them to incur extra costs to guard against such an outcome). This same sort of analogy can be made in any area of property law: heterogeneity that touches upon ownership rights will inevitably lead to increased cost, both with respect to the parties at issue and with respect to all third parties.

[78] If the numerus clausus were applied to vesting heterogeneity, the many different kinds of vesting documents would be reduced and simplified, *see* Pomeroy, *SVD*, *supra* note 9, at 993; if it were applied to third party rights, all jurisdictions would be pushed toward a more standard set of exemptions and creditor rights, *see* Pomeroy, *WPH*, *supra* note 9, at 535–37; and, if it were applied to co-ownership, the conflicting laws associated with these property interests would narrow, *see id.* Simply put, the variations from jurisdiction to jurisdiction would go away, leaving a smoother, more wholly "Americanized" property law. *See id.* at 542. *See also* S. ANIL KUMAR & N. SURESH, OPERATIONS MANAGEMENT 198 (2009) (tying together standardization and simplification). This does not mean, of course, that all heterogeneity would disappear. As indicated above, the numerus clausus does not impose a rigid sameness. *See supra* note 62 and accompanying text. Rather, it pushes the law toward an optimal point of homogeneity, wherein the informational costs of variety are balanced with the need for inventiveness. *See supra* note 61 and accompanying text. As described in WPH, "a widespread heterogeneity numerus clausus would take effect—on a case-by-case basis, continually evaluating new or different property rules to balance the extent to which such newness benefits the law with the extent to which that same newness harms the legal system." Pomeroy, *WPH*, *supra* note 9, at 537.

heterogeneity, why is it that only one area of property law is homogenous? In WPH, I mostly passed over the issue, noting that it was a question for another day.[79] Instead, I analyzed the legal system's failure to change or adapt in an ongoing fashion, focusing on the extraordinary cost that changing settled property law would cause.[80] I continue to believe that this is valid—property law, though fractured and often uncertain, is far too economically important to change in a retroactive manner.[81] However, upon further reflection, I think the question of why the numerus clausus has not created blanket uniformity throughout property law is a fatal flaw belying the entire doctrine.

Consider an analogy. Suppose that there is a doctor in the early 20th century, and a man comes to him complaining of headaches, nausea, and loss of appetite. After a battery of tests and questions, the doctor diagnoses the man as having typhoid fever.[82] Being a curious doctor, he delves deeper, attempting to discover the cause of this long-known but little-understood disease. He asks questions about the patient's family, job, diet, and living situation. Eventually, after digging deeper, he focuses on the man's diet. Recently, the man cut most meat out of his diet, now eating primarily fruits and vegetables—food that he does not find appetizing. The doctor

[79] *See* Pomeroy, *WPH*, *supra* note 9, at 537–38 ("It is not entirely clear from the research set forth and examined here precisely why it is that the informational burdens associated with property form heterogeneity had a stabilizing influence, while those associated with other areas of property law have not had a similar influence," but "this question is largely beyond the scope of this article.").

[80] *See id.* at 532. In other words, rather than asking why the numerus clausus has not homogenized all of property law, I focused on why courts have not *reacted* to the doctrine, in reviewing new property law issues and in re-evaluating old precedent. *See id.* This is a prospective question, ignoring the potential ex ante application of the numerus clausus that Merrill and Smith claim has occurred with respect to property form.

[81] The example I gave in WPH concerned attempting to impose uniformity in a state (Nevada) that has historically permitted what is known as a grant, bargain, and sale deed (a "GBS deed"). *See* Pomeroy, *WPH*, *supra* note 9, at 540. This type of vesting document is unknown in many jurisdictions and so would conceivably have never been permitted had the first Nevada court with an opportunity disallowed it. *See id.* That does not mean, however, that present courts should do so, as such an action would limit creativity (the kinds of costs traditionally associated with the numerus clausus) *and* create a host of present and future "roll-back" costs (like correcting future users and purging old documents). *See id.* at 541. All attempts to create uniformity would have similar costs. Indeed, in the context of many areas of property law, these costs are likely structural and pronounced, given that our recording system cements into place past practices. *See id.*

[82] *See Water, Sanitation and Hygiene*, UNICEF, http://www.unicef.org/wash/index_wes_related.html (last visited Jan. 31, 2014) (noting that symptoms of Typhoid fever "are characterized by headaches, nausea and loss of appetite").

examines other patients with typhoid, and they all suffer from loss of appetite, as well. As such, the doctor reaches a conclusion: typhoid fever is caused by eating unappetizing vegetables!

Obviously, this conclusion is untrue.[83] But let us reflect on the logic of the analytical process of our doctor and his conclusion. It is true that typhoid typically causes loss of appetite and that, therefore, it is easy to associate loss of appetite with typhoid.[84] However, there are many, many diseases that cause loss of appetite,[85] and our hypothetical patient does not have any of those diseases, according to the doctor. Our doctor, then, is painting with far too broad a brush. The consumption of unappetizing vegetables can be used to explain a whole host of diseases and seems equally convincing with respect to each of them, but it does not actually cause any of them.

I think this is what Merrill and Smith have done. They have selected a facially logical explanation for the homogeneity of the law governing property form and have therefore put that forth as *the* explanation. What they have not considered (like our doctor did not consider) is that heterogeneity drives up costs in all areas of property law because the informational burdens (which drive Merrill and Smith's numerus clausus construct) are present throughout property law, not just in the context of property form. That this is so, despite the fact that the homogeneity that Merrill and Smith claim flows from those burdens is wholly absent in virtually every other area of property law, significantly weakens Merrill and Smith's central thesis.[86] It is not logically possible to tie together cause and effect if

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[83] *See, e.g.*, *The Real Cause of Typhoid Fever Accidentally Discovered*, INSIDE SCIENCE (July 19, 2013), http://www.insidescience.org/content/real-cause-typhoid-fever-accidentally-discovered/1212. Typhoid Fever is caused by the bacterium *Salmonella typhi*, a pathogen that is often found in dirty water or contaminated food.

[84] *See, e.g.*, *Typhoid Fever*, WEBMD, http://www.webmd.com/a-to-z-guides/typhoid-fever (last visited Jan. 31, 2014); *Common Water and Sanitation Related Diseases*, UNICEF, http://www.unicef.org/wash/index_wes_related.html (last visited Jan. 31, 2014).

[85] *See, e.g.*, *Loss of Appetite*, *MEDICINENET.COM*, http://www.medicinenet.com/loss_of_appetite/symptoms.htm (last visited Jan. 31, 2014) (indicating that loss of appetite can be a symptom of Addison's disease, Amyloidosis, Cancer, Cat Scratch Disease—apparently a real malady, not just a terrible song—dementia, depression, kidney failure, postpartum depression, Rheumatoid Arthritis, stroke, and yellow fever, to name a few).

[86] Consider just a single example. "The numerus clausus principle is essentially nonexistent in intellectual property law." Mulligan, *supra* note 8, at 237–38. *See also* Heller, *supra* note 46, at 1174–75 (discussing the failure of patent law to "prevent[] excessive fragmentation"). This is so despite the presence of precisely the type of informational burdens identified by Merrill and Smith. *See* Mulligan, *supra* note 8, at 266 (describing, in terms of the difficulties of third parties in understanding and ordering rights, the confusion and costs caused by the differing types of licensing

the alleged cause exists in other contexts without an effect.

This sort of error is, it seems, related to the "sharpshooter fallacy." This is a logical error in which one does not establish the conditions of a "test" until after the results are "proven." The classic example of this fallacy is of someone shooting a wall and then painting a target around the bullet hole, thereby "proving" a bullseye and establishing his shooting accuracy.[87] Merrill and Smith did not do this in the classic sense. That would involve establishing and describing the numerus clausus and then determining that it could be used to explain property form homogeneity. Instead, I think they identified the "problem" of property form homogeneity,[88] came up with the "solution" of the numerus clausus, and then fit the two together, concluding that the one explains (or causes) the other. Rather than shooting against a wall and painting a bullseye, I think this is more akin to shooting against a wall and hitting many different bullseyes—but only focusing on one of them and then using that one shot to establish accuracy.

Instead of the sharpshooter fallacy, then, perhaps this sort of logical disconnect should be called the "shotgun fallacy." A shotgun generally uses a fixed shell to fire many smaller, spherical pellets called shot. The shot sprays out, with the individual pellets hitting in different places and creating a much wider blast radius. So, then, the pellets hit many "targets." However, that does not mean the shooter can point to a particular bullseye and claim that his good shooting caused the bullseye.

Similarly, the numerus clausus ultimately sprays out over a wide swath of property law, as discussed above.[89] It does "hit" property form, in the sense that heterogeneity would cause additional costs in this area of the law. However, the numerus clausus also "hits" other areas of the law in precisely the same sense.[90] As such—in the same way that our marksman cannot claim that his good shooting caused the bullseye or that our hypothetical doctor, above, cannot claim that

rights extant in the American system of intellectual property law).

[87] *See, e.g.*, Exxon Corp. v. Makofski, 116 S.W.3d 176, 186 (Tex. Ct. App. 2003) (giving a basic explanation of this fallacy, apparently sometimes called the "Texas Sharpshooter Fallacy").

[88] As can be inferred from the discussion above, the "problem" of homogeneity, as originally faced by Merrill and Smith, was that it was unique and so required explanation. *See supra* Part II.B.

[89] That is, the burdens and costs that drive informational burden analysis at the heart of the numerus clausus doctrine all seem to be present in other areas of property law as well. *See supra* Part II.B.

[90] *See id.*

eating unappetizing vegetables causes typhoid fever—I do not think that one can claim that the numerus clausus causes, or is uniquely connected to, the homogeneity of property form. The context here is slightly different, but the principle is apt: the numerus clausus, which seems equally applicable to all areas of property law, cannot serve as an explanation for something that manifests itself in just one, specific area of property law. In the end, the differing levels of homogeneity present in property form and the other areas of property law, despite the similar informational burdens inherent in all of property law, undercuts the use of the numerus clausus as a reasonable, logical explanation of the sort urged by Merrill and Smith.

To be fair, Merrill and Smith could still be correct if it were demonstrated that property form heterogeneity fosters informational burdens, if not uniquely, then in a different manner, or to a higher degree, than it does in other areas of property law.[91] However, there is no real reason to think that this is so. As discussed above, Merrill and Smith do a very nice job of describing the numerus clausus and of explaining the costs that arise from heterogeneity in that context.[92] But that description and that explanation seem to be *just as* applicable in virtually every other area of property law.[93] Indeed, the argument above regarding the theoretically widespread presence of heterogeneity-induced informational burdens in all of property law appears to be uniform in all particulars. In other words, conceptually, there is some reason to think that heterogeneity *necessarily* creates cost in every area of property law.

To understand this, return again to the basic purpose of property: encompassing and conveying rights.[94] It is, to once more use Merrill and Smith's term, a way to "broadcast" information about legally cognizable rights and obligations.[95] This purpose holds true for all aspects of property. All of the different facets of property law[96] combine to define what we "own" and what that means. Accordingly, confusion over any one of these areas creates confusion throughout

[91] *See* Pomeroy, *WPH*, *supra* note 9, at 524 n.79.

[92] *See id.*

[93] *See id.*

[94] Property law defines ownership rights in property. *See* Rose, *supra* note 31, at 577 (indicating that much of property is constituted of rules that "signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests").

[95] *See supra* note 73 and accompanying text.

[96] *See, e.g.*, Pomeroy, *WPH*, *supra* note 9, at 510 (setting forth a taxonomy that dissects property into its component pieces).

all systems that interpret and rely upon property principals—that is, confusion (created by heterogeneity) increases the costs for all participants and potential participants. This is precisely what troubled Merrill and Smith in contemplating property form heterogeneity;[97] but, again, it exists everywhere in property, and in equal measure.

In the end, then, it appears that the numerus clausus, fashioned by Merrill and Smith as a remedy to informational overload that is uniquely applicable to property form, is a misdiagnosis and does not withstand theoretical scrutiny.[98] In essence, "an argument that explains everything, explains nothing."[99] Of course, that raises the obvious question of what does really explain the unique homogeneity of property form. I address this question in Part III, below, and come

[97] *See supra* note 57 and accompanying text.

[98] Also casting Merrill and Smith's hypothesis into doubt is the fact that a number of the cases cited by them in support of their diagnosis of a sub silentio numerus clausus seem not to bear closer scrutiny. *See, e.g.*, Sumner v. Borders, 98 S.W.2d 918 (Ky. Ct. App. 1936) (cited in Merrill & Smith, *supra* note 2, at 14 n.44); Thompson v. Baxter, 119 N.W. 797 (Minn. 1909) (cited in Merrill & Smith, *supra* note 2, at 22 n.87); Garner v. Gerrish, 473 N.E.2d 223 (N.Y. 1984) (cited in Merrill & Smith, *supra* note 2, at 22 n.88); Smith's Transfer & Storage Co. v. Hawkins, 50 A.2d 267 (D.C. 1946) (cited in Merrill & Smith, *supra* note 2, at 11–12 n.28). Three of these cases are lease cases, and they all ultimately permit the creation of a lease that is neither a traditional term of years nor a traditional tenancy at will. *See Thompson*, 119 N.W. at 799 (permitting the creation of a life estate terminable upon the lessee's moving away from the locale of the leased property); *Smith's Transfer*, 50 A.2d at 268 (construing a lease as creating a term for one year, unless World War II had not terminated at that time, in which case the lease shall continue until that war terminated "by proclamation of the President of the United States, or by joint resolution of Congress of the United States"); *Garner*, 473 N.E.2d at 225 (interpreting a lease term dependent on one party's discretion as a "determinable life tenancy"). Indeed, *Thompson* cites a number of additional cases permitting determinable leasehold life estates. *See Thompson*, 119 N.W. at 799 (citing, among others, *Hurd v. Cushing*, 24 Mass. 169 (1828), which permitted a lease for "so long as the salt works located thereon should continue in operation" and *Warner v. Tanner*, 38 Ohio St. 118 (1882), which permitted a lease for yearly rent so long as the lessee should continue to occupy the premises for a particular purpose). And the first case mentioned above, *Sumner v. Borders*, actually turns upon a local statute. *See Sumner*, 98 S.W.2d at 919. It is true, then, that the Kentucky Court of Appeals turned a seemingly "fancy" interest into a fee simple. *See id.* However, it did so not due to any concern out of informational burdens, but rather at the direction of the state legislature. *See id.* That this distinction is quite relevant will become apparent later on in this Article. *See infra* Part III.

[99] *See* Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1527 (2001). Though not credited in the foregoing article, this quote is often attributed to Karl Popper, an Austro-British philosopher and professor at the London School of Economics, as a description of the sharpshooter fallacy. I believe the logic inherent in the statement is my self-styled "shotgun fallacy."

to a much earthier, though admittedly less elegant, conclusion than Merrill and Smith.

III. THE HISTORY OF PROPERTY

"He who controls the past controls the future."[100]

Rather than seeking the key to our eclectic property laws from a clever articulation of economic ideals,[101] we should look instead to historic England and to the motivations and circumstances that influenced the English monarchy and nobility as they engaged in a series of skirmishes that ultimately shaped modern property law. In particular, we need to examine a couple of critical statutes passed in the thirteenth century, which ultimately had an outsized effect on our concept of estates and property form. In reviewing this important part of our common law history, we should be mindful of the underlying motivations of the parties in power who created these laws. We should keep these motivations in mind, first, because it aids in our understanding of just how it is that these ancient decisions fundamentally changed property law, and, second, because those underlying motivations are with us to this day and reverberate through our modern laws and circumstances.

To begin, let us stipulate that most affairs of collective human activity are founded upon contests for money and power[102] and examine how property has been shaped in that context. Not surprisingly, given this discussion, an analysis of the history of our laws reveals the omnipresent desire of those who craft these laws for money and power. The interplay of these desires and competing concerns, over the centuries, manifested itself in a series of competing, evolving statutes and laws in early English common law. It is the nature of these statutes, and the interests underlying them, which really explains what has happened to property.[103] Indeed, the

[100] GEORGE ORWELL, *1984* 178 (Good Book Classics, 2013) (memorably quoted by Rage Against the Machine in *Testify*, 1999).

[101] Again, I wish to give credit to Merrill and Smith's theory. I think it is an elegant one, and I think it has very much stoked an interest in a really interesting area of property law. Ultimately, however, I do not think it is applicable in the way Merrill and Smith contend.

[102] There is, of course, no real footnote that can support this subjective claim. I think it well within the realm of reasonability, however, given an even cursory review of human history. Laws, wars, migrations, discovery—virtually any important historical element of human activity can be credibly ascribed to humanity's thirst for money and power.

[103] Given the focus of this paper, this historical analysis is intended to explain the unique homogeneity of property form against the backdrop of property's generally heterogeneous nature. Additionally, it is worth noting that this analysis is not

very nature of our system of estates—from which ultimately springs the unique homogeneity of property form—arises from the contest for wealth and influence.

To understand the relevant history, one must begin with the concepts of feudal incidents. Conceptually, all land belonged to the king and was granted from him to his lords in exchange for "feudal incidents."[104] These lords could, in turn, transfer the land to others in exchange for their own feudal incidents. These incidents varied a great deal.[105] However, at their base, they benefited the king (or overlord) at the expense of the inferior landowner and can thus be viewed, broadly, as a tax.[106] One of the earliest contests over land, power, and wealth, then, involved the struggle between the king and the nobility over these incidents. And one of the earliest rules serving

intended to be an exhaustive history of English statutes, even as they might relate to the topic at hand. There are almost certainly additional statutes, aside from the ones discussed momentarily, that would relevant here. Nevertheless, I believe that these statutes serve as an adequate basis to broach, and establish, my hypothesis that property homogeneity is more appropriately attributed to a historical review of English common law than to Merrill and Smith's informational burden analysis.

[104] "After the Battle of Hastings, William declared himself the owner of all land in England. Rather than award outright ownership of land to his supporters, William . . . kept some strings attached to the land." Roy T. Black, *The Historical Background of some Modern Real Estate Principles*, 34 REAL EST. L. J. 327, 334 (2005). "[T]he landholders essentially became tenants holding in service of the king." *Id.* "The landholding lords owed different forms of rent, known as feudal incidents . . . ." *Id.* The feudal incidents can also be viewed as taxes. *See infra* note 106. This practice instituted by William caused land to be held by a relatively small class of wealthy individuals. *See* H.R. LYON, ANGLO-SAXON ENGLAND AND THE NORMAN CONQUEST 327–28 (2d ed. 1991) ("By 1086 when the Domesday census was taken there were only two English tenants-in-chief of baronial rank out of approximately 180 in the whole of England.").

[105] *See* James M. McElfish, Jr., *Property Rights and Wetlands Regulation*, SA83 ALI-ABA 439, n.54 (1996) ("The free tenures were: tenure by knight service (requiring military service and the feudal incidents and aids); serjeanty (requiring personal service to the lord); frankalmoin (involving lands granted to religious establishments who were then obliged to say masses or prayers); and free and common socage (fixed rental of lands)."); B.H. McPherson, *Revisiting the Manor of East Greenwich*, 42 AM. J. LEGAL HIST. 35, 39 (1998) ("The number and character of incidents varied with the nature of the tenure."). Eventually, the practical application of this variation disappeared, as most of these incidents were commuted to simple monetary payments. *See* Mark A. Senn, *Shakespeare and the Land Law in his Life and Works*, 48 REAL PROP. TR. & EST. L.J. 111 (2013).

[106] *See* David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1015 (2011) ("These feudal incidents . . . of wardship and marriage can be viewed as a tax."); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom*, 85 CORNELL L. REV. 1035, 1041 (2000) ("The Statute of Uses, enacted in 1535, eliminated the use as a tax avoidance device and restored the king's power to collect feudal incidents."); Lior Jacob Strahilevitz, *The Right to Abandon,* 158 U. PA. L. REV. 355, 399 (2010) ("Real property taxes are the modern-day equivalent of feudal incidents.").

the king's interest in this struggle was the rule of primogeniture.[107] Under this system of inheritance, ownership of property passed from father to eldest son, leaving other children and third parties with very little or nothing.[108] This served the interests of the king because it limited the total number of landowners in the feudal system.[109] The king, and his underling overlords, desired this because division and fragmentation of land could affect, and sometimes reduce, the incidents and relief flowing to the overlords and, ultimately, the king.[110] Of course, in this, the king's interest was directly opposed to those of the landowners, who would have liked to elude incidents and who also thereby lost any ability to transfer and control their land, the principal form of wealth.[111]

Inevitably, various landowners, seeking control of "their" property, violated the rule of primogeniture.[112] This, in turn, led the king and the overlords (and, more generically, any ancestors desiring to exercise control from beyond the grave) to create the fee tail.[113] This estate, generally created by words to the effect of "To X and the heirs of his body," was meant to grant the land to A for life and to his eldest son upon survival, and to repeat that process *ad infinitum*.[114] Eventually, the courts became involved, exercising a strongly anti-alienation[115] prerogative and permitting the grantees of fee tails to

[107] *See* Meggie Orgain, *Death Comes to Us All, but Through Inheritance, the Rich can get Richer: Inheritance and the Federal Estate Tax*, 4 EST. PLAN. & CMTY. PROP. L.J. 173, 175 (2011).

[108] *See id.* at 175 (2011); *see also* Christine G. Clark, *Women's Rights in Early England*, 1995 B.Y.U. L. REV. 207, 226–30 (discussing the effect of this practice on women).

[109] *See* Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 64 (2006); *see also* II POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 362 (2d ed. 1905) ("Primogeniture reflects not family interest but rather the interests of a stranger to the inheritance—some king or lord whose interests demand that the land shall not be partitioned . . . . The great fief, which is both property and office must, if it be inherited at all, descend as an integral whole.").

[110] *See* William A. Reppy, Jr., *Judicial Overkill in Applying the Rule in Shelley's Case*, 73 NOTRE DAME L. REV. 83, 129–35 (1997); *see also* Stephen W. DeVine, *Ecclesiastical Antecedents to Secular Jurisdiction Over the Feoffment to the Uses to Be Declared in Testamentary Instruments*, 30 AM. J. LEGAL HIST. 295, 295 (1986).

[111] *See* Champine, *supra* note 109, at 64.

[112] *See* Marianne M. Jennings, *Real Property Could Use Some Updating*, 24 REAL EST. L.J. 103, 106 (1995).

[113] *See* Thomas C. Martin, *Haunted by History: Colonial Land Trusts Pose National Threat*, 48 WM. & MARY L. REV. 303, 312 n.59 (2006) ("The term 'fee tail' comes from the early modern English doctrine of entail, which arose out of the principle of primogeniture.").

[114] *See* Kent D. Schenkel, *Exposing the Hocus Pocus of Trust*, 45 AKRON L. REV. 63, 101 (2012).

[115] English courts have long favored the free alienation of property interests. *See*

avoid this sort of limitation.[116] The back and forth involving the king and other landholders (the tax recipients), the inferior landholders (the taxpayers), and the courts continued when, in 1285, the legislature passed a statute called the *De Donis Conditionalibus*.[117] This statute seemed to cement into place a victory for the tax recipients by eliminating the fee simple conditional and legitimizing the fee tail.[118] However, in a response that is not surprising in hindsight, the courts again responded by creating the concept of "disentailing," which essentially permitted the tenant in tail to convert their interest into a fee simple absolute.[119]

So the contestants went back and forth, everyone trying, like Agamemnon in our story above, to establish their base of power and revenue. More to the point, however, this back and forth began to shape our concept of property. Indeed, the very concept of an "estate" as a legal metric of ownership can largely be traced to this struggle and, more specifically, to the *De Donis Conditionalibus*.[120]

> As a result of *De Donis* . . . the medieval lawyers recognized that an entailed fee was somewhat less than a fee simple and that the quantum of an estate had to be measured by its possible duration in time. Reversioners and remaindermen became holders of existing interests as opposed to holders of rights to obtain an interest when the scope of the real actions expanded. This recognition led to the conclusion

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Jessica L. Lacey, *The Dead Hand Loses Its Grip in Virginia: A New Rule for Trust Amendment and Termination?*, 29 U. RICH. L. REV. 1235, 1240 (1995).

[116] The courts relied on what is known the fee simple conditional to accomplish this. This estate becomes a fee upon the occurrence of some condition—in this case, the birth of issue. *See* John G. Shively, *The Death of the Life in Being: The Required Federal Response to State Abolition of the Rule Against Perpetuities*, 78 WASH. U. L.Q. 371, 374 (2000); *see also* Jennings, *supra* note 112, 106 ("[W]hen the judges read 'To A and the heirs of his body,' they said, 'Looks like a fee simple conditional to me. Once A has heirs, he can do anything he wants with the land, including giving it to a [third party].'" (footnotes omitted)).

[117] *See* Jennings, *supra* note 112, at 106.

[118] *See id.* at 106–08. Thereafter, the language, "To A and the heirs of his body," clearly referred to the grantor's lineal descendants. *See id.* at 107. As such, instead of the estate ultimately vesting in the grantee (as under the fee simple conditional construction), the grantor indefinitely retained a reversion for so long as the possibility existed that the line of natural descendants might expire. *See* David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History; Part I: Shared History*, 34 REAL PROP. PROB. & TR. J. 143, 176 (1999).

[119] *See* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 663 (1938) ("[T]he power to disentail makes the tenant in tail the substantial owner and causes interests after the estate tail to be in substance gifts by the last tenant in tail at the time of expiration of his estate.").

[120] *See* Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 REAL PROP. PROB. & TRUST J. 507, 519 (2003).

> that a fee simple could be comprised of several interests or estates. In this sense, the root of estate (L. *status*, or standing or position), shows that an estate existed in relation to other possible interests.[121]

Of course, the back and forth detailed above did not stand alone. Also implicated in this early fashioning of estates was the *Statute Quia Emptores*. This statute, not surprisingly, resulted from the partial victory of the king and his taxing cohortrepresented by the *De Donis Conditionalibus*.

When tenants lost some of their ownership rights, under the *De Donis Conditionalibis*, they turned to other means to exploit their property.[122] To understand what occurred, recall that, at its base, all property in Norman England belonged to the king and was "rented" out to his followers in exchange for different forms of "rent" or "taxes" in the form of feudal incidents.[123] Those followers also desired to turn the land into rent. As such, after receiving the use of the land from the king, they granted an estate in the land to a subordinate in exchange for their own feudal incidents.[124] This process created "a pyramidal land holding structure with the king at the top of the pyramid and layers of landholders below him down to lowly serfs, who were in essence sharecroppers, paying their land rent with agricultural products."[125] So this process, called subinfeudation,[126] permitted the landowners who had lost out under *De Donis Conditionalibis* to raise funds without violating primogeniture or fee tail restrictions by recruiting subordinate holders to pay feudal incidents.[127]

The process of subinfeudation, however, was not a

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[121] *Id.* (footnotes omitted); *see also* C.M.A. McCauliff, *The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations and the Interests of Women*, 66 TUL. L. REV. 919, 981–82 (1992) ("De Donis has largely been credited with establishing the doctrine of estates . . . [because] the avowed intention of this Act was simply to establish uniform rules for the regulation of conditional fees, but its effect was to create a form of estate of inheritance unknown to common law.").

[122] "Exploit," here, is used in a strict sense and is not pejorative. It merely means "to make productive use of." *See Exploit*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/shape (last visited Feb. 2, 2014).

[123] *See supra* note 104 and accompanying text.

[124] *See* Black, *supra* note 104, at 337 ("The barons in turn granted the use of lands to knights who owed incidents to the barons."). This granting of an estate is also known as "enfeoffment." *See* Senn, *supra* note 120, at 557.

[125] *See* Black, *supra* note 104.

[126] "Subinfeudation" is sometimes referred to as "subinfeudination," though the two terms appear to possess the same meaning.

[127] *See* Julia Belian, *Medicaid, Elective Shares, and the Ghosts of Tenures Past*, 38 CREIGHTON L. REV. 1111, 1146 (2005).

straightforward one. Let us take for example a situation wherein the king grants an estate in land to A. As we have discussed, A owes feudal incidents to the king, and A can subinfeudate by granting an estate in the land to B in exchange for B's promise to pay future feudal incidents. The problem with subinfeudation, from the king's perspective, was that B (the newly enfeoffed tenant) was not required to pay feudal incidents directly to the king.[128] Instead B paid his[129] incidents directly to A, who now became an overlord himself.[130] Of course, A was still required to pay *his* incidents to the king.[131] A often had difficulty doing so, however, because overlords in A's position regularly reduced the kinds of incidents requested from grantees like B in order to increase the initial purchase price.[132]

As such, in keeping with our recurring theme of parties seeking economic advantage through legislative action, the king (and overlords who similarly suffered due to subinfeudation) sought to block such transfers by statute. This effort culminated in the *Statute Quia Emptores*, passed in 1290.[133] Under this statute, subinfeudation (and its accompanying devaluation of feudal incidents) was prohibited, but lords were required to accept substitution[134] upon the payment of a fee.[135] This prohibition of subinfeudation significantly simplified the newly conceived system of estates by eliminating the very existence of a whole category of property claims.[136]

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[128] *See* Senn, *supra* note 120, at 556–57 (discussing the differences between substitution and subinfeudation).

[129] And, due to primogeniture and other Norman traditions, it was always a "he." *See generally* Clark, *supra* note 108, at 226–30.

[130] *See* Senn, *supra* note 120, at 557.

[131] *See id.* at 557. In this, subinfeudation is different from substitution. "By substitution, the tenant stepped out of the feudal hierarchy and the grantee replaced him. The grantee then owed the lord whatever services and incidents his grantor had owed." *Id.* at 556.

[132] *See id.* at 557. So, for example, A may be required to provide the king with ten knights per year, while B may only be required to pay A "a peppercorn" each year. *See, e.g.*, *id.* This economically negative effect of subfeudation was compounded, from the king's perspective, because the insertion of B into the chain of ownership prevented the property from escheating to the king upon A's death, and all the king ended up with then was a tenant (B) who pays a peppercorn each year. *See id.* at 557 n.398 ("The seignory (i.e., the tenant's right to the peppercorn) reverts; the land does not.").

[133] *See* David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1856 (2013); Belian, *supra* note 127, at 1146.

[134] *See supra* text accompanying note 131 (discussing substitution).

[135] *See* Belian, *supra* note 127, at 1146.

[136] *See* Michael A. de Gennaro, *The "Public Trust" Servitude: Creating a Policy-Based Paradigm for Copyright Dispute Resolution and Enforcement*, 37 TEX. TECH L. REV. 1131, 1139 (2005) (indicating that subinfeudation created "many layers of competing

What we see occurring here is that the historical contest between taxpayers and tax recipients created the foundations of our property system; established the very nature of the property forms over which I have spilled so much ink; and immediately began to cabin the number of acceptable property forms.

This limitation occurred naturally and implicitly as a result of the categorical nature of the *De Donis Conditionalibis*[137] and more explicitly as a result of the *Statute Quia Emptores*'s bright line elimination of various kinds of interests. This history, then, created our fixed concept of ownership as a system of estates; and once that structure was initially populated, innovation largely ceased.[138]

That is not to say that all attempts at customization ceased. The contest over money and power is never-ending, and the struggle between those seeking taxes and those seeking to avoid them will never end. Take, for instance, the Statute of Uses. Though the system of estates and the generally recognized suite of property forms were largely finalized after 1300, landowners discovered a way to avoid the payment of feudal incidents "by conveying land to one party 'for the use' of another."[139] This conveyance, ancestor to the

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interests").

[137] Once a concept like an "estate" is created, it must be classified. Here, estates were quickly broken into either "estates in possession or estates in expectancy." *See* Senn, *supra* note 120, at 519–20 ("Estates in possession included the fee simple, which was the largest estate and descended to lineal and collateral heirs, the fee tail, which descended only to lineal heirs, and the life estate. The estates in expectancy were the interests left over when the grantor gave less than all he owned: a reversion if the interest returned to him, and a remainder if it went to someone else.").

Categorization is, in and of itself, a limiting force and once bright lines are drawn around something, any innovation or exercise of creativity becomes a departure from the accepted. This has an effect on people and on customs—instead of continually improvising, trying to improve, and adapting to new circumstances, people instead view the world through the lens of custom and, at least, hesitate to step outside the norm. That is what occurred here, in the context of estates and property form.

[138] McCauliff, *supra* note 121, at 983:

> [I]nterests in land were virtually fixed by *De Donis*. [A]fter *De Donis*, new types of interests in land were for the most part not created. . . . The interests in land were the fee simple, the fee tail, and the life estate, with the possibility of a remainder or reversion in estates in tail or for life.

Id; *see also* Percy Bordwell, *The Common Law Scheme of Estates*, 18 IOWA L. REV. 425, 427 (1933) ("[T]he old categories remained except as affected by the *Statutes De Donis* and *Quia Emptores*, and probably will remain substantially unchanged as long as the common law system of estates continues."); Belian, *supra* note 127, at 1146 ("By 1300 or so, this push and pull had flattened the feudal pyramid and frozen the estates as they stood.").

[139] *See* Thomas, *supra* note 118, at 178.

modern trust, avoided feudal incidents of tenancy by separating legal title from beneficial (or equitable) title.[140] In response to the growth of this custom and the eventual atrophy of feudal incidents, "[Henry VIII] forced through the Statute of Uses (1536), designed primarily to prevent evasions of these incidents, and set up the Court of Wards and Liveries to collect them."[141] This "desperate attempt" by the king to restore feudal revenues worked, effectively cutting off the use as an effective tax avoidance scheme.[142] More relevant to us, though, is that this serves as yet another example of how economic concerns drive legislation, which, in turn, drives the shape of our property system. In the case of the Statute of Uses, Henry VIII's need for revenue led him to pass a statute that significantly changed the nature of property interests that had existed up to that time.[143]

The lesson to take from this, then, is that property law, generally, and property form, particularly, has been shaped by historical economic concerns. The *De Donis Conditionalibis*, the *Statute Quia Emptores*, and the Statute of Uses all affected our property forms—establishing the concept of estates, narrowing the types of estates, and ultimately affecting the kinds of legal interests permitted within our system—and all of these statutes arose from the interplay between citizen and government over taxes.[144] These historical forces are what

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[140] *See* R. H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1503 (1979); W. Ives, *The Genesis of the Statute of Uses*, 82 ENG. HIST. REV. 673, 674 (1967); Payson R. Peabody, *Taming CERCLA: A Proposal to Resolve the Trustee "Owner" Liability Quandary*, 8 ADMIN. L.J. AM. U. 405, 432 (1994); Claude Treece, *The ERA and Texas Marital Law*, 54 TEX. L. REV. 590, 610 (1976).

[141] JESSE DUKEMINIER ET AL., PROPERTY 190 (7th ed. 2010).

[142] *See* Percy Bordwell, *Seisen and Disseisin*, 34 HARV. L. REV. 592, 597–98 (1921). *See also* Max Gibbons, *Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate*, 50 UCLA L. REV. 1259, 1276 n.104 (2003) ("The Statute was the brainchild of King Henry VIII, who was running out of money and needed to concoct a system whereby landowners were unable to escape the feudal incidents owed to the Crown."). The Statute of Uses also greatly affected our system of conveyancing by permitting the transfer of real property by documents, *see id.*, thus bringing into "almost universal use modes of alienation that did not require the symbolic ceremony [of feoffment]." Joyce Palomar, *History of the United States' System of Conveyancing*, PATTON AND PALOMAR ON LAND TITLES § 3 (2012).

[143] *See* Jeffrey Evans Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV. 401, 417 (2005) ("[In 1536, the Statute of Uses] executed 'uses,' beneficial interests recognized in equity, making them into legal interests. Because it was possible to create many sorts of interests in equity that did not previously exist at law, the Statute of Uses made it possible for donors to create new legal interests."); Gibbons, *supra* note 142, at 1276 ("In 1536 the Statute of Uses was passed in England, the major effect of which was to convert equitable estates (uses) into legal estates by operation of law.").

[144] The argument that historical forces have shaped property, rather than an inherent informational cost-benefit analysis, is further supported by the types of

have shaped property, not something as ephemeral as the numerus clausus doctrine.[145]

The echoes of these forces are with us still. The property laws of England continue to affect American jurisdictions to this day.[146] And the struggle between tax recipients and taxpayers continues as well.[147]

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property that have faded into disuse. "In Blackstone's time, the *numerus clausus* was much more numerous, populated with incorporeal hereditaments such as corodies and advowdsons that no longer exist. Over time, these forms were pared down to the streamlined list that exists today." *See* Heller, *supra* note 46, at 1176 n.62. *See also* Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 Vand. L. Rev. 1597, 1610–11 (2008) (discussing a number of historical property forms that have been eliminated). Interestingly, these property forms were eliminated in and around the 14th Century, the timeframe immediately following the *De Donis Conditionalibis* and the *Statute Quia Emptores*. *See* Dictionary of the English Church, Ancient and Modern 158 (T. Moore 1881) ("By I Edward III. stat. 2, cap. 10, it was enacted that there shall be no more grants of corodies at the king's request by bishops, abbots, &c."). That these varied or heterogeneous property types were excluded at just this point in history seems to support the idea that it was really the need for taxes that created property form homogeneity.

[145] These historical forces explain the homogeneity of property form, but they do not explain why the rest of property law is so varied (unlike other areas of law). This heterogeneity may be attributable to the fixed nature of real property and the parochial interests that arise and attach to land in that context.

> Obviously, land does not move—it is forever tied to a single jurisdiction. This inability to enter any sort of stream of commerce or to seek out any other laws or rules may remove any incentive any jurisdiction has to accommodate other views or to evolve or attempt to reach any useful consensus.

Pomeroy, *WPH*, *supra* note 9, at 517. It may be that American jurisprudence, having taken property form as an established part of the background of property jurisprudence, immediately began to fracture across jurisdictional lines.

[146] *See* David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History: Part III: British and American Real Property Law and Practice—A Contemporary Comparison*, 34 REAL PROP. PROB. & TR. J. 443, 516 (1999) ("Almost every American state has by constitution or statute 'received' the English common law as the rule of decision in its courts, unless a contrary law or condition prevails in that state. The result is that, today, in real property matters, the common law of England plays a much more important role in America than in England."); *see, e.g.*, Van Rensselaer v. Hays, 19 N.Y. 68, 74 (N.Y. 1859) ("[I] am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Colony, and that it was the law of this State, as well before as after the passage of our act concerning tenures, in 1787.").

[147] There are many, many ways in which local states and jurisdictions profit from property. These include, without limitation, property transfer taxes, *see, e.g.*, Mushfique Shams Billah, *Arab Money: Why isn't the United States Getting Any?*, 32 U. PA. J. INT'L L. 1055, 1087 (2011); stamp taxes, *see* Bradley T. Borden & Mathews Vattamala, *Series LLCs in Real Estate Transactions*, 46 REAL PROP. TR. & EST. L.J. 255, 258 (2011); and, of course property taxes, *see* J. Lyn Entrikin, *Tax Ferrets, Tax Consultants, Bounty Hunters, and Hired Guns: The Property Tax Netherworld Fueled by Contingency Fees and Champertous Agreements*, 89 CHI.-KENT L. REV. 289, 289 (2014). Indeed, state and local governments collected nearly $478 billion in property taxes in the year ending on March 31, 2013. *See* Entrikin, *supra* at 289. This represents "more

Accordingly, all of the pressures discussed above in the context of "ancient" England remain with us today. Governments still want to control the type and form of property to ensure that their revenues remain consistent, and so they continue to rely on the rules and structures created by the old laws and statutes of England. As such, the present shape of history is unavoidably affected by its history and by the economic forces that have surrounded property for hundreds of years. Property's unique role as a source of revenue, then, is the more likely explanation for the homogeneity present in the area of property form. Compounding and strengthening this influence is the fact that property—unlike torts, contracts, and other areas of law—is of infinite duration.

> By virtue of its durability, land invites an intricate layering of rights over time. Lawyers have never bothered to create an elaborate doctrine of, say "estates in automobiles" or "covenants running with automobiles"; nor have they done so with any other non-landed property. That is because after only a limited number of years, any given automobile will end in the junk heap. This finite lifespan keeps encumbrances on automobiles relatively simple and few in number.
>
> Land, on the other hand, sticks around indefinitely, while claims against land can go on and on, in layer after layer, to be lost, found, banished, restored, relished, then lost again to longstanding practice and prescription.[148]

This infinite duration cuts both ways in terms of heterogeneity. On one hand, this creates variability because, as Rose indicates, claims stack up, never truly expiring. As such, the laws and rules that address and order these claims also stack up and continue on, "layer after layer," in Rose's words. This never-ending aggregation leads to confusion and the heterogeneity described here.[149] On the other hand, the unending existence of property means that the revenues

than one third of all state and local government revenue for that time period." *Id.*

[148] Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 614 (1998).

[149] It is also likely that land's fixed geography contributed to said confusion. *See* Pomeroy, *WPH*, *supra* note 9, at 517. Land is anchored to a single jurisdiction, which means that its stakeholders cannot seek out more favorable rules or laws, thereby blunting any incentive a jurisdiction might have to evolve away from anachronistic or parochial laws. *See id.* (citing the Uniform Commercial Code, its adoption by states seeking to protect their relative economic interests, and the uniform laws fostered thereby as a counter-example).

they generate are also (potentially) unending.[150] Accordingly, lawmakers (be they kings, state legislatures, or county administrators) have an ongoing desire to do what Henry VIII and others have done in channeling property into profitable forms and ensuring that they stay there.[151] This quirky confluence of the state's profit motive and the permanence of the governed object, then, ensures that the property form rules that have solidified under the circumstances described above, remain static over time.

An article written by Abraham Bell and Gideon Parchomovsky discussing the numerus clausus supports this conclusion even further.[152] Bell and Parchomovsky argue that the numerus clausus is, as articulated by Merrill and Smith, overstated.[153] In particular, they acknowledge the existence of a relatively narrow suite of property types but argue that this narrowness is deceiving given the multiplicity of states and the federalist nature of American government.[154] Each state is able to vary the "menu" of property types to suit its own purposes, which is in turn given effect between and among states pursuant to federalist principles.[155] This means that "[f]ederalism allows owners to reach beyond a short menu of forms, making the number of property forms variable over time and between the states."[156] Spousal and joint property rights are prime examples.[157]

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[150] *See supra* note 146 and accompanying text regarding the modern manifestations of this enormous revenue stream.

[151] Contrast this with other ways in which governments raise revenues. By way of example, consider the American income tax system, which seeks to tax present-period (i.e., annual) income from "whatever source derived." *See, e.g.*, Edward J. McCaffery & James R. Hines Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031, 1041 (2010) (quoting I.R.C. § 61(a) (2013)). The subject of taxation here is a year's worth of income, a concept that continually changes over time in response to economic circumstances and legal ingenuity. As such, the government must do the same, changing and adapting rules, procedures, and definitions in its never-ending desire to acquire revenue based on "new" types of income. Now go back to the kinds of taxes and fees that flow from property. These revenue streams, consisting largely of recording and transfer fees, *see supra* note 146, focus not on an open-ended notion like "income." Instead, they focus on a concrete thing known as "property." As such, these sources of revenue will vanish if what we consider to be "property" is permitted to evolve away from the tax laws, as written. So the government forecloses that by forbidding evolution, thus creating property form homogeneity.

[152] *See generally* Bell & Parchomovsky, *supra* note 43.

[153] *See id.* at 75–76.

[154] *See id.*

[155] *See id.*

[156] *Id.* at 76.

[157] *See id.* at 76–77.

This criticism of Merrill and Smith's explanation of the numerus clausus makes sense and does appear to weaken Merrill and Smith's informational burden analysis. It is, however, wholly consistent with the historical explanation. The engine behind the historical need for form homogeneity is, as discussed herein, revenue.[158] Of course, revenue flows to a particular jurisdiction.[159] It is that, and only that, jurisdiction that cares about the relevant revenue and will take steps to protect it. And, in the case of the revenues flowing from property, the relevant jurisdictions are primarily states or state-controlled entities.[160] It is not at all surprising, then, that the "short menu of forms" would vary from state to state as each such taxing entity seeks to protect its revenue.[161] It is notable, however, that each state, in and of itself, strives for consistency.[162] Indeed, that is precisely what one would predict, based on the governmental history of securing property-based revenue streams outlined herein.

IV. CONCLUSION

Property is a wonderful area of the law, not least because it is so uniquely fractured among the many different states. Of course, the well-known exception to this is the area of property form, which is widely acknowledged as generally static and uniform in nature. This homogeneity has received a lot of attention in the last decade or so, largely due to the numerus clausus theory formulated by Merrill and Smith as an explanation for this curious state of affairs. This Article argues, however, that much of this attention has been misplaced.

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[158] *See supra* notes 101–144 and accompanying text.

[159] *See, e.g.*, George Mundstock, *The Tax Import of the FASB/IASB Proposal on Lease Accounting*, 32 VA. TAX REV. 461, 472 (2013) (noting that tax flows to the "relevant taxing jurisdiction").

[160] *See supra* notes 145–146 and accompanying text (indicating that the tax revenues and other fees arising from property largely arise from recording fees, transfer taxes, and other taxes levied by local, not federal, entities).

[161] Bell & Parchomovsky, *supra* note 43, at 76.

[162] *See generally id.* (focusing on the variability that can arise through federalism, as opposed to variety that arises in-state). *See also* Sumner v. Borders, 98 S.W.2d 918 (Ky. 1936). As discussed above, *see supra* note 98, this case turned upon a state statute, which stated that, "[u]nless a different purpose appear by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of." *Id.* (citing KY. STAT. 2342). Thus, the homogeneity supported by this case came not from a concern about informational burdens or from a federal statute but from a statute promulgated by the governmental entity most likely to be concerned about property-based revenue. This again supports my theory that property form homogeneity is based on a historical concern for revenue protection.

While Merrill and Smith's theory and its attendant informational burdens analysis is ingenious in design, it does not withstand careful scrutiny and so cannot really explain the matter of property form homogeneity. Instead, we must look to the history of property law stretching back to 13th century English statutes. These statutes, shaped by the legal and economic climate existing at the time of their promulgation, effectively arrested the development of different property forms and explain why property began to develop along this path, and the fact that the forces that shaped those statutes are still with us explains why the inertia of homogeneity never left us. In the end, then, property is shaped by us, and we never change.