WHY IS PROPERTY SO HARD?

Chad J. Pomeroy[*]

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INTRODUCTION

So: property law is probably not your favorite subject.[1] It is variously referred to by law students (and some lawyers) as "boring," "very boring," or even "incredibly boring." No less than Blackstone himself acknowledged, in his commentaries, that the study of property may "afford[] the student less amusement and pleasure" than other areas of the law.[2] Even I admit to similar feelings during my law school career—a fairly honest acknowledgment from a property law practitioner and professor.[3]

Why is it, then, that property gets such a bad rap? Is it because it is not useful? Is it just a bunch of unhelpful arcana gathered for the sake of compilation? Clearly not: whether you litigate, engage in

* Assistant Professor of Law, St. Mary's University School of Law. J.D., Brigham Young University; B.A., Brigham Young University. Among others, I gratefully acknowledge the help and assistance of Brigham Daniels, Associate Professor of Law, at Brigham Young University Law School.

1. If you are a student, it is probably not your favorite subject to study; if you are a practitioner, it is probably not your favorite subject to research; and, if you are an academic, it is probably not your favorite subject to teach.

2. 2 WILLIAM BLACKSTONE, COMMENTARIES *382.

3. Made, no less, in the introduction to a law review article regarding property law.

transactional law, do criminal defense, or practice almost any other type of law, property issues (especially real property issues) are significant and important.[4] Is it because property law is so reliant on ancient case law? Certainly, there may be some of that—few people honestly like to read 200-year-old cases about noxious beasts.[5] But that is really not that much worse than 150-year-old cases about shipping cotton to England[6] or 650-year-old cases about a potential assault at an English tavern.[7]

No, I posit that one of the primary reasons that the law of property is so disfavored is because it is so difficult. And it is so difficult because it is so vast and so varied. Tort, contract, criminal, and other broad areas of law that serve as the "bedrock" of a legal education start out challenging but eventually coalesce into a comprehensible whole. These areas of the law were forged over hundreds of years by the common law into rules that rely on consistent principles and a fundamental structure largely applicable throughout the country. Property law, on the other hand, starts out wide-ranging and challenging and stays that way. It too is based on common law principles, but these principles are distinctly less consistent from state to state and even from county to county. It is, in effect, an "infinite" series of rules that have "been heaped one upon another for a course of seven centuries, without any order or method . . . , [which make] the study of this branch of our national jurisprudence a little perplexed and intricate."[8]

Think, for a moment, back to your first year property course, and you will see what I mean. Recall some of the broad subjects you studied there: acquisition by gift or by adverse possession, future interests, co-ownership, marital interests, landlord-tenant law, and transfer. All of these topics are important, and they all broadly come together to create a reasonably reliable prism for a young lawyer when thinking about property issues.[9] But these areas are all riddled

4. It is probably fair to note that some areas of property law—notably, future interests—come up in real world practice less often than others. But all substantive fields have less utilized topics, and there is no denying the significant role that property law plays in modern commerce and law. *See, e.g.*, Dean Arthur R. Gaudio, *Electronic Real Estate Records: A Model for Action*, 24 W. NEW ENG. L. REV. 271, 272-74 (2002).

5. See Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805), the seminal case seemingly meant to confuse all first year law students, which is excerpted in, among others, JESSE DUKEMINIER ET AL., PROPERTY 18 (7th ed. 2010).

6. *See* Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (Exch. Div.), *excerpted in* CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS 290–91 (6th ed. 2011).

7. *See* I de S et Ux. v. W de S, At the Assizes, Y.B. Lib. Ass. fol. 99, pl. 60 (1348) (Eng.), *mentioned in* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 38 (4th ed. 1971).

8. 2 BLACKSTONE, *supra* note 2, at *382-83.

9. *See infra* Part II.A.

with particularities and differing interpretations. Whichever textbook you utilized in your first year class, odds are that it had more note cases and side discussions than any of your other books because those asides are necessary to acknowledge and discuss the many divergent rules that exist throughout the country.

In *A Theoretical Case for Standardized Vesting Documents*, an earlier publication to which I will refer in this Article as "SVD," I wrote about this heterogeneity in the context of vesting documents.[10] Different jurisdictions utilize entirely different types of documents to vest and transfer rights and ownership in property, a state of affairs resulting in enormous confusion and cost.[11] Upon further review and discussion, however, it becomes apparent that this heterogeneity is an even deeper and more significant aspect of property law. Indeed, this variability is a unique characteristic that largely explains why property law is practiced the way it is in America and why most law students' and lawyers' first reaction to their property law classes is the negative one discussed above.

This Article seeks to flesh out this characteristic and to analyze it in depth. Part I begins this examination by setting up a taxonomy for property law and then describing the heterogeneity inherent in that context and the costs associated with that variability. Real estate law has continually evolved throughout American history—changing from a small, local business to a large, national one, spanning jurisdictional lines and limits—and it is the haphazard and varied nature of this evolution that has created this difficulty and cost. This is notable when contrasted with the homogeneity and relative stability of other areas of the law. And it is particularly notable when contrasted with one particular area of property law itself: when it comes to property form, property law is remarkably stable and predictable, and a closer examination of this exception to property's broader heterogeneity leads to an enlightening analysis of the underlying reasons for the larger heterogeneity that is the focus of this article.

Part II undertakes just that sort of examination, examining property form in terms of the *numerus clausus*. This theory, which means "closed number," was first discussed by European scholars and has more recently been propounded by Thomas Merrill and Henry Smith to describe and explain the fact that the wider variability of property law does not extend to common law

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10. *See* Chad J. Pomeroy, *A Theoretical Case for Standardized Vesting Documents*, 38 OHIO NO. U. L. REV. 957 (2012). Throughout this Article, I build upon the concepts and research presented in SVD and have utilized some of the discussion and analysis present there. I have included citations where appropriate, but many of the concepts are too diffuse and generally serve as important background elements herein.

11. *See id.* at 961.

restrictions on property types.[12] In particular, they argue that the *numerus clausus* drives the standardization of property types by implementing an informational cost-benefit analysis that focuses on whether a new property type would provide helpful information to interested parties, the unique benefit of which exceeds the marginal informational costs thereof.[13]

In SVD, I argued that this same cost-benefit analysis should apply to vesting documents,[14] largely because of the similarity between the informational burdens associated with new property types and the heterogeneity costs associated with vesting document heterogeneity. Here, I contend that this argument need not be limited to vesting heterogeneity. Property is, at its heart, meant to provide information and to put others on notice. Indeed, in many ways, this is what property is: excluding others from a thing by making them aware of your claim to it.[15] The information burdens identified by Merrill and Smith and the theoretical simplifying pressure arising therefrom, then, are present in all areas of property law. As such, the cost benefit analysis implemented by the *numerus clausus* ought to act on all areas of variability for the greater good.

Having concluded as much, Part III applies this analysis to property law generally by demonstrating its application to vesting, co-ownership, and third-party property rights heterogeneity. Part IV then builds upon this construction to explain why this has not yet occurred in our system by focusing on the significant rollback costs that would result from attempting to change established real property practices and laws. Any such attempt would upset settled expectation based upon prior precedent and hundreds of years of recorded documents, creating much higher costs than those usually associated with legal innovation.

The Article concludes that our property system is dangerously inefficient and costly and that the *numerus clausus* analysis provides a potentially adequate vehicle for addressing this problem, while

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12. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 3-4 (2000).

13. *Id.* at 68-70.

14. Here, as in SVD, these documents, which pass title from one party to another, are referred to as "vesting documents." *See generally* Pomeroy*, supra* note 10. This is not a term of art with a clear, settled definition. However, the meaning adopted herein makes good sense and is useful herein. *See* BLACK'S LAW DICTIONARY 1083 (abridged 6th ed. 1997) (defining "vest" as "to give an immediate, fixed right of present or future enjoyment"); *see also, e.g.*, MICH. COMP. LAWS § 554.13 (2012); OHIO REV. CODE § 5302.171 (West 2011); Sintz v. Stone, 562 So.2d 228 (Ala. 1990); Sun Valley Land and Minerals, Inc. v. Burt, 853 P.2d 607 (Idaho Ct. App. 1993); Dixon v. Still, 121 A.2d 269 (D.C. 1956).

15. Property being "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 BLACKSTONE, *supra* note 2, at *2.

acknowledging the very real costs associated with any such attempt.

I. VARIATION IN PROPERTY LAW

As introduced above, property law is varied and somewhat confused, differing from one jurisdiction to another. In order to more fully examine this heterogeneity, its costs, and a potential response thereto, we first need to be more specific about what this variability is and how it manifests itself. Identifying broad categories of study within property law and examining how they fracture throughout the country and the costs of those fractures permits us this level of specificity, particularly when contrasted with a similar examination of other broad areas of the law.

A. Taxonomy and Heterogeneity in Property Law

Creating any sort of taxonomy, much less one as sweepingly comprehensive as is necessary to encompass an entire doctrinal section of law, is problematic. All such areas of the law are continually being reevaluated, refined, and reappraised.[16] This is particularly so with respect to "property law."[17] As is the point of this Article, "local and state property laws may substantially diverge among different jurisdictions . . . and federal law in itself is highly complicated and often obscure."[18] Moreover, highly conceptual views of legal doctrines are, by their very nature, subject to controversy and criticism, given the wide range of potentially conflicting opinions and viewpoints. Nonetheless, a conceptual taxonomy of property law is "analytically and jurisprudentially essential" for an analysis such as this, which involves a wide-reaching examination of a potentially vast body of law.[19] By organizing property law into a consistent whole, we can attempt to "maintain[] a reasonable level of clarity and certainty."[20]

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16. *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) (describing recently modified areas of property law).

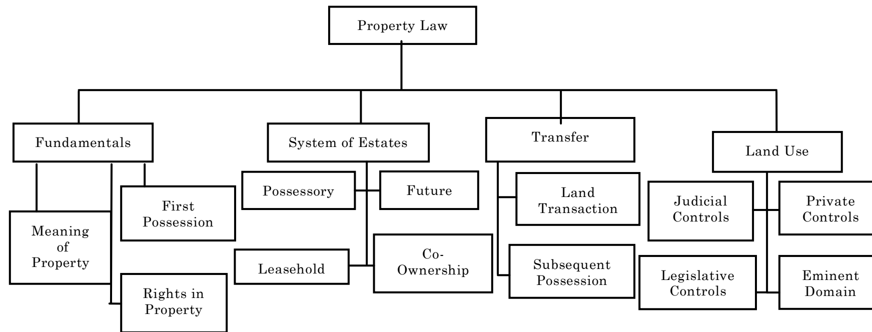
17. Amnon Lehavi, *The Taking/Taxing Taxonomy*, 88 TEX. L. REV. 1235, 1242 (2010).

18. *Id.* (citing Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74-75 (2005) (discussing competition over property regimes among different jurisdictions); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 889 (2007) (explaining how local zoning restrictions change over time due to electoral changes or shifts in demographics)).

19. Lehavi, *supra* note 17, at 1276.

20. *Id*. As Professor Lehavi points out, such a taxonomy need not be overly simplified or descriptive. *See id.* ("[T]he enterprise of legal taxonomy need not be understood as necessarily yielding to formalist or positivist conceptions of law, in which law purports to be capable of dividing the legal world into neat distinctive categories that simply reflect objective legal reality."). This is so, even given a relatively concise conceptualization. Indeed,

Given the utility arising from such concision, a useful taxonomy here should focus on simplicity but do so without sacrificing depth. Though difficult, this is feasible, given most lawyers' largely shared background. That background is first year property, a doctrinal course we all share.[21] Given that shared understanding, much can be packaged and conveyed in a relatively straightforward manner. The following taxonomy sets forth the basics of property law to a second level of detail:



This proposed taxonomy encompasses much of what we generally consider to be property law: from the fundamental basis of defining property, to the system of estates that we use to describe the various types of property recognized at law, to transferring property, to land use controls, most high-level property concepts are represented.[22] Of course, each of the lower, or second-level, concepts

> the link between the number of legal categories and the simplicity of the legal system is not straightforward. The question is not . . . how many different types of legal categories we have, and how easy it is for us to classify a particular event or situation as falling within a specific category, but also what is the type of legal norm that applies to each category—i.e., whether the norm is designed as a clear-cut rule that sets out a straightforward, relatively rigid decree, or rather, as a broadly phrased standard that requires further, later-stage crystallization.

Id. at 1277. In other words, the direct can, and does, encompass the complicated and ambiguous. As such, although no taxonomy can ever perfectly identify and separate all aspects of property law, it is possible to create a delineation that gives "a substantially coherent sense to what is undoubtedly a very muddy world." *Id*. at 1278. In other words, from a doctrinalist perspective, property "rights can be fully identified, specified, and labeled." Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 615 (1998).

21. Even though complexities and ambiguities can arise in any area or at virtually any level of abstraction, most of us return to a similar set of underlying concepts and understandings. *See, e.g.*, Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1169-70 (1999) (setting forth a highly theoretical and very well-received discussion focused on what property really *is*).

22. Though not entirely drawn therefrom, this conceptualization owes much to the

contain numerous doctrines, and many of those admit to their own subdoctrines and, in many cases, there may be some ambiguity about which idea goes where.

But perfection is not necessary.[23] This taxonomy encompasses and categorizes property concepts sufficiently to permit comparison and discussion. For instance, Merrill and Smith focus on the uniformity of property type across time and geography.[24] "Property type," in their discussions is effectively the same as "system of estates," above.[25] Similarly, in SVD, I discuss the heterogeneity of vesting documents. "Vesting documents" would fall under "land transactions," above, along with other familiar concepts like brokers, contract of sale, and financing.[26] Each of these topics, or subjects, encompasses roughly similar issues and legal controversies across different jurisdictions.

This organizing lens, then, puts property concepts into digestible compartments and so permits us to identify and compare like concepts across different jurisdictions and in different circumstances. And one area in which to perform this comparison is that of vesting

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classic Dukeminier text on property law. *See generally* DUKEMINIER ET AL., *supra* note 5.

23. *See supra* note 20. There are other potentially useful ways of putting together a relevant taxonomy. *See, e.g.*, Heller, *supra* note 21, at 1169 ("Ownership can be analyzed in many dimensions. One useful framework distinguishes among categories of ownership I call 'physical things,' 'legal things,' and 'legal relations.' While distinctions among these three types of fragmentation are primarily useful as organizational tools, the three categories do correspond to historical shifts in property theory and to trends in constitutional decision-making."). The framework set forth herein is useful because it is direct and reasonably concrete and therefore provides a clear basis for comparison of its internal aspects.

24. *See supra* note 12 and accompanying text.

25. *See* Merrill & Smith, *supra* note 12, at 23. Or, at least, it is the same as the list of estates that are described thereunder. The system of estates is, in reality, itself a taxonomy utilized to describe property with prescribed characteristics. *See* DUKEMINIER ET AL., *supra* note 5, at 183-316. Merrill and Smith's primary point is that the types of property with those prescribed characteristics are limited—that there is not an open or indefinite menu of property type or interests. *See* Merrill & Smith, *supra* note 12, at 3. Of course, the phrase "property interest" is itself open to interpretation. *See*, *e.g.*, O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 795 (1980) (Blackmun, J., concurring) ("[A] majority of the Justices of this Court are already on record as concluding that the term 'property' sometimes incorporates limiting characterizations of statutorily bestowed interests."). However, one reasonable definition is "a legal right of one person enforceable against another person or class of persons with respect to the possession, enjoyment and/or alienation of a thing." Jeanne L. Schroeder, *A Repo Opera: How* Criimi Mae *Got Repos Backward,* 76 AM. BANKR. L.J. 565, 580 (2002). This makes sense, and is workable here, in that it focuses on the rights flowing from a thing insofar as those rights define our view of that thing, which ties together Dukeminier's text and Merrill and Smith's article.

26. *See, e.g.,* DUKEMINIER ET AL., *supra* note 5, at xviii-xix (listing topics covered under the heading "The Land Transaction").

documentation.[27] The United States contains more than 3000 counties and county equivalents,[28] each of them has their own recording system and customs,[29] and many of these utilize different documents to provide evidence of claims upon property. This distinct and clear lack of uniformity arises due to the nature of the American recording system.[30]

The basic goal of property law is to define ownership rights in property,[31] and doing so requires that parties be able to reasonably obtain information regarding ownership rights and claims because ownership rights do not exist in a vacuum. They exist only in relation to other people and their rights, and that relationship cannot function unless all interested parties can efficiently discover everyone's relative rights.[32] The recording system is what makes this possible. It does so by incentivizing the recordation of vesting documents, making those documents publicly known, and providing the structure for title assurance.[33] Unfortunately, none of this evolved uniformly. English common law had no real recording system, as there was historically very little need for a centralized source of written information.[34] On the relatively rare occasions when property was transferred, it was done so by way of a witnessed ceremony.[35] The eventual solution to this state of affairs was the

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27. See Pomeroy, *supra* note 10, regarding the variability of vesting documents. This type of comparison can be done in virtually any area of property law. Other than property type, all areas of property law are heterogeneous (hence the novelty of Merrill and Smith's articles about the *numerus clausus*).

28. *See How Many Counties Are There in the United States?*, USGS, http://gallery.usgs.gov/audios/124 (last updated Jan. 9, 2013).

29. *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).

30. The development and history of the recording system helps explain the myriad vesting documents that exist throughout the country and sheds some light on the wider heterogeneity of property law generally. *See generally* Pomeroy, *supra* note 10; John H. Scheid, *Down Labyrinthine Ways: Recording Acts Guide for First Year Law Students*, 80 U. DET. MERCY L. REV. 91 (2002).

31. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988) (indicating that property law works 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. People "need some means of assuring that they share a common understanding of . . . rights." Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S382 (2002).

33. *See* 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.01(1)(a) (Michael Allan Wolf ed., 2012) ("Recording acts, by definition, require the public preservation of written documents of title to land, or of other written evidences of certain proprietary interests.").

34. *See id.*

35. *See* Ray E. Sweat, *Race, Race-Notice and Notice Statutes: The American Recording System*, 3 PROB. & PROP. 27, 27 (1989). Once the ceremony occurred,

recording act,[36] which addressed the deficiencies of earlier statutes by refusing to give priority to vesting documents that were not recorded, thus incentivizing the public to create a reasonably accessible and comprehensive database of information.[37] However, the recording acts failed to institute uniform requirements as to what was to be recorded,[38] predictably leading to an ad hoc evolution of these documents. As such, deeds, mortgages, liens, and all sorts of vesting documents look different across different jurisdictions.[39] This

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ownership was transferred and the prior owner could no longer affect title. *See id.* This rudimentary ceremony institutionalized the "first in time, first in right" concept of ownership, though it made it difficult for interested parties to gain any real information because there was no permanent memorial of any transfer. *See* Chad J. Pomeroy, *Ending Surprise Liens on Real Property*, 11 NEV. L.J. 139, 145-48 (2010) (discussing the evolution of recording acts in the context of "surprise liens").

36. It took some time for the law to come to this rough conclusion. England passed the Statute of Uses in 1535 and the Statute of Enrolments in 1536, both in an attempt to force landholders to register property with a public official. *See* Sweat, *supra* note 35, at 27; George Lee Flint, Jr. & Marie Juliet Alfaro, *Secured Transactions History: The First Chattel Mortgage Acts in the Anglo-American World*, 30 WM. MITCHELL L. REV. 1403, 1433-34 (2004). These statutes, however, were ineffective. *See* Sweat, *supra* note 35, at 27. As such, the Statute of Frauds followed in 1677, doing away with the exceptions that so badly riddled the Statutes of Uses and Enrolments, and requiring written documents to create or transfer real property interests in most situations. *See* Alberto Luis Zuppi, *The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and* Lex Mercatoria, 35 GA. J. INT'L & COMP. L. 233, 236-37 (2007). The Statute of Frauds represented a step in the right direction but did not systematically provide the type of information required because vesting documents were physically conveyed to the transferee, along with the land. *See* Sweat, *supra* note 35, at 27. There was no central filing or storage system to track the documents that evidenced ownership, so there was still no real way to be sure who owned what. *See* Gaudio, *supra* note 4, 272-74. That is until the recording act came along. Today, all fifty states and the District of Columbia have recording systems based upon the basic recording act. *See* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1364 (2010).

37. *See* Peterson, *supra* note 36, at 1366; Sweat, *supra* note 35, at 27-28.

38. The first modern recording act was adopted in 1640, and it did, in fact, prescribe the format of the vesting document. *See* POWELL, *supra* note 33, § 82.01(1)(b); Sweat, *supra* note 35 at 27-28. As a matter of practicality, this seems reasonable: if one is interested in providing useful information to a large population of potentially interested third parties, it seems reasonable to standardize the information. *See* Pomeroy, *supra* note 10, at 969-75. But this sort of requirement did not last. Recording acts eventually permitted the recording of virtually any type of document. *See id.* at 966-69. There are some rules that apply in most jurisdictions. *See* Sweat, *supra* note 35, at 28. But the type and content of vesting documents has never been systemically regulated.

39. This evolution can also be traced to the evolution of the documents themselves. Consider, for example, transfer deeds. The earliest type of deed was the charter of feoffment. *See* DUKEMINIER ET AL., *supra* note 5, at 585. This deed passed into obsolescence with the passage of the Statute of Uses, in favor of a bargain and sale deed, and, in the more than 300 years since then, different kinds of deeds have come and gone, with the law presently settling on the general warranty deed, the special warranty deed, and the quitclaim deed. *Id.* at 585-86. These deeds, however, are not

is especially stark when considered in the context of the many different recording systems present throughout the country.[40] Since there is no central authority for these thousands of jurisdictions, there are thousands of rules defining what is and is not recordable.[41] This is the very definition of heterogeneity, and it is laced throughout property law.

Another example of this variability in property law arises in the context of "rights in property," classified under the top level concept of "fundamentals," above. This concept of "rights in property" pertains to the very basic rights that inhere in individuals based upon their claims to an item of property. This is distinct from "system of estates," which ultimately turns upon broadly recognized characteristics of the property types at issue (related primarily to duration and possessory rights) insofar as those characteristics constitute the sole stable element of property law.[42] Rights in property, on the other hand, relate to other elements inhering to the owners of the recognized estates, which affect the relative rights of parties to the property but which do not change the essential nature of the property. In other words, though there is an existing suite of permissible and recognized estates, parties may be given different rights to those estates across different jurisdictions.

As a case in point, it is well recognized that state law regarding third-party rights in debtor property differs substantially from state to state.[43] Creditors generally can seize debtor assets,[44] but that

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precisely the same and can vary significantly, even within the same category. *See id.* at 585-90. As such, even when the evolution of a vesting document narrows itself into a broad type or series of types, there is no true uniformity as to what gets recorded.

40. There are "approximately 3,600 counties, cities, or other municipalities" that utilize a land recording system. *See* David E. Ewan, John A. Richards & Margo H.K. Tank, *It's the Message,* Not *the Medium!*, 60 BUS. LAW. 1487, 1487 (2005).

41. Notably, there is no consistent requirement as to content: the recording office is generally given basic parameters to review, which depend on the jurisdiction, and, once those basic elements of a document are fulfilled, the office will record the document. *See, e.g.*, Peterson, *supra* note 36, at 1365.

42. The entire premise of which rests upon the claim that there is only this one, single instance of uniformity in property law. *See* Merrill & Smith, *supra* note 12, at 5-6.

43. *See* 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."). The extent to which property becomes part of the estate is a direct result of the extent to which a creditor has rights to a debtor's property, which is, in turn, governed by varying state laws. Under the Bankruptcy Code, a trustee for a bankrupt debtor has the power to exploit defective filing by avoiding flawed transactions. *See* 11 U.S.C. § 544(a)(1) (2006). If avoided, the relevant property becomes available for distribution to all unsecured creditors. This is known as the "strong-arm power," which affords a trustee the same

ability—that fundamental property right in property "belonging" to someone else—varies significantly from state to state, with each jurisdiction creating slightly different rules.[45] Very similarly, creditor rights with respect to concurrent interest and married couples also vary. Some states, for instance, extinguish a mortgage given by a

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rights as a hypothetical creditor in a hypothetical proceeding, and effectively ensures that a bankrupt estate will have the same rights as any other creditor. *See* REPORT OF COMMN ON THE BANKR. LAWS OF THE UNITED STATES, H.R. REP. NO. 93-137, at 18 (1973); *see generally* Barkes, *supra* note 43.

44. Either with respect to secured property or with respect to unsecured property, upon obtaining a valid judgment. This material focuses upon the latter possibility.

45. *See, e.g.*, ALA. CODE § 6-10-6 (2012) ("The personal property of such resident, except for wages, salaries, or other compensation, to the extent of the resident's interest therein, to the amount of $3,000 in value, to be selected by him or her, and, in addition thereto, all necessary and proper wearing apparel for himself or herself and family, all family portraits or pictures and all books used in the family shall also be exempt from levy and sale under execution or other process for the collection of debts."); CONN. GEN. STAT. § 52-352b (2012) (establishing exemptions for the property of "any natural person," including "[t]ools, books, instruments, farm animals and livestock feed, which are necessary to the exemptioner in the course of his or her occupation, profession or farming operation; . . . [p]ublic assistance payments[;] . . . [h]ealth and disability insurance payments," alimony, child support, and items such as homestead up to the value of $75,000, "[o]ne motor vehicle [up] to the value of [$3,500,] . . . [w]edding and engagement rings[,] . . . and "[a]rms and military equipment, uniforms or musical instruments owned by any member of the militia or armed forces of the United States"); MO. REV. STAT. § 513.430 (2012) (establishing exemptions from "attachment and execution" for, among other things, any person's interest in property such as "[h]ousehold furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments that are held primarily for personal, family or household use of such person or a dependent of such person, not to exceed" aggregate value of $3,000); TEX. PROP. CODE ANN. §§ 42.001–42.002 (West 2012) ("(a) The following personal property is exempt under Section 42.001(a): (1) home furnishings, including family heirlooms; (2) provisions for consumption; (3) farming or ranching vehicles and implements; (4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession; (5) wearing apparel; (6) jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a); (7) two firearms; (8) athletic and sporting equipment, including bicycles; (9) a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license . . . (10) the following animals and forage on hand for their consumption: (A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each; (B) 12 head of cattle; (C) 60 head of other types of livestock; and (D) 120 fowl; and (11) household pets."); WYO. STAT. ANN. § 1-20-106 (2012) (establishing personal exemptions for, among other things, "(i) [t]he family bible, pictures and school books; (ii) [a] lot in any cemetery or burial ground; [and] (iii) [f]urniture, bedding, provisions and other household articles of any kind or character as the debtor may select, not exceeding in all the value of four thousand dollars ($4,000.00)"). These statutes create personal exemptions and indicate the various states' widely divergent policy decisions as to what types of property should be protected from seizure by creditors. *See, e.g.,* William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt-out" as Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149, 169-70 (1997). This variability is not limited to the statutes creating personal exemptions. It is present in many different areas relevant to creditor rights.

predeceasing joint tenant, and others do not.[46] Likewise, some jurisdictions permit tenants by the entirety to encumber the whole of the property so held, and some do not.[47] These examples, again, are clear manifestations of substantial heterogeneity, particularly considering the basic nature of the concept at issue. The right and ability of a creditor to look to a debtor's property in the context of an extension of credit is of significant consequence. Indeed, much of our economy turns on this third-party right.[48] That there is no single rule or law upon which creditors can rely is again, then, a striking example of the unduly heterogeneous and varied nature of property law.

This raises the question as to why property law is like this. As discussed below,[49] other areas of law are not nearly as fractured and disorganized. So why is property law different? As evidenced by the evolution of the recording system, discussed above, there are probably numerous historical and economic reasons that are unique to property law that have contributed to this situation.[50] There is also the simple fact that real property 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

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46. *See*, *e.g.*, Harms v. Sprague, 473 N.E.2d 930, 932-34 (Ill. 1984) (discussing the extent to which a mortgage given by a joint tenant survives that mortgagor's predeceasing another joint tenant, an issue that varies from state to state).

47. *See, e.g.,* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 83-84 (2005) ("Tenancy by the entirety has fallen into disfavor in recent decades, leading to a remarkable diversity of approaches to such tenancies in the United States."); *see also* Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 430 (2001) ("Jurisdictions vary in their approaches and there is conflicting case law arising even within the same jurisdiction.").

48. For example, in the context of real property, more than $1.2 trillion of residential mortgages were extended to borrowers in 2011 alone. *MBA Mortgage Finance Forecast*, MORTGAGE BANKERS ASS'N (Jan. 18, 2012), http://www.mortgagebankers.org/files/Bulletin/InternalResource/79428_.pdf. Doubtless, these loans were largely securitized ones on which the creditors could rely, but they still serve to indicate the extent to which credit and property are related. Though a wholesale evaluation of credit extension is beyond the scope of this Article, it seems beyond question that creditors routinely rely on property (either directly through securitized debt, or indirectly through unsecured debt extended on the basis of financial strength) as the basis for an extension of credit.

49. *See infra* Part I.B.

50. One such possible reason is the changing importance of real property at the time of the development of the American recording acts. *See* Pomeroy, *supra* note 10, 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." (citing Gaudio, *supra* note 4, at 272)). This shift was particularly pronounced in America, and it intensified throughout the industrial revolution, at the same time that the colonies began to establish "American" land recording systems. *See id.*

> 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. This enduring quality is one reason why claim-clearing doctrines like "adverse possession" and prescription are essential with respect to land.[51]

This durability, and its concomitant layering of doctrinal variation, certainly contributes to heterogeneity. It may also be the case that land's fixed nature plays a role. 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.[52] Whatever the cause, this heterogeneity results in substantial costs that are not present elsewhere in the law.

B. Taxonomy and Homogeneity in Other Areas of Law

The relatively extraordinary nature of property's heterogeneity is particularly apparent when property is compared to other doctrinal areas of the law. Take, for instance, contract law. As above, any sort of taxonomy created here is going to be open to conflicting opinions and viewpoints but doing so is, again, "analytically and jurisprudentially essential"[53] in that it permits us to compare conceptual issues across any number of jurisdictions. And, again, such a taxonomy can, and should, be comparatively simple and drawn from most legal thinkers' shared background.

In that vein, the following chart sets forth the basics of contract law to a second level of detail:

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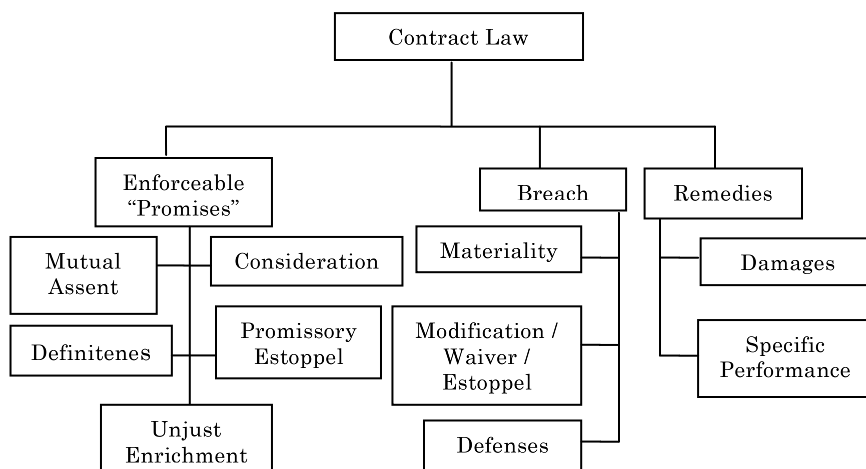
51. Rose, *supra* note 20, at 614.

52. Contrast this, for example, with the relatively uniform law relating to personal property fostered by the Uniform Commercial Code. It may well be that the states, fearing a flight of property and capital, were forced to engage economic forces in a constructive manner, cooperated in order to come up with a relatively stable—and hence relatively efficient, system—and so established a significantly stable rule of law with respect to many aspects of personal property law. *See*, *e.g.*, 8 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-102:1 (2012) (discussing "the intent of the drafters of [UCC] Article 9"). As to why the states have not changed, as the economic importance of real property has become more interjurisdictional, see *infra* Part IV, which discusses the difficulty of attempting to change property law after so many years of such heterogeneity.

53. Lehavi, *supra* note 17, at 1276.



As with the property taxonomy, this proposed schema generally covers most of contract law.[54] From what constitutes an enforceable promise, to when a breach of such a promise has cognizably occurred, to what damages are appropriate, this chart contains within a high-level view of all basic contract issues with enough specificity to allow for comparison and analysis.

With that in mind, let us examine the concept of modification. This is a relatively high-level doctrinal concept; there are numerous doctrines and subdoctrines within this issue, and, of course, there is some ambiguity about which idea or doctrine goes where.[55] That said, it is clear that the law permits the modification of contracts and that this concept generally arises in the context of breach or defense to breach.[56] And it is also relatively clear that this doctrine is consistent from jurisdiction to jurisdiction. The law permits contract modification if there is "consent and 'a meeting of the minds.'"[57] This

54. *See, e.g.,* MICHAEL B. KELLY, INSIDE CONTRACT LAW: WHAT MATTERS AND WHY (2011); Thomas P. Egan, *Equitable Doctrines Operating Against the Express Provisions of a Written Contract (or When Black and White Equals Gray)*, 5 DEPAUL BUS. L.J. 261, 263-69 (1993) (outlining basic contract law doctrine).

55. And there is, of course, disagreement and confusion about how to parse out the various doctrines.

56. *See, e.g.,* Mary G. Jolley & Catherine M. Morrison, *1995 Developments in Property Law*, 29 IND. L. REV. 1035, 1047 (1996) (indicating that modification is a generically available defense to a breach of contract claim); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981).

57. Binninger v. Hutchinson, 355 So.2d 863, 865 (Fla. Dist. Ct. App. 1978) (citation omitted).

is basic, and it is stable.[58] This large and significant area of contract law is effectively identical across any number of varied jurisdictions despite the development of the common law in different ways in different states.[59] The same can be said for other areas of contract law, as well. Take, as another example, unjust enrichment. This contract concept provides an alternative to standard contractual requirements (similar to promissory estoppels) and is grouped, above, under the general category of enforceable "promises."[60] Again, the law here is relatively clear and relatively stable.[61]

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58. *See, e.g.*, Ore–Ida Potato Prod., Inc. v. Larsen, 362 P.2d 384, 385 (Idaho 1961) ("This Court has followed the general rule of law that parties to an unperformed contract may, by mutual consent, modify it . . . ."); Butler v. Wayne Co., 798 N.W.2d 37, 44 (Mich. Ct. App. 2010) ("[T]he party seeking to supplant the contract language must show the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract." (quoting Port Huron Educ. Ass'n v. Port Huron Area Sch. Dist., 550 N.W.2d 228, 232 (Mich. 1996))); Olson v. Penkert*,* 90 N.W.2d 193, 203 (Minn. 1958) ("Parties can alter their contract by mutual consent, and this . . . is merely the substitution of a new contract for the old one." (citation omitted)); Bier Pension Plan Trust v. Estate of Schneierson, 545 N.E.2d 1212, 1214 (N.Y. 1989) ("Under general contract rules, an obligation may not be altered without the consent of the party who assumed the obligation."); S.K. Apparel Mfg., Inc. v. City of Houston*,* No. 14–01–00554–CV, 2002 WL 1822406, at *2 (Tex. App. Aug. 8, 2002) ("To prove a modification, [a party] must show that [the other side] (1) had notice of the change and (2) accepted the change." (citing Price Pfister, Inc. v. Moore & Kimmey, Inc., 48 S.W.3d 341, 349-50 (Tex. App. 2001))); Duncan v. Ala. USA Fed. Credit Union, Inc., 199 P.3d 991, 1002 (Wash. Ct. App. 2008) ("Modification of a bilateral contract requires a meeting of the minds as well as consideration separate from that of the original contract.").

59. Of note, the common law differs from the Uniform Commercial Code in that Article 2 does not require consideration to support modification. *See* U.C.C. § 2-209(1) (2003). However, even this difference is consistent among the states.

60. The quotation marks here indicate that this broad category encompasses concepts other than basic contract, concepts representing enforceable obligations, such as unjust enrichment and promissory estoppel.

61. *See, e.g.,* Flooring Sys., Inc. v. Radisson Grp., Inc., 772 P.2d 578, 581 (Ariz. 1989) (indicating that liability for unjust enrichment is appropriate when "it was not intended or expected that the services be rendered or the benefit conferred gratuitously, and that the benefit was not 'conferred officiously'" (citations omitted)); Reed Iron, Inc. v. Int'l Sales and Serv. Corp., 200 P.3d 1133, 1136 (Colo. App. 2008) ("The test for recovery under an unjust enrichment theory, as stated by the Colorado Supreme Court, requires a showing that: '(1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying.'" (quoting Robinson v. Colo. State Lottery Div., 179 P.3d 998, 1007 (Colo. 2008)); Hill v. Cross Country Settlements, LLC, 936 A.2d 343, 351 (Md. 2007) ("Unjust enrichment consists of three elements: 1. A benefit conferred upon the defendant by the plaintiff; 2. An appreciation or knowledge by the defendant of the benefit; and 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value."); Graves v. Berkowitz, 15 S.W.3d 59, 61 (Mo. Ct. App. 2000) ("The essential elements of a *quasi contract* action of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance and retention of the benefit under such

This point can be made over and over again, with respect to all sorts of contractual concepts: the law simply is not that variable.[62] This is all to the good, of course. One of the most fundamental purposes of contract law (if not *the* fundamental purpose) is to ensure that parties can negotiate, act, and reach agreement with a degree of certainty. This relative jurisdictional stability significantly increases the confidence of market participants, who do not have to wonder whether their affairs will be ordered differently in different jurisdictions, thus stimulating positive market activity.[63] That makes its stark contrast to property law all the more notable, and all the more remarkable. Even though a stable property regime would create certainty and incentivize commercial activity in much the same way that stable contract law does,[64] property law has simply, and clearly,

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circumstances that it would be inequitable for defendant to retain the benefit without paying the value thereof."); Credit Inst. v. Veterinary Nutrition Corp., 62 P.3d 339, 344 (N.M. Ct. App. 2002) ("To prevail on a claim for unjust enrichment, 'one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust.'" (quoting Ontiveros Insulation Co. v. Sanchez, 3 P.3d 695, 698 (N.M. Ct. App. 2000))); Stoeckinger v. Presidential Fin. Corp. of Del. Valley, 948 A.2d 828, 833 (Pa. Super. Ct. 2008) ("The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." (quoting Styer v. Hugo, 619 A.2d 347, 350 (Pa. Super. Ct. 1993))); Boyce v. Freeman, 39 P.3d 1062, 1065 (Wyo. 2002) ("A party who is seeking damages on the basis of unjust enrichment must prove four elements: (1) Valuable services were rendered, or materials furnished, (2) to the party to be charged, (3) which services or materials were accepted, used and enjoyed by the party, and, (4) under such circumstances which reasonably notified the party to be charged that the plaintiff, in rendering such services or furnishing such materials, expected to be paid by the party to be charged.").

62. Again, within the context of the broader taxonomy set forth above, this is a generality. There is considerable room for disagreement as to the placement and definition of some of these concepts, and there is, of course, some heterogeneity in every conceptual area of the law, including contract law. *Compare, e.g.*, Kewin v. Mass. Mut. Life Ins. Co., 295 N.W.2d 50, 54 (Mich. 1980) (applying Michigan law and limiting contract recovery measurement of damages in a bad faith claim to stated policy amount), *with* Jarvis v. Prudential Ins. Co. of Am., 448 A.2d 407, 410 (N.H. 1982) (applying New Hampshire law and permitting recovery of foreseeable losses exceeding policy amount in the same circumstances). The point stands, however, that contract law is remarkably uniform when contrasted with property law.

63. *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.").

64. In much the same way that contractual certainty supports the confidence necessary for parties to engage in commercial activity, interjurisdictional clarity of

eschewed this approach.

C. Accounting for Heterogeneity

So there is significant heterogeneity in property law and not in other areas of law—so what: why is this such a problem? The primary problem is cost. The heterogeneity of property law creates costs, both in terms of actual transaction costs and in terms of mistakes made and errors overlooked.[65] Because the law is so variable, it is time consuming and difficult to understand the law and to gain confidence in one's rights and actions. In other words, the wide-ranging nature of property law, so hated by students, is also ultimately hated by market participants and practitioners. In SVD, I analyzed this cost for vesting heterogeneity by measuring the extent to which doctrinal variation detracted from the ability of the recording system to communicate information. But, again, the issue is broader than that. It is not just the recording system that is meant to provide information—it is all of property law.

In a very real sense, property law is primarily concerned with providing information to others. Again, let us return to Blackstone's famous definition of property: "[T]hat 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."[66] Under this view, property rights are defined with respect to an actual thing that is possessed or "owned" (as opposed to being defined with respect to the actors or individuals involved),[67] and that "thing" therefore broadcasts the rights and obligations inherent therein "to the world."[68] But this broadcast is no good if nobody understands it. "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

property law would permit parties to engage in property transactions without fearing unknown or unclear standards or rules. *See* Trebilcock & Leng, *supra* note 63, at 1525-26. This fear 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. Though this may not have been a particularly widespread problem during the early development of property law, when property tended to be a local concern, it is certainly more broadly troublesome now that property is a transjurisdictional issue of significant commercial importance. *See supra* note 50.

65. *See generally* Pomeroy, *supra* note 10, at 980-84 (discussing these costs in the context of vesting documents, specifically).

66. 2 BLACKSTONE, *supra* note 2, at *2.

67. This is a traditional view of property, in contrast to a more recent view of property rights as a malleable "bundle of rights." *See* Pomeroy, *supra* note 10, at 981 n.143.

68. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001).

rights, to the attendant liabilities of the owner to others . . . ."[69] If they cannot do that, property law fails (at least to some extent).

And so it is that the broad-based heterogeneity, outlined above, compromises all of property law, by making the inherent provision of information by items of property less useful and less effective. Again, with respect to the recording system, this is fairly easy to perceive. Simply look at the incentives fostered by the typical American recording system as a manifestation of property law, generally. This system effectively forces parties to record by invalidating unrecorded transfers in favor of subsequent transferees.[70] This creates certainty—voiding prior, unrecorded transfers incentivizes regular recording, which, in turn, ensures the propagation of information.[71] This informational certainty, and its power to avoid injury, is not unlimited,[72] but it is clearly the primary goal of the recording system, which is consistent with the nature of property. That goal, however, is significantly undermined by the vesting heterogeneity that subsists at the very heart of the system. Or, put differently, vesting heterogeneity is inefficient.[73] A wide range of potentially recordable documents negatively affects informational certainty because it

69. Merrill & Smith, *supra* note 12, at 26; *see also* Rose, *supra* note 31, at 577 (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"). This is a fundamental difference from other areas of law, focusing on (and necessarily arising from) a concrete, physical object.

70. *See* 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).

71. *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).

72. If certainty were the only goal of the recording system, then all unrecorded interests would be void, and that is not how the system operates. "Instead, an unrecorded transfer" is void "only when a" qualified, later transferee (one who has exchanged value for his interest and who is ignorant of prior interests) challenges the earlier, unrecorded conveyance. *See* Schechter, *supra* note 70, at 110; *see also, e.g.*, Cunningham v. Norwegian Lutheran Church of Am., 184 P.2d 834, 836, 840 (Wash. 1947) (upholding a bona fide purchase for value even though buyer purchased for only $100 real estate valued at $1,500). This has been termed a "cost avoidance" rationale: the recording system permits interested actors (those exchanging value for a property interest) who need ownership information (those who do not already possess such information) to obtain that information in a reliable manner. *See* Schechter, *supra* note 70, at 119. This deviation from uniformly voiding all unrecorded transfers necessarily results in some uncertainty but still comports with a system focused primarily on the provision of information.

73. From a positive perspective, economic analysis can be utilized to explain the development and current state of the law regarding the heterogeneity of vesting documents. *See* Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 768-69 (1975). As such, the question would be whether the current system of permitting the recording of differing types of vesting documents is economically justifiable, and the answer to that question is "no."

makes organization and searching difficult and expensive and so effectively restricts the access sought by interested actors.

Similarly, the variation of third-party rights in debtor property discussed above also undermines the innate provision of information that is so essential to our concept of property and ownership. Indeed, a creditor's need to perceive and assess the rights and values of a potential debtor's rights in property is, if anything, even more clear and important than in connection with the recording system. Potential lenders, in assessing whether to extend credit to potential debtors, necessarily attempt to determine the ability of the debtor to pay back the debt.[74] They do this in a variety of ways, but a very significant part of what they must do is to evaluate their ability to ultimately pursue recourse from the assets of a debtor. This is particularly important in the context of unsecured lending.

In a secured lending situation, a creditor theoretically has the ability to collect from the piece of property securing the loan.[75] An unsecured lender, on the other hand, has no collateral to which it can turn upon default. As such, it must seek recourse by attempting to extract value from the assets of the debtor.[76] And, in assessing its ability to do this, it will attempt to rely on the information broadcast by property, discussed above. Creditors will, ex ante, ask for financial statements and balance sheets and any other indication of ownership because they generally believe that those assets, if owned by the debtor, are available to the debtor (and its creditors) to satisfy claims. But this is not necessarily so.

As indicated above, the law has a fairly clear policy of not permitting creditors access to all assets.[77] This makes some sense

74. This is, of course, a matter of common sense. Creditors must make this assessment, and any failure or mistake in doing so is likely to have significant consequences. *See, e.g.,* RICHARD A. POSNER, A FAILURE OF CAPITALISM 18-29 (2009) (discussing the abandonment of this practice by secured lenders in the early 2000s and the role this abandonment played in the real estate meltdown of the last several years). The causes of this failure have been the subject of much speculation, but there is no real doubt that, whatever its cause, the failure to adequately assess debtor reliability ended in disaster. *See* Michael Lewis, *The End*, PORTFOLIO, December 2008, at 4 *available at* http://www.mutualfundsbureau.com/docs/PortfolioMagazineArticle.pdf (noting that, between 2000 and 2005, subprime lending had grown from $130 billion to $625 billion).

75. This is so if the value of the collateral available to the creditor (i.e., not exempt under law or subject to a senior lien) equals or exceeds the amount of the debt. If this is not the case, the loan is "undersecured," and the collateral will not make the lender whole if the debtor defaults, though it may cover some of the debt.

76. This reliance on other assets may or may not involve litigation. Either a creditor will pursue a judgment and ultimately attempt to levy on the debtor's assets, or the creditor will negotiate a resolution with the debtor. Likely, both of these courses will be pursued simultaneously. In either case, the creditor will have to look to the debtor's assets (or future assets) for recompense.

77. *See supra* note 45.

from a policy perspective[78] and is not necessarily a problem from a potential creditor's (and, hence, from an economic generation) perspective. So long as creditors can reasonably and accurately assess what will be available, prior to engaging in a credit relationship, their eventual lack of recourse is not problematic, as they can accurately include that in the overall calculus of how much to lend, to whom, and under what terms. The difficulty comes, then, not from the concept of debtor asset protection, but from the extent to which that concept is heterogeneous. Again, creditors seek out this information because they need it so that they can order their affairs. But this task is difficult because the law is heterogeneous—i.e., it varies enormously from jurisdiction to jurisdiction. Creditors cannot easily assess their potential rights merely by assessing the property interests of potential debtors. Instead, they must discern just what those rights mean in the relevant jurisdiction. This constitutes a potentially significant transactional cost, creating inefficiency.[79] As such, the goal of property is once more undermined because of its heterogeneous nature.

This inefficiency, this inability of property to serve its purpose due to the difficulty of deciphering what rights flow from what property, then, is present throughout the law of property. Though it is likely impossible to accurately estimate the size and scope of this

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78. *See* Brown, *supra* note 45, at 169 ("The purposes behind exemptions are inseparable from social policies endorsed by legislative bodies and courts, such as the provision to the deserving debtor of 'property necessary for his physical survival;' the protection of 'the dignity, cultural and religious identity of the debtor;' the 'enablement of the debtor's financial rehabilitation and future earning ability;' the protection of the 'debtor's family from the adverse consequences of impoverishment;' and, a shifting of the burden for 'providing the debtor and his family with minimal financial support from society to the debtor's creditors,' who will receive less from the debtor as a result of available exemptions." (citations omitted)).

79. *See infra* Part III.B. There is, in other words, 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. These information costs are what create the inefficiencies outlined herein. Note that an implication of this extension of the *numerus clausus* concept, as identified and defined by Merrill and Smith, is that the informational burdens identified therein are associated with the entire spectrum of property law. Heterogeneity in the context of any of the taxonomically distinct elements of property law set forth above creates informational burdens and so fosters inefficiency. This potentially contradicts Merrill and Smith insofar as their theses imply that heterogeneity in property format would uniquely foster these sorts of costs. Of course, Merrill and Smith could be correct if one could somehow demonstrate that property format heterogeneity does foster informational burdens, if not uniquely, then at least to a higher degree than heterogeneity in other areas of property law. If not this, though, it appears that heterogeneity creates informational burdens wherever it exists in property law and that Merrill and Smith have misdiagnosed the reason for property's peculiar homogeneity in the context of property format. That leaves open the question, then, as to what is the true cause of this peculiarity.

cost, it is perhaps possible to begin to understand it by looking at the title insurance industry. Title insurance effectively provides indemnification against the loss that occurs if title proves to be inferior to what the title company indicated in an issued title policy.[80] In other words, it protects parties from misinterpreting the rights that flow from property—i.e., from misunderstanding the information broadcast by the thing itself—the danger of which is a direct outgrowth of the variability set forth above.[81] Accordingly, title insurance is necessary due to the inefficiency of the property system, and the money spent on this form of protection can be viewed as some indication of just how pernicious and costly this inefficiency truly is.[82] And the amount of money spent is huge. The title insurance industry is a multibillion-dollar industry, generating $8.7 billion dollars in premiums in 2010 alone.[83] The cost associated with heterogeneity, then, is huge.

However, this cost is not quite as large as it could be because there is a single area of property law that is an exception to the rule of heterogeneity and its cost. That exception is in the area of property format (or system of estates, in the taxonomy created above). An examination of this homogenous outlier, and the theory previously put forth to explain it, is helpful here.

II. PROPERTY FORM AND THE *NUMERUS CLAUSUS*

The exception to heterogeneity in property law arises in the context of property form. In this setting, courts have been strikingly hostile to the variability so endemic to other areas of property law. Seizing upon this, Merrill and Smith have propounded what they call the *numerus clausus* theory,[84] which attempts to explain why property law is uniform in only this single area.[85] This theory turns

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80. *See* John C. Murray, *Title and Survey Issues in Commercial Real Estate Transactions*, *in* UNDERSTANDING THE SOPHISTICATED REAL ESTATE TRANSACTION 55, 57-58 (Practising Law Institute ed., 2003).

81. *See also infra* Part II.B.

82. Title insurance would still be purchased even if the title was perfectly understandable from a legal point of view, as there are reasons other than the legal inefficiency of property law to insure title (e.g., poor record-keeping, mistrust of parties, etc.). So the entire cost of title insurance cannot be relied on here as a proxy. But it seems eminently reasonable to believe that some element of that cost is attributable to the systemic inefficiency identified herein such that the cost of title insurance is, at least, instructive as to the magnitude of the issues involved.

83. 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).

84. A theory I have previously relied upon extensively. *See generally* Pomeroy, *supra* note 10.

85. *See* Merrill & Smith, *supra* note 12. *See generally* Henry E. Smith, *Community*

upon Merrill and Smith's view of the informational burdens inherent in "new" property types.[86] These topics are helpful here, as they provide the basis for an expansion of the *numerus clausus* theory to property law as a whole.

A. An Exception to Heterogeneity and the Numerus Clausus

The *numerus clausus*, as developed by Merrill and Smith, provides a reason as to why property law restricts parties' discretion to customize their ownership interests.[87] Simply put, people cannot create different types of property because property law recognizes only a limited number of property forms or types and refuses to allow parties to stray from these set categories.[88]

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.[89] This can be seen with respect to virtually all subcategories of "property form,"[90] starting with estates. There are five types of possessory estates ("the fee simple absolute, the defeasible fee simple, the fee tail, the life estate, and the lease"); a similar number of future interests (reversions, termination powers, remainders, and executory interests); and the courts rarely vary from these categories.[91] This strict approach extends to the other

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and Custom in Property, 10 THEORETICAL INQUIRIES L. 5 (2009); Merrill & Smith, *supra* note 68.

86. *See* Merrill & Smith, *supra* note 12, at 40-42.

87. *See id.* at 3.

88. *See id.*; *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."). This case is heavily relied upon by Merrill and Smith, who use its terminology to describe their thesis that property law will not permit "fancies." *See* Merrill & Smith, *supra* note 12, at 25-26.

89. *See* Merrill & Smith, *supra* note 12, at 11-12. Therein, Merrill and Smith make their point with a classic example: a lease "for the duration of the war" would almost certainly not be enforced according to its terms. Seeking to place such a lease within one of the four traditionally recognized types of leasehold interests, a court would probably shoehorn the lease into category of periodic tenancy or a tenancy at will. *See id*. at 3 (citing 1 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 11.01, at 11-2 (Patrick J. Rohan ed., 1999)); CHARLES DONAHUE, JR. ET AL., CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 457 (3d ed. 1993); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 204 (4th ed. 1998); LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS § 61, at 45-46 (2d ed. 1956)). Merrill and Smith believe that courts and scholars generally honor this conception of property: "They treat previously-recognized forms of property as a closed list that can be modified only by the legislature." Merrill & Smith, *supra* note 12, at 10-11. *But see* Garner v. Gerrish, 473 N.E.2d 223, 225 (N.Y. 1984) (characterizing an interest as "a life tenancy terminable at the will of the tenant").

90. *See supra* Part I.A.

91. Merrill & Smith, *supra* note 12, at 13; *see also* DUKEMINIER ET AL., *supra* note 5, at 183-316; *see also, e.g.,* Stuehm v. Mikulski, 297 N.W. 595, 603 (Neb. 1941)

subcategories of property form as well. Concurrent interests, nonpossessory interests, personal property, intellectual property, and lienhold interests[92] all generally receive the same treatment: even though the courts never use the term *numerus clausus*, they steadfastly follow its precepts and deny parties the right to create new interests of their own choosing.[93]

Interestingly, our laws do this without explicitly recognizing or explaining why—that is, without even acknowledging the *numerus clausus* principle. This differs from civil law countries, where the concept is explicitly recognized and referred to by name: the *numerus clausus*, which means "the number is closed.[94]

The concept is less developed in the United States, and Merrill and Smith view it as a "stealth doctrine,"[95] having identified a relatively unknown decision, which they endorse as a "leading case," as an example of how the concept has worked its way into our jurisprudence with little fanfare.[96] In *Johnson v. Whiton*, Royal

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(Carter, J., concurring) ("It is essential that titles and estates in land be definite and certain. It is not a field in which the court should undertake to establish that it is liberal and modernistic in keeping pace with changing conditions. The creation of hybrid estates unknown to the common law is to be deplored.").

92. American common law recognizes a very basic catalogue of concurrent interests: "tenancy in common; joint tenancy; marital property; trusts; and condominiums, cooperatives, and time-shares." Merrill & Smith, *supra* note 12, at 15 (citing Powell's treatise on real property). The same can be said of nonpossessory interests: easements, covenants, equitable servitudes, and profits have been remarkably stable and unchanged by the courts. *See id.* at 16-17. Similarly, almost all attempts to create nuanced forms of personal property take place in the context of trust law. *See id.* at 17-18. Intellectual property also shows the effects of the *numerus clausus* in that there has historically been no real protection for creative property outside the legislative dictates of patent, copyright, trademark, and trade secret. *See generally* DUKEMINIER ET AL., *supra* note 5, at 56-96. Finally, almost all secured lien interests in real property are either a mortgagor interest or a beneficiary interest arising from a deed of trust. *See, e.g.*, AMY MORRIS HESS ET AL.,TRUSTS AND TRUSTEES § 29 (3d ed. 2007).

93. This view is a widely cited one, but it is not the only explanation for the *numerus clausus*. *See, e.g.,* Heller, *supra* note 21, at 1170 (arguing that undue fragmentation of property interests would create inefficiency, as the costs of such fragmentation would not be born by the creators thereof).

94. Merrill and Smith acknowledge as much, citing to a number of European writers who have previously written on the topic. *See* Merrill & Smith, *supra* note 12, 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 Typenfixierung"); KLAUS SCHREIBER, SACHENRECHT 28-29 (1993) ("Typenzwang und Typenfixierung")); *see also, e.g.*, 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 EDIN. L. R. 267, 267 (2004) (Scot.).

95. *See* Merrill & Smith, *supra* note 12, at 20-23.

96. *See id.* at 20-21 (discussing Johnson v. Whiton, 34 N.E. 542 (Mass. 1893)).

Whiton devised land to his granddaughter "and her heirs on her father's side."[97] The court construed this as an attempt to create a new type of estate and disapproved, instead ruling that Royal's granddaughter received a fee simple absolute.[98] Merrill and Smith see this as a seminal case because it so nicely fits their description of the *numerus clausus* as a widely controlling, but subtle and unnamed, rule of law.[99]

So we are left with a subtle doctrine, fashioned as an explanation to an exception to the extreme variability present in property law. The courts may not cite the principle, and historical treatises may not recognize it in this country, but Merrill and Smith believe that the concept is important and that it explains a large swath of American property jurisprudence.[100] Their thinking is both interesting and relevant to our discussion of the wider heterogeneity of property law generally.

B. Informational Burdens

According to Merrill and Smith, the *numerus clausus*, as applied here, can be explained by focusing on informational costs and burdens.[101] Property law, they point out, focuses on the *thing* and the rights flowing from that thing.[102] This focus on the *in rem* (as opposed to the *in personam*) nature of property is the basis for Blackstone's famous definition of property as "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."[103] In other words, rights are defined with respect to an item that is possessed or "owned," as opposed to being defined with respect to the owners thereof.[104]

As such, property only "works" when the thing at issue properly communicates the rights inherent therein—i.e., the property itself

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97. *Johnson*, 34 N.E. at 542.

98. *See id.*

99. *See* Merrill & Smith, *supra* note 12, at 21-22, 69.

100. *See id.* at 21-22.

101. *See id.* at 53. *But see* Heller, *supra* note 21, at 1176-78 (suggesting, in contrast, that the purpose of the *numerus clausus* is to promote the easy transferability of property).

102. *See* Merrill & Smith, *supra* note 68, at 359.

103. 2 BLACKSTONE, *supra* note 2, at *2. This definition of property has been criticized as out of date. *See, e.g.,* Lehavi, *supra* note 17, at 1245. Nevertheless, it still has substantial, and enduring, appeal. *See, e.g.,* Rose, *supra* note 20, at 602 ("[M]odern legal scholars refer to it often, whether they do so with approbation or disapproval.").

104. This is in contrast to the view of property rights as a malleable "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 (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").

broadcasts the rights and obligations associated with its ownership "to the world," and the world must understand that broadcast so that everyone can recognize and respect those rights which ultimately constitute "property."[105]

> 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).[106]

Of course, third parties have to expend time and resources to gain this knowledge, and unusual property forms increase the cost of doing this. It is this cost (this informational burden) that Merrill and Smith focus on, claiming that what the *numerus clausus* is really doing is making it easier on others to understand what is being broadcast in order to decrease the costs inherent in property law.[107] In other words, what the courts are truly concerned about is that new types of property interests will create information costs for third parties.[108] The *numerus clausus*, then, simply guards against the informational burdens that would result from recognizing the many unique property rights that parties would develop of their own accord.[109]

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105. Merrill & Smith, *supra* note 68, at 359.

106. Merrill & Smith, *supra* note 12, at 26.

107. *See id.* at 25-26 (relying upon Keppell v. Bailey, (1834) 39 Eng. Rep. 1042 (Ch.) 1049). The relationship between heterogeneity of property forms and higher cost arises, with respect to the parties to the transaction, due to the fact that all communication must be processed in order to be understood. This processing requires one to expend resources (i.e., incur cost). Expanding the type or range of information being communicated involves changing what rights are possible and will necessarily increase that cost. The relationship between heterogeneity and cost does not stop at the parties with a direct connection to a piece of property, though. The duty to understand property rights is not personal. It attaches to everyone: in order for property to "work," everyone must clearly and efficiently perceive everyone else's property rights. *See* Merrill & Smith, *supra* note 68, at 359. Unfortunately, this universality amplifies the costs of communication because everyone (even third parties who presumably have no need to understand the rights and responsibilities of a given property owner) bears them. *See, e.g.,* Merrill & Smith, *supra* note 12, at 27 (citing Henry Hansmann & Reinier Kraakman, *Unity of Property Rights* 5-6 (Nov. 17, 1999) (unpublished manuscript) (on file with the Yale Law Journal)). It is this bearing of cost by third parties that Merrill and Smith focus on. Property owners will not take adequate account of these third-party costs because they do not bear them, so property can function as intended only so long as it remains simple and standardized such that "everyone else" can understand the broadcast easily and with little cost. *See id.* at 28.

108. *See* Merrill & Smith, *supra* note 12, at 26-27.

109. Limiting the types of property forms allows everyone "to limit his or her inquiry to whether the interest does or does not have the features of [pre-existing] forms." *Id.* 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*

And this generally applies to property law. Merrill and Smith utilize the *numerus clausus* to explain the extraordinary homogeneity of property form, but this doctrine and its underpinnings have a much broader application than that.

III. A BROADER THEORY OF HOMOGENEITY

The *numerus clausus*, insofar as it is driven by an underlying concern for informational burden and cost, theoretically should apply to all of property law. Heterogeneity drives up costs everywhere, not just in the category of property form, and the manner in which the *numerus clausus* could apply elsewhere is easily conceivable. This section examines this limited application by explaining what a widely applicable *numerus clausus* would look like and how it could apply to all areas of property law.

A. What

In proposing that a *numerus clausus* type of analysis could apply broadly in a manner similar to that in which it has previously been applied to property form, it is helpful to start by doing so in a number of concrete doctrines of property law.[110] Let us start with the property subcategory of vesting.[111] The *numerus clausus* should theoretically apply to vesting because the informational burdens of property (as defined and described by Merrill and Smith) are increased by vesting heterogeneity in the same way that they would be increased by property form heterogeneity.[112]

In particular, the vesting heterogeneity costs exist insofar as vesting document variability "detracts from[] the underlying purpose of the recording system, which is to make information available to the right parties at the right time."[113] This is, in essence, the same concern as the informational burdens identified by Merrill and Smith in the property form context in that it similarly focuses on "the difficulty and expense others will encounter in attempting to understand the ownership rights of a particular piece of property."[114]

Notice in Commercial Finance Law, 21 EMORY BANKR. DEV. J. 421, 497 (2005). Without that shorthand, there is potential for the parties to "mistakenly make inconsistent uses of the asset or underuse the asset" or to misallocate resources due to a fear "that the other will . . . opportunistically assert rights that properly belong to the other." Hansmann & Kraakman, *supra* note 32, at S382.

110. *See supra* Part I.A.

111. *See* Pomeroy, *supra* note 10, at 987.

112. This similarity is not exact. Merrill and Smith's focus on exogenous costs is not parallel here and does not directly drive the application of the *numerus clausus* to the heterogeneity of vesting documents. *See id.* at 985-87.

113. *Id.* at 985.

114. *See id.* (setting forth parallel property form and vesting document examples that make this point).

In other words, the costs that drive the courts to enforce the *numerous clausus* in the property form context are fundamentally similar to the costs caused by vesting document heterogeneity.

The same can be said in other contexts, as well. Take, for example, the issue of third-party property rights heterogeneity, discussed above. Variability in this area of the law prevents potential creditors from uniformly assessing property rights and lending risk. As another example, consider co-ownership, a topic identified in the property law taxonomy, set forth above. There is variability here in that different jurisdictions grant different rights and assign different responsibilities to the same types of co-ownership interests.[115] There are no uniform rules or standards, so interested parties must constantly be on guard for the particularities of a given jurisdiction or situation. This is so for all creditors and interested parties: those in a given transaction must take care, of course, but even those who are merely present in the lending industry generally or who are only interested in acquiring property must do the same, as there is never any guarantee of uniformity or "sameness" in any future or theoretical transaction or purchase.

In other words, the heterogeneity present throughout property fosters the same sorts of informational burdens identified above, making it difficult (costly) for anyone interested in property rights (a very large category, given the significant impact of property in our economy) to access the right information at the right time. Indeed, there is no reason to think that the informational burdens created by heterogeneity are absent in any area of property law. Because property is fundamentally intended to encompass and convey rights, its basic lack of heterogeneity necessarily creates confusion and inconstancy.

As such, the *numerus clausus*, and its lessons, are theoretically applicable to all of property. The *numerus clausus* has traditionally acted (solely) to foreclose anything other than a standardized set of property types in order to moderate the costs ultimately borne by "everyone else," but it should do the same thing elsewhere. How that would occur—that is, how the *numerus clausus* would function broadly in the context of all property law—is addressed below.

B. How

So would the *numerus clausus* work on a widespread basis? With respect to property form, this is easy to envision in a practical sense because it is, in fact, the present state of the law: courts systemically

115. *See, e.g.,* Riddle v. Harmon, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980) (recognizing existence of differing law as to existence of unities of title necessary to creation of joint tenancy).

limit parties to certain, prescribed categories of property forms.[116] How, though, would this work conceptually and practically in other areas of property?

To examine this, let us turn again to the subcategories discussed above.[117] If the *numerus clausus* were applied to vesting heterogeneity, it is likely both that the categories of potential vesting documents would be reduced and that the content of the categories remaining would be simplified.[118] Similarly, if the *numerus clausus* were applied to the third-party rights or co-ownership heterogeneity, the conflicting laws and contradictory elements associated with these sorts of property interests would disappear, and a more simplified schema would replace it.[119] There is, however, no reason to think that property law would settle upon a single property format, that any particular exemption or limitation on creditor rights would disappear entirely, or that the rules applicable to co-ownership property types would regularize across all jurisdictions. Instead, these elements of heterogeneity would move toward standardization efficiently, seeking to permit interested parties to gather information in a cost-effective manner. In Merrill and Smith's terminology, the *numerus clausus* would simply move property law toward a level of "optimal standardization."[120]

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116. *See* Merrill & Smith, *supra* note 12, at 12-20 (providing an outline of the various categories of property law).

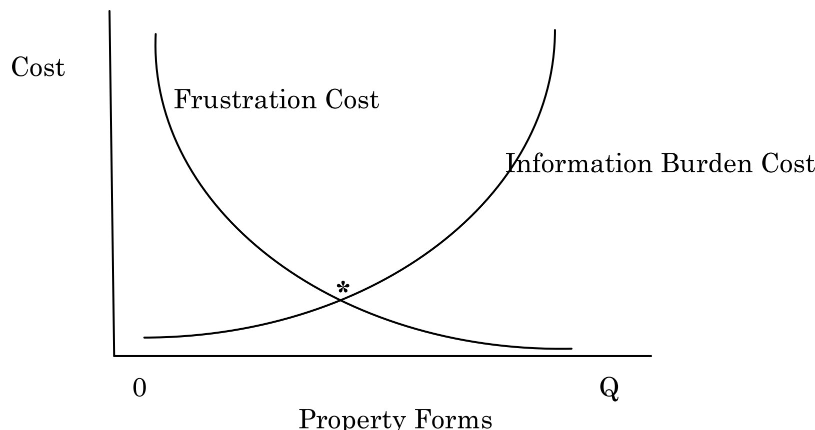
117. With respect to this discussion, insofar as it relates to vesting heterogeneity, see Pomeroy, *supra* note 10, at 987-95.

118. Standardization and simplification are closely related. *See, e.g.*, S. ANIL KUMAR & N. SURESH, OPERATIONS MANAGEMENT 198 (2009). Currently, countless documents can be filed in the recording system, but, if the *numerus clausus* were applied, some of these types of documents would go away because their utility would not justify the costs they generate. *See* Pomeroy, *supra* note 10, at 987-88. The discussion contained herein of how the *numerus clausus* would apply to vesting heterogeneity attempts to apply the *numerus clausus* concept in an original fashion, starting at a theoretical point of time in the past. Here, when thinking through how the *numerus clausus* would apply to an area of the law to which it has not, in fact, been applied, we must imagine how the *numerus clausus* would be applied to a given heterogeneous element immediately prior to that element's historical adoption. If applied ex ante, in this fashion, it would prevent the creation of fancies. It would not, however, analyze the costs inherent in changing the law, though such an examination is interesting in other contexts. *See infra* Part IV.

119. Again, the relationship between standardization and simplification would drive this elimination of inefficient elements of these respective areas of property law. *See* KUMAR & SURESH, *supra* note 118, at 183-85. Creditors would have fewer sources of rules to grapple with and would be able to more easily assess their contingent rights in debtor property, and parties would be able to more easily understand the nature of multiparty ownership property types and issues.

120. Hence the title of Merrill and Smith's article. *See* Merrill & Smith, *supra* note 12, at 38. As Merrill and Smith discussed in the property form context, the problem with the simplicity that comes from total uniformity is that it frustrates parties' goals. *See id.* at 35. Instead, the *numerus clausus* balances simplicity and frustration by

This move toward optimal standardization, as postulated by Merrill and Smith in the context of property form, can be represented in graphic format:[121]



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.[122] By superimposing these cost curves on each other, the *numerus clausus* results in a rough equilibrium at point *, which creates the "correct" number of property formats—that is, a number of different formats that balances frustration costs and informational burdens and so minimizes overall cost.[123]

If the *numerus clausus* were applied broadly to all property law, this same optimization would occur throughout all property categories. We can see this in more detail by applying the above analysis to the areas of property law discussed above.

Let us start again with vesting heterogeneity and apply the *numerus clausus* theory by examining the trust deed, a common vesting document.[124] Because the deed of trust was created in direct response to a limitation inherent in prior existing mortgage documents, it is possible to hypothetically apply a "vesting heterogeneity *numerus clausus*" analysis by balancing the frustration

balancing informational burdens with creativity and ingenuity.

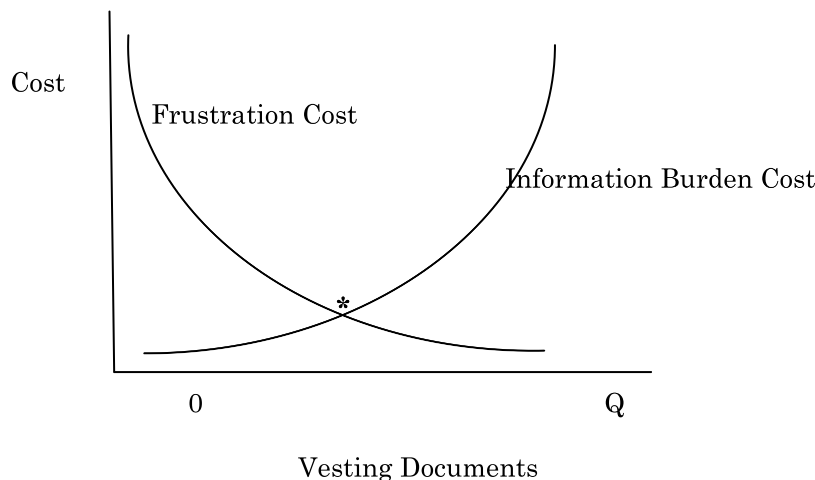
121. *See* Pomeroy, *supra* note 10, at 990-91 (setting forth the graph, derived from Merrill and Smith's graphic representation).

122. *See id*. (explaining these cost curves in detail).

123. *See id.* at 993.

124. *See id.* at 993-94. This is particularly useful here, given the relatively recent creation of the trust deed document as a solution to the problem posed by prior mortgage documents' failure to permit effective foreclosure. *See id.* (citing DUKEMINIER ET AL., *supra* note 5, at 616-21).

cost that exists absent the document against the marginal informational burden cost of the document. In other words, we must determine whether the trust deed "decreases frustration costs by an amount that is greater than its concomitant increase in informational burden costs."[125] To do this, the model discussed above could be modified to reflect its application to vesting documents as follows:[126]



Again, then, the two axes result in two cost curves,[127] and the *numerus clausus* analysis would seek to determine whether a world with trust deeds is at, or to the left of, point *. If it is, then the frustration costs of not permitting that type of document exceed the costs of permitting it, so the world would be better off if trust deeds were permitted. A world with trust deeds is to the right of point *, however, if the frustration costs associated with losing the trust deed are less than the informational burdens created by having a new document. The theoretical result of this analysis is not critical—what is important is to note the manner in which the *numerus clausus* analysis can be applied.[128]

125. *Id*. at 992.

126. *Id*. at 992-93 (setting forth this graph and explaining that the x-axis is the number of categories of vesting documents permissible and that the y-axis is the generic cost incurred by society).

127. As above, both of these are curves because the costs at issue marginally increase or decrease in sync with the x-axis.

128. It seems likely that a *numerus clausus* analysis here would have permitted the creation of trust deeds, as the frustration costs (not being able to avoid a costly and difficult foreclosure process involving the equity of redemption) seems to exceed the heterogeneity costs created by the creation of a new document. *See id*. at 990-93.

And it can be applied to all areas of property law. To demonstrate this, let us return to third-party property rights and co-ownership, two of the topics discussed above.[129] Again, conceive of a simplified world wherein the substantive aspects of co-ownership and all third-party property rights are basically the same across all jurisdictions. Though these two areas of property law are less easily compartmentalized than vesting (because there are not analogues to distinct vesting documents), it is nevertheless possible to conceive of the hypothetical effect of the *numerus clausus* here. Each desired departure from the standardized rules of co-ownership and third-party property rights would have to balance the frustration costs that would exist without that new departure against the costs that arise from permitting a variety of co-ownership and third-person property rights and rules.

Take, as a dual example, third-party rights in property held as tenants by the entirety and the rules regarding creation of joint tenancy. In both circumstances, the law varies from jurisdiction to jurisdiction: different jurisdictions grant creditors differing rights in marital property and have differing rules regarding whether one must utilize a straw buyer to create a joint tenancy including the grantor.[130]

The *numerus clausus* would not necessarily have eliminated all differing elements associated with third-party property rights or imposed a standardized rule as to the creation of a joint tenancy including the grantor. Tenancy by the entirety is a relatively unique property interest that developed in response to a need to accommodate joint ownership in the marital context, given the perceived unity of husband and wife.[131] Importantly, it arose to fulfill the need for marital ownership and evolved over time, in response to relevant social and legal changes regarding the rights of women.[132] Similarly, joint tenancy historically involved a common law fiction that joint tenants are one, thereby permitting them to take by right of survivorship, an important aspect of co-ownership.[133] Similarly, the differences here arose due to modern pressures and views of legal

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129. *See supra* Part II.A.

130. *See* Carrozzo, *supra* note 47; Riddle v. Harmon, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980).

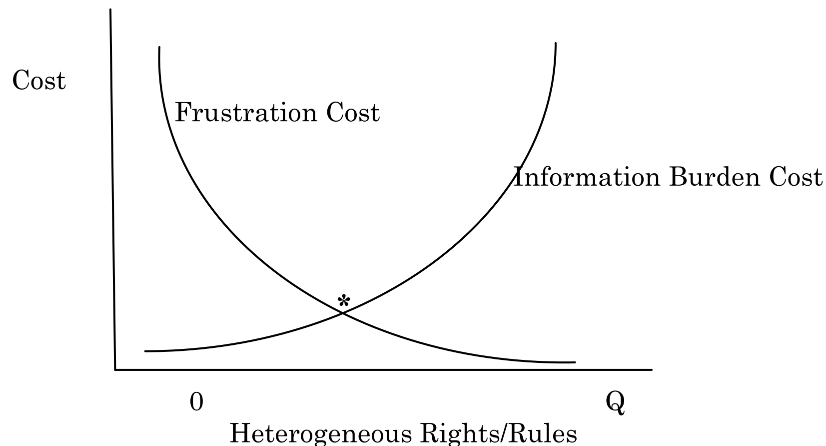
131. *See* Carrozzo, *supra* note 47, at 436 ("[T]his oneness of person made true concurrent ownership by husband and wife a legal, albeit fictitious, impossibility. Thus, it was necessary for land to be owned in its entirety by the marital unit of husband and wife." (internal quotation marks omitted)).

132. *See id.* at 436-46.

133. *See* DUKEMINIER ET AL., *supra* note 5, at 320. This fiction required that all joint tenants be equal in all aspects of ownership, including time of acquisition, and this necessarily meant that a grantor could not create a joint tenancy in himself and another by a direct conveyance. *See id.* at 320-21.

technicalities applied to an old, rigid doctrine.[134] It is clear, then, that these differences (the differing rights of third parties in tenancy by the entirety and the different rules regarding creation of joint tenancy) result from a complex history of legal and cultural differences underlying significant aspects of local law and have resulted in varying rules in numerous jurisdictions.[135] The *numerus clausus*, from an original position, would account for these concerns.

Let us again apply the model set forth above, this time to co-ownership and third-party rights:



The x-axis here would be the number of third-party property rights or joint-tenancy creation rules extant. At 0, there would be a single regime applicable to all jurisdictions (in the case of third-party rights, a single rule as to what rights creditors could achieve in tenancies by the entirety, and, in the case of co-ownership, a single rule as to the creation of a joint tenancy by the grantor). At Q, on the other hand, there would exist whatever number the various jurisdictions desired to create. Once more, the y-axis would measure the costs associated with the resultant curves: the fewer peculiarities permitted, the higher the frustration costs and the lower the information burden costs; and the more peculiarities permitted, the lower those frustration costs and the higher those information burden costs.

As above, the *numerus clausus* would seek not ultimate simplicity but optimization. It would permit the varying third-party rights associated with tenancy by the entirety or the creation of

134. *See id.*

135. *See id.* at 320-22; Carrozzo, *supra* note 47, at 445-46.

grantor joint tenancy by way of a direct transfer if doing so would place the law at, or to the left of, point * because, there, the frustration costs of not permitting varied third-party property rights or creative freedom would exceed the cost of permitting it. Again, given the historical antecedents of both tenancy by the entirety and joint tenancy, it is possible that the *numerus clausus* would permit heterogeneity in these circumstances, so long as it established (in the context of existing conceptual strictures) a necessary form of married ownership or a useful expedient in the creation of joint ownership, given all relevant circumstances and considerations.

This, then, is how 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.[136] In the context of property form, the *numerus clausus* has put a brake upon individual creativity in the name of wider efficiency and thereby reduced the number of potential property forms, and it would do the same wherever applied in property law. It would oppose individual creativity—whether in creating new vesting documents, creating different third-party property rights, or permitting new methods of joint tenancy creation—in the name of efficiency and simplify the law whenever heterogeneity costs incurred would exceed the frustration costs of prohibition.

IV. WHY HETEROGENEITY IS SO WIDESPREAD

Given the theoretically justifiable application of the *numerus clausus* across all areas of property law, why has this not occurred? Merrill and Smith persuasively point to the informational burdens that would result if property law permitted an open suite of property types as an explanation for the uniquely stable nature of property's system of estates.[137] I have argued that these informational burdens similarly result from the heterogeneity that is baked into other areas of property law, as well. If this is correct, though, why is the rest of common property law so stubbornly heterogeneous?

The short answer, here, is that this question is largely beyond

136. This is if such an analysis were applied prospectively. *See infra* note 143. This section applies the *numerus clausus* concept to property law concepts in an original fashion, starting at a theoretical point of time in the past. That is, it does not attempt to analyze the costs inherent in changing existing law. To apply the *numerus clausus* doctrine on a retroactive basis—that is, to ask to what extent it could be utilized to actually roll back the documents now available (which is, of course, what would be required for all categories of property law, other than property form)—would have to account for the additional costs associated with upsetting existing practice and expectations. *See infra* Part IV.

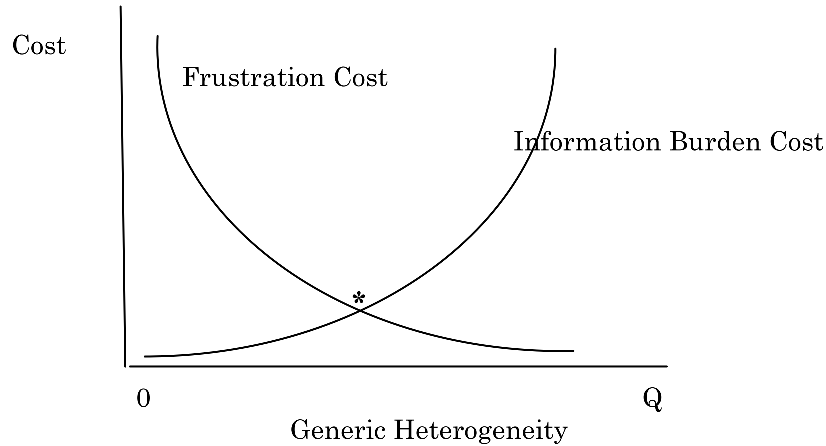
137. *See supra* Part II.B.

the scope of this article. The primary thesis of this Article is that the informational burdens identified and analyzed by Merrill and Smith are present elsewhere in property and that the presence of these burdens and costs explains, in part, the stubbornly difficult and challenging nature of property law, from both a student's and from a practitioner's point of view. It is not entirely clear from the research set forth and examined here precisely why it is that the informational burdens associated with property format heterogeneity had a stabilizing influence, while those associated with other areas of property law have not had a similar influence.[138]

This Article does not, then, proffer a reason why the *numerus clausus* has not had a greater effect on property law, from an ex ante point of view. It is possible, however, to draw upon the research herein and to suggest a reason why the law has not changed, or adapted, in response to the hypothetical *numerus clausus* pressures discussed herein. This is a different question in that it acknowledges that courts may alter their course once they have seen the benefits (either practical or academic) of a particular doctrine or view of the law. But here they do not.So a more refined question is, given the widespread discussion and analysis of the *numerus clausus* (and its application to property format), why have courts not attempted to streamline property law at any point in time, either in reviewing new issues or in changing prior law or precedent?

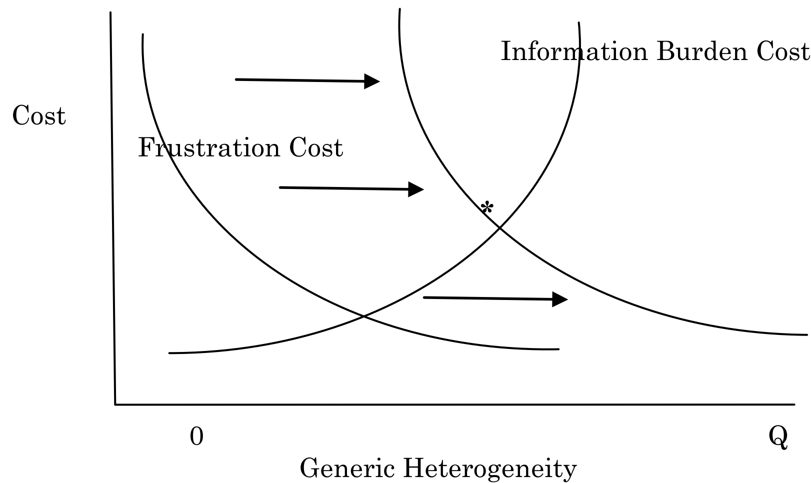
In order to understand this lack of adaptation, let us return to the graphic representation of the *numerus clausus*, set forth above:

138. Of course, one potential explanation is that it is not really the informational burdens identified by Merrill and Smith that explain property format homogeneity. Such a claim, incipient herein, would not suggest that informational burdens do not result from variation—instead, it would propose that these burdens are present everywhere in property law and hence cannot be the driving force behind the relatively unique homogeneity of property format. Another potential argument is that the agent of substantive property form law differs from the agent of other aspects of property law. *See* Pomeroy, *supra* note 10, at 987-95. "In the context of property forms, the agent of implementation has been the court system." *Id.* at 994-95 (citing Merrill & Smith, *supra* note 12, at 9-10 (discussing the *numerus clausus* as a "norm of judicial self-governance")). That the courts have not historically become as involved in some other areas of property law is perhaps because many of these other areas have been largely addressed legislatively. *See id.* This deference for legislative autonomy can be seen even in the property format, given the legislative addition of new property formats such as condominium interests and time-shares. *See* Heller, *supra* note 21, at 1176 n.62. It would seem reasonable, then, that the courts would similarly decline to become involved, or attempt to impose a *numerus clausus* regime, in other areas generally falling within the legislative realm. Neither of these potential arguments, however, is within the scope of this Article.



As discussed above, this demonstrates the manner in which the *numerus clausus* balances the advantages of newness and creativity against the disadvantages, or costs, of the same. And, again, this makes sense from an original position—that is, from that point in time where the law is being formed.

However, to apply the *numerus clausus* doctrine on a retroactive basis—to ask to what extent it could be utilized to actually roll back and change the law as it currently stands—would involve a different examination in that such an analysis would have to account for the additional costs associated with upsetting existing practice and expectations. This different analysis would involve the same balancing, but it would shift the frustration cost curve to the right:



This shift would occur, in a retroactive attempt at applying the *numerus clausus*, because reducing heterogeneity (or "Q") would involve not just the frustration of not being able to utilize creative or new property concepts—it would also involve the enormous expense and difficulty of changing the current landscape. That is, there would be a very significant "rollback" cost wherein prior manifestations of property heterogeneity would have to be altered to conform with the new homogenous world.

As an example, imagine attempting to impose the *numerus clausus* on vesting heterogeneity after the development of the grant, bargain, and sale deed (a "GBS deed"), as it is utilized in a given jurisdiction (here, Nevada).[139] The GBS deed is in the same category as the special warranty or general warranty deed, but it creates different legal obligations and rights, and so is a clear example of vesting document heterogeneity.[140] There is some reason to think that the *numerus clausus* doctrine would not permit the development of such a "fancy" if it were applied in an ex ante manner, as the benefits of permitting this new type of vesting document likely would not equal or exceed the informational burdens arising from an additional document of such a nature.[141] If, though, the *numerus*

139. Nevada is not special and merely serves as an example. This example and much of this discussion comes from Pomeroy, *supra* note 10, at 987-95. In Nevada, a GBS deed differs from a warranty deed in that it does not come with all of the implied warranties inherent in warranty deeds and in that these GBS deed covenants do not run with the land. *Id*. at 989.

140. *See id*.

141. *Id*. at 993. ("If it is to the right of [point *] . . . [t]he frustration costs associated with losing the unique characteristics and attributes of the GBS deed are less than the

clausus were imposed at the present, in an ex post manner, the costs associated with eliminating the GBS deed would not be limited to the frustration costs arising from losing the unique characteristics and attributes of the GBS deed. Instead, it would include the costs of repealing such a document—of correcting future users of the document, of purging old documents from the property system, and of addressing the complications bound to arise from this sort of undertaking. This is what shifts the frustration curve to the right, thereby moving point * farther toward Q—i.e., permitting greater heterogeneity than might otherwise be anticipated.

This, then, is an explanation as to why the *numerus clausus* has not acted upon the existing state of property heterogeneity.[142] This increased cost associated with *changing* the current system (as

opposed to adopting it initially) explains the differing levels of homogeneity associated with property format and the other areas of property law discussed herein, notwithstanding the similar informational burdens inherent in all of property law.[143]

CONCLUSION

Property law is unique among core legal subjects in that it is highly, highly variable. Different states, different counties, different courts—every conceivable lawmaking unit propounds seemingly different and varied rules regarding nearly every category of property law. Except one: as Merrill and Smith have shown, property form is uniquely simple and uniform. This can be explained, they

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heterogeneity costs created by the addition of the GBS deed to our recordable oeuvre, and the world would be better off without the new document.").

142. As discussed in SVD, this does not mean that the *numerus clausus*, and the efficiency it seems to offer, is necessarily out of reach. *See* Pomeroy, *supra* note 10, Part IV.B. The institution of a *numerus clausus* type of doctrine could still come from the legislature (though it would likely have to be federal in nature, given the varied interests and activities of the various state legislatures). Of course, this has not yet occurred. *See id.* Another possibility is the free market. *Id.* at 995. A market-based source, or demand, for uniform property rules and mores could conceivably become significant enough that it could create a system of "network effects" influential enough to drive parties to standardization. *Id.* at 995-96 ("Network effects exist when one party's adoption of a particular format or standard has positive consequences for other adopters of the same."). Given that, it seems possible that the free-market could promulgate and demand uniform property rules with enough vigor to become a sort of de facto standard. *Id.* at 996. Such a system would not be perfect and would not as strongly force standardization as would the courts or the legislature. *Id.* at 997. It is, however, a possible solution to the problems associated with the informational costs identified herein.

143. This may be a problem of a particularly acute nature in the context of property law, given the importance of recording here. *See supra* Part II.A. The recording system concretely memorializes past practice and any change thereto would involve significant cost and difficulty. Arguably, that sort of necessity, the need to reach backward in time and adjust existing rights and upset existing expectations based on prior practices, is much less clear in other areas of the law.

claim, by the *numerus clausus*, a theory that effectively reduces heterogeneity in order to avoid the information burden and cost that would be incurred by everyone if the law permitted people to utilize whatever property forms they desired.

I agree that the application of the *numerus clausus* is an important insight and have previously suggested that it could, theoretically, apply to vesting documents, as well. Here, I go even further and suggest that it should apply to all areas of property law. All of property law is undermined by heterogeneity—whether one considers variability in the context of property form, vesting documents, or third-party property rights, one finds the same information burden and cost cited by Merrill and Smith in applying the *numerus clausus* to property form.

And, if it were so applied to other areas of property law, it would operate the same way it does to property form: it would restrict creativity and heterogeneity generally but not entirely, permitting new and different elements when the benefit of doing so outweighs the informational burden of doing so. This makes sense and would benefit our system, but it likely has not yet occurred because the law is too well developed and too entrenched to countenance such significant change. Implementing anything like the *numerus clausus* would cause too many difficulties and create too much cost due to the difficulty of attempting to rollback years and years of established usage and precedent. Still, if there were a way to implement the *numerus clausus*, this would immeasurably improve property law's ability to accomplish its purpose of providing information to everyone, something that is sorely called for.