Inteview

The numerus clausus principle means that property law recognizes only a limited menu of mandatory forms. In the United States, first year law students spend significant time mastering the limited menu of estates in land. In France or in Italy, every first year student learns that the “real rights” are ownership, emphyteusis, superficies, real servitudes, the right of usufruct, the right of use and the right of habitation. The numerus clausus principle exists in both the civil law and the common law, but, comparative law scholars warn, its nature and scope differ. In the civil law, the numerus clausus is a rigid rule with a long historical pedigree. It has structured the property system since Roman law. It is either explicitly stated or implied in the civil code. The menu of recognized forms is a relatively short one, comprising less than ten items. It is also significantly stable, with few variations from Justinian to the present. By contrast, in the common law, the numerus clausus has attracted the attention of property scholars only recently. It is a more flexible rule of judicial self-governance. The menu is a richer one, comprising forms, such as the trust, that civil law scholars have long envied.

The fact that the numerus clausus is a near universal feature of property systems has not made it less puzzling to private law scholars. Isn’t private law’s very function to provide individuals with flexible legal devices that allow them to reach any desired economic outcome? If flexibility and customization are what private law promises, then why do virtually all modern legal systems provide a restricted list of recognized forms? In recent years, property experts have proposed a variety of possible explanations for the numerus clausus principle. For some, it serves the purposes of preventing the excessive fragmentation of property entitlements, which would preclude, or make more difficult, the efficient productive use of valuable resources. For others, the function of the numerus clausus principle is to lower the information costs incurred by third parties who seek to acquire property rights or to avoid violating them. Still others suggest that the numerus clausus principle works as filter of the content of property forms, allowing the legislature and courts to deny the status of property rights (i.e. validity against the world) to forms that are at odds with contemporary values.

This rich strand of recent numerus clausus scholarship has focused mostly on the common law, leaving undisputed the traditional view as to the rigidity and stability of the numerus clausus principle in the civil law. This article presents a new understanding of

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1 See Bernard Rudden, Economic Theory v Property Law: The Numerus Clausus Problem, in OXFORD ESSAYS IN JURISPRUDENCE, JOHN EEKELAAR & JOHN BELL EDS (1987) 239-263 (at 239, “the issue to be discussed is the apparent conflict between a modern economic theory of property rights and the law”). Law & economics antipathy for numerus clausus principle
the *numerus clausus* principle in civil law systems. It focuses on an aspect of the operation of the *numerus clausus* principle in the civil law that has received virtually no attention. If we look at the list of recognized property forms in a historical perspective, yet another *numerus clausus* puzzle emerges. Not only is the list dynamic, in the sense that new property forms are occasionally recognized, but we can observe an interesting type of dynamism.\(^2\) Property forms have been, first, eliminated from and, then, re-admitted to the list. The article examines two recent instances where an old form was re-introduced. The right of *emphyteusis* (a type of long lease) was a form widely used until the 17th century. It was dropped from the list of the 19th century civil codes and was recently legislatively re-introduced in France and in the Netherlands. Ownership of *res communes omnium* (ownership of commons) was a form recognized in Roman law and later dropped from 19th century civil codes. It is now being revived by French and Italian property lawyers and is the object of recent legislatives proposals.

The article draws from these two recent episodes of dynamism in the list of recognized property forms two ideas.

First, the *numerus clausus* operates in much the same way in the common law and the civil law. The *numerus clausus* is yet another instance where the alleged stark difference between common law property and civil law property has been largely overstated. In both systems, the *numerus clausus* is a flexible principle that allows for significant experimentalism in property law. But, in both systems, there are limits to this experimentalism. Because property rights are *in rem*, i.e. valid against the world, we want to limit the information costs incurred by third parties who seek to acquire rights or avoid violating them. And, because the *in rem* nature of property rights confers on them a “public” quality, we want to exercise some control over the content of property forms.

Second, these recent instances in which an old property form was re-admitted into the standard list suggests something important about the emerging normative commitments of property law. The *numerus clausus* list tells us a great deal about the values we associate with property. But qualitative studies of the *numerus clausus* list are still largely missing.\(^3\) In other words, there has been little investigation of what these values are and how they have changed over time. Moments of dynamism in the list of property forms tend to be moments of significant social and economic change, as well as change in private and public values. Property scholars and historians agree that the pruning and expansion of the property list that happened in the early 19th century, when modern industrial society was just taking shape, reflected the rejection of feudal hierarchies and the commitment to negative freedom and the free alienability of property in the market. But what do recent changes in the list suggest? Is there anything new in the plurality of clashing normative ideals we seek to pursue through property? I argue that *emphyteusis* and ownership of *res communes omnium* have been, or are in the process of being, re-admitted into the list because they have an important quality. In both, decisions over the use and management of resources that involve important public interests, such as water, scarce urban land or cultural institutions, are made through a participatory

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\(^3\) with the exception of Joseph W. Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2008-2009)(focusing on changes in the list of property forms in the US over the course of the 20th century and on the rejection of feudal hierarchies.)
deliberative process. Both property forms have mechanisms of deliberative democracy built in. They suggest that decisions over certain resources should be made not by one private or public owner, but through a deliberative process open to all.

1. **The “Numerus Clausus” principle in the civil law and the common law**

   a. The conventional wisdom: the *numerus clausus* as a rigid design principle of civil law systems.

   The *numerus clausus* principle means that the legal system limits the creation of property rights by providing a fixed menu of standard property rights. The principle has two dimensions. First, it limits the number of property rights parties can create (*Typenzwang*). Second, it precludes customizing the content of the allowed property rights. Parties cannot freely shape the content of the allowed property rights but rather have to stick to legislatively predetermined terms (*Typenfixierung*). Comparative property scholars have long viewed the *numerus clausus* principle as one of the features marking a stark contrast between common law and civil law property. They suggest that, while the *numerus clausus* principle exists in both property systems, its nature and scope differ.

   First, the *numerus clausus* principle has a long pedigree in civil law systems but a relatively recent history in the common law. In civil law systems, the *numerus clausus* principle has been a near constant feature since Roman law. The *numerus clausus* principle was explicitly formulated for the first time in 19th century German property theory, but scholars have traced its presence back to Roman law, where it took the form of a *numerus clausus* of property actions. By contrast, in the common law, the *numerus clausus* principle has attracted significant scholarly attention only in relatively recent times. Comparative property scholars had long argued that the *numerus clausus* principle

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4 FW. Frachter, *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* (1973) vi ch 11, n 109 (arguing that civil law codes contain a rigid *numerus clausus* principle, an exclusive list of recognized real rights which prevents the recognition of the trust form); Others go even further and argue that the *numerus clausus* principle is known only to civil law systems and is a legacy of Roman law see RENE DAVID & C.JAUFFRET-ESPINOSI, *LES GRANDS SYSTEMES DE DROIT CONTEMPORAINE* (10th ed. 1992) n 310.


6 See J. Michael Milo, *Property and Real Rights*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 587-602 at 593 (arguing that the *numerus clausus* principle probably arose in the 19th century German Jurisprudence under the influence of von Savigny); see also AKKERMANS *supra* note at 173 (discussing von Savigny’s theory on the strict separation of the law of property and the law of obligations) and at 22 and 55 (noting that Roman law was a system based on actions where the question was not who had a certain right, but rather who had a certain action to protect a certain legal position and that the *numerus clausus* principle existed in Roman law in the sense that only those relations that were recognized by the Corpus Iuris Civilis as property relations were granted proprietary actions).

7 The credit for bringing the *numerus clausus* principle at the front of property debates in the US goes to Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L. J.* 1 (2000-2001); see, in particular, p 4 (noting that the *numerus clausus* principle has received very little examination in Anglo-American literature in contrast to the civil law where it is widely acknowledged by commentators); Milo, *supra* note at 594 (noting that the *numerus clausus* principle is less easy to detect in common law jurisdictions and has only recently been addressed as such).
principle is “foreign to the English legal mentality according to which ownership may be fragmented without restriction”. The same seemed true for the post-realist American legal mentality and scholarly examination of the *numerus clausus* principle in the American common law is recent.

Comparative law experts point to a second difference. In civil law systems, the *numerus clausus* principle is a fundamental principle, implied or explicitly stated in the civil code, while, in the common law, it is an unstated and more flexible norm of judicial self-governance. The only civil code that explicitly recognizes the *numerus clausus* principle is the Argentinian, whose article 2502 states that no real right can be created except by statute and that any contract which modifies the real rights recognized in the code only creates rights in personam. While, in other civil law systems, the *numerus clausus* principle is not explicitly stated in the civil code, scholars argue that it is implied in the code. In France, there is significant scholarly support for the proposition that article 543, by stating that “one may have a right of ownership, or a mere right of enjoyment, or only land services to be claimed on property” impliedly limits parties’ ability to create new property forms. In Germany, property scholars suggest that paragraph 137 of the civil code, by prohibiting parties from customizing the powers of the owner with *in rem* effect, other than in the ways recognized by law, works as “the main protector of the *numerus clausus*”. In the Netherlands, article 3:81 (1) of the 1938 civil code makes it clear that, as one scholar put it, “the system would not know any property rights other than those recognized by the law”.

By contrast, in the Anglo-American common law there is no civil code functioning as the primary source of private law and, hence, the *numerus clausus* principle is a more flexible “norm of judicial self-governance”. Faced with new, customized property forms, Merrill & Smith argue, courts tend to struggle to fit them into existing categories. For example, courts would consider a “tenancy for the duration of the war” either a “periodic

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8 See DAVID & JAUFFRET-Spinosi, *supra* note at n 310.
10 Merrill & Smith, *Optimal Standardization, supra* note at 9-12 (explaining that in the common law the *numerus clausus* is a principle of judicial self-governance. Civil law systems rest on the premise that the code is the exclusive source of legal obligation and thus if the code recognizes certain forms of property but not others it follows logically that the forms listed in the code are the only allowed ones; by contrast, the common law rejects the assumption that enacted law is the exclusive source of legal obligation and courts are regarded as having the power to create law; yet, despite this common law courts behave toward property rights very much like civil law courts do, i.e. they treat previously recognized forms of property as a closed list that can be modified only by the legislature).
11 See for example EMILE CHENON, *LES DEMEMBREMENTS DE LA PROPRIETE FONCIERE EN FRANCE AVANT ET APRES LA REVOLUTION* (2nd ed 1923); for an overview on the debate over whether art 543 implies a numeros clausus principle see also Akkermans *supra* note at 167 and Christian von Bar & U. Drobnig, *Study on Property Law and Non-Contractual Liability Law as they relate to Contract Law* available at [http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf) at 312-313;
13 Akkermans *supra* note at 322.
tenancy”, if the lease provides for a periodic rent, or a “tenancy at will”. Similarly, courts faced with a testator’s attempt to leave property to a surviving spouse as a life state but with the power to convey or devise a fee simple, have consistently refused to enforce such a hybrid, construing it either as a “life estate” or a “fee simple”.

Comparative lawyers suggest that a third difference between the civil law and the common law versions of the *numerus clausus* is the length of the standard menu. In civil law systems, the list is a short one, comprising less than ten forms, largely derived from Roman property forms. The classical list includes ownership, one form of co-ownership and a small number of “*iura in re aliena*”, lesser real rights. These lesser real rights are derived from ownership and, hence, cannot comprise rights and obligations the owner did not have. Lesser real rights include *emphyetosis* (a long term lease), *superficies* (the right to have ownership of a building on someone else’s land), “usufruct” (the right to use the thing of another as an owner but on the condition that the substance of the thing is preserved), “use” (similar to usufruct but the right to take the fruits the thing produces limited to the right holder’s need) and “habitation” (the right to live in a house) and “real servitudes”. The list of admitted property forms is relatively fixed and difficult to enter. Courts do not create new property forms, but, in rare instances, the legislature may add a new form to the list.

Conversely, in the US, the menu of property forms is richer, including four types of present possessory estates (the fee simple absolute, the defeasible fee simple, the life estate and the lease), five basic forms of concurrent interests (tenancy in common, joint tenancy, marital property, trusts, condominium, cooperatives and time shares) and four basic forms of non-possessory interests (easements, profits, real covenants and equitable servitudes). This relatively ample menu has fluctuated significantly over time and continues to fluctuate in modern law. For example, the estate in coparceny and the fee

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14 Merrill & Smith, *Optimal Standardization*, supra note at 11-12.
15 *Id.*, at 13.
16 Milo, *supra* note at 599 (noting that “dogmatically, in civil law systems, these other property rights are derived from ownership (*iura minus quam dominium*) and thereby the limited real right cannot by definition encompass rights and duties which the owner did not have”)
17 Milo, *supra* note at 597 (“in civil law jurisdictions, the courts do not normally create new real rights but accept the primacy of the legislator”).
18 See Merrill & Smith, *Optimal Standardization*, supra note at 12-17 (discussing the full menu of property forms in US law).
19 Davidson, *supra* note at 1611 (noting that “Likewise Anglo-American legal history has witnessed the excision of a number of forms. The estate in coparceny for example and the fee tail have been removed almost entirely from the legal landscape. Other examples of the elimination of once-important forms are strewn throughout the historical record. The list, moreover, continues to fluctuate in modern law”).
tail have been removed from the list, while the law of servitudes is expanding to include, for example, new chattel servitudes in the context of digital property.20

b. Property experimentalism in civil law systems: the *numerus clausus* as a flexible principle.

However, at closer inspection, in civil law jurisdictions, the *numerus clausus* appears far less rigid than conventionally assumed.21

First, historically, the stability and continuity of the *numerus clausus* principle in civil law systems is a contested matter. The *numerus clausus* can be traced back to Pre-Classical Roman law only if we accept a more flexible understanding, in which the principle stands for the general idea that “the legal system imposes restrictions on private parties in the creation of property relations”.22 Most importantly, the supposed continuity of the *numerus clausus* principle, was in fact broken for over two centuries, from the twelfth to the fourteenth century. The age of the medieval *ius commune*, one of the periods of greater creativity in private law in Continental Europe, rejected the *numerus clausus* principle. At the core of the concept of property accepted by the Glossators, the medieval jurists who, working creatively with Roman law materials, shaped the private law applied throughout Continental Europe until the 18th and 19th century, was the notion of “*dominium divisum*”. *Dominium divisum* was a new conceptual category invented to describe in familiar Roman law language new forms of land tenure that had developed in medieval society. The concept of *dominium divisum* described property forms where ownership entitlements were split between one subject having *dominium directum* (title and few minimal entitlements such as the right to receive a rent or personal services) and another having *dominium utile* (an ample package of use rights and transfer rights along with obligations including the payment of rent or personal services). *Dominium divisum* contradicted the very idea of *numerus clausus*. It was an open conceptual category that could accommodate any custom-tailored form of split ownership.23 The *numerus clausus* principle reappeared in the 15th century, when the jurists of the Humanist school of legal thought, committed to restoring the linearity and clarity of Roman law, dropped the medieval aberration of *dominium divisum* and retrieved the Roman fixed list of property forms.24

Second, in civil law systems, the status of the *numerus clausus* principle as a fundamental and rigid design principle is less solid than conventionally thought. Courts

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21 Milo, *supra* note at 595 (noting that “while common law jurisdictions of England and the United States seem to discover and apply the principle of *numerus clausus*, civilian jurisdictions seem to test the flexibility of the principle. In legal writing, case law and legislation property rights are tried to be made more flexible in number as well as content. This development is seen as potentially bringing about a rapprochement between civil and common law systems of property law”).

22 Akkermans, *supra* note at 43.

23 Andrea Fusaro, *The Numerus Clausus of Property Rights*, in MODERN STUDIES IN PROPERTY LAW, (ELIZABETH COOKE ED, 2001) vol I 309-317 at 311 (“the principle of *numerus clausus* was unknown to the feudal pattern of ownership which allowed fragmentation into many titles none of which amounted to complete undivided ownership”)

24 Akkermans, *supra* note at 63.
and lawyers have periodically denied that the *numerus clausus* principle structures the property system, limiting the creation of new forms. In France, the famous 1834 Caquelard v Lemoine case, the *Cour de Cassation* repudiated the *numerus clausus* principle, splitting ownership entitlements in a new form not recognized by the Code Civil. The *Cour* admitted that Caquelard and Lemoine were co-owners. But, while the Code Civil rules on co-ownership would have given each an equal share of the whole land, the *Cour* agreed with the lower court that Caquelard had an exclusive right to the herbs on the land and Lemoine an exclusive right to the trees. The Court took the Caquelard case to make a general point about the *numerus clausus* and the structure of the French property system. The *Cour* argued that articles 544, 546 and 552 of the Code Civil are illustrative but not prohibitive. They illustrate the standard content of ownership but do not preclude the possibility of modifying “the normal right of ownership”.25

Similarly, in the Netherlands, while in the eyes of the legislature and of the courts, the list of property forms was a closed one, practicing lawyers were never fully convinced. Several early twentieth century legislative proposals for amendments to the civil code assumed that the list was closed. Further, the *Hoge Raad*, the Supreme Court of the Netherlands, in the 1905 landmark decision Blaubboer v Berlips reaffirmed the difference between property law, governed by the *numerus clausus*, and the law of obligations, governed by the principle of parties’ freedom. Regardless, in 1914 the Brotherhood of the Notaries held an official meeting to discuss the question of whether new property forms, not recognized in the civil code, could be created. During the debate, Bram Akkermans recounts, the answer seemed not at all clear.26

As to the short and closed character of the list, a quick glance at the evolution of property law in civil law systems, shows significant dynamism in the list. And, contrary to old comparative law wisdom, legislatures have not been the exclusive gatekeepers in property law. Courts have actively participated in managing the list of property forms. For instance, *emphyteusis*, is an interesting case of a property form that was first expelled and then re-admitted in the list of recognized property forms. Widely used from “vulgar Roman law” to the nineteenth century, *emphyteusis* was expunged from both the French Code Civil as well as the 1838 Dutch Civil Code. It was subsequently re-introduced by courts first and by legislation later. The French Code Rural (1902) and the 1992 Dutch Civil Code list *emphyteusis* as one of the admitted property forms. And, in most civil law systems, there have been important additions to the list of property forms. French, German and Dutch law have recognized a new form of co-ownership for apartments. In German law, courts have shaped a new property form, the *Anwartschaftsrechte* or “acquisition right”.27 In 2007, the French legislature has introduced in the Code Civil the *fiducie*, a trust-like device, thereby ending a decades-long scholarly controversy over the unavailability of the trust form in the civil law.

Further, while the list of recognized property forms is shorter in civil law systems, parties can achieve almost any desired outcome by combining and stacking the available forms. Merrill & Smith compare American property law to a language capable of generating a potentially infinite range of utterances with a limited vocabulary.28 This is

25Cass, 13.2.1834, Dalloz, 1834, 1, Sirey, 1834, 1, 205.
27 Akkermans, *supra* note at 217 and 248.
28 Merrill & Smith, *supra* note at 35-38.
true for the civil law as well. Civil law systems do not preclude the possibility of “stacking” property rights. This “creates interesting possibilities for parties that want to create certain specific legal relations”. For example, the Dutch Civil Code allows the creation of a servitude of a right of emphyteusis, superficies or usufruct or even the creation of a right of emphyteusis on a right of emphyteusis.

In other words, the idea that there is a closed list of property forms does not accurately describe either civil law or common law property. Both allow for significant experimentalism. New forms are periodically added to the list as a result of a complex process that involves private parties, citizens, courts and legislatures. In both, property resembles, as Bell & Parchomowsky put it, a “three dimensional puzzle” whereby, as needs change, parties, courts and legislatures adjust property entitlements along one or more of three axes (number of owners, scope of dominion and configuration of the asset) to achieve a potentially infinite set of outcomes. Property is not changing all the time. Moments of greater creativity are followed by moments where the list of property forms appears static. The dynamism in property seems to be greater at moments of radical political, social and economic change. The end of feudalism and the age of the modern revolutions was one such moment of creativity. Old feudal property rights were dropped and new forms capable of fostering the productive activity of free and equal individuals were devised. In recent decades, under the pressure of changes in economic organization, information technology, social practices of production and new environmental challenges, we seem to have entered a new moment of creativity in property.

But there are limits on property experimentalism. The *numerus clausus* principle stands not for the idea that there is a closed inventory of property forms, but rather for the idea that there are some fundamental limits on the ability to shape new property forms. In the next section, I will discuss these different justifications for a flexible *numerus clausus* principle.

### 2. Limits on experimentalism in property law

Even in its flexible version, the *numerus clausus* is puzzling. It seems to conflict with the very virtues, autonomy and efficiency, we associate with the private law system and with property law, in particular. Until recently, property theorists had struggled to explain the *numerus clausus* principle. Thirty years ago, Bernard Rudden surveyed the conventional answers to the *numerus clausus* question and concluded that all leave him in doubt. Unwilling to give up solving the *numerus clausus* puzzle, US property scholars

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29 Akkermans, supra note at 323
31 Rudden, *supra* note at 239 (“my question is why? Answers abound and will be cited later, but they all leave me in doubt”. Absence of demand, often assumed in property texts, seems to Rudden a dubious explanation. Our perception of what people want, Rudden notes, is conditioned by the fact that they take what we let them have. Furthermore, in many property systems, some of the property rights in the closed list have seen significant strain in recent years. Think of the attempts to circumvent the rule that, to count as real rights good against the world, servitudes must not impose positive obligations. In other words, the fact
have, in recent years, offered full fledged theories of the *numerus clausus* principle that are descriptively more accurate and normatively richer than the conventional explanations. These theories fall, broadly, in two camps. Theories in the first camp, focus on economic explanations. They argue that the *numerus clausus* principle is a structural feature that allows property systems to perform their function of efficient allocation of resources by preventing the excessive fragmentation of property rights or by lowering the information costs incurred by market actors. Theories in the second camp see the *numerus clausus* as a mechanisms to exercise substantive control over the content of property forms to make sure they reflect values we collectively, as a society, approve of.

a. The *numerus clausus* as a device that allows the property system to function efficiently.

For some law & economics scholars, the *numerus clausus* principle limits property experimentalism in order to prevent the efficiency problems posed by the excessive fragmentation of property rights. Michael Heller has coined the term anti-commons to describe the problem of excessive fragmentation. If ownership of resources becomes excessively fragmented it will become difficult for stakeholders to reach unanimous consent necessary to put the property to productive uses. By limiting the parties’ possibility to create new property rights, the *numerus clausus* principle serves the function of policing against excessive fragmentation. However, critics within the law & economics camp have noted that emphasis on the anti-fragmentation function is misplaced. If the *numerus clausus* principle were an anti-fragmentation device, Merrill & Smith suggest, it would have limited effect: it would prohibit some kinds of fragmentation but tolerate others. In real property, “the size of the parcels and the number of owners is what generates the most pressing problems, and yet the *numerus clausus* principle does not limit this type of fragmentation”. The *numerus clausus* rule places a limit on the number of types of interests rather than on the number of interest holders.35

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33 Merrill & Smith, *supra* note at 51-54.
34 Merrill & Smith, *supra* note at 51-54.
35 Merrill & Smith, *supra* note at 52 (noting that “not only does the *numerus clausus* principle tolerate much fragmentation, it also does not necessarily lead to less fragmentation. For example, the law construes a lease for life to be either a life state or a tenancy at will. But neither outcome reduces the number of holders. Many applications of the *numerus clausus* do not result in fewer right holders, making the doctrine difficult to view as an anti-fragmentation device”). Moreover, Merrill & Smith note, the problem of fragmentation is addressed much more directly and effectively through other legal doctrines besides the *numerus clausus*: action for partition, adverse possession, the rule against perpetuities, recording acts, doctrines of changed conditions, eminent domain. In other words, the anti-fragmentation justification does not explain why the
In a recent article, Merrill & Smith have offered a new understanding of the *numerus clausus* principle that focuses on information costs. The most important effect of the *numerus clausus* principle, Merrill & Smith argue, is not that it limits fragmentation but that it lowers the information costs incurred by market participants. Third parties who seek to acquire property rights or to avoid violating them need to ascertain what those rights are. Acquiring information on property rights and their attributes is costly. When parties create new customized property rights, they weigh the effect the unusual custom attributes of these have on their market value but they do not take into account the full magnitude of the information costs imposed on third parties. By limiting property rights to a standard list, the *numerus clausus* rule reduces the cost of measuring the attributes of rights. Prospective buyers or potential violators will limit their inquiry to whether the interest does or does not have the features of the rights on the menu.

While Merrill & Smith theory represents a fresh start in the understanding of the *numerus clausus* puzzle, some critics are not fully convinced. If facilitating alienability and lowering information costs were the reasons for the *numerus clausus*, there would be more effective ways to achieve these goals.

First, Hansmann & Kraakmann have objected, establishing a well functioning system for notice would, to a large extent, remedy concerns about information costs. Notice, for example, Hansmann & Kraakman argue, could be effectively provided through a rights-labeling regime. The attributes of the right are verified by a label that is attached to and travels with the asset itself or in a separate document to which the label refers. For example, in the United States, such a labeling regime was long used for the purpose of establishing an author’s copyright: the mark © on copies of the author’s work signals the existence of copyright. Similarly, the ancient Greeks indicated the existence of a mortgage on a parcel of land by placing on the parcel a heavy stone with a brief inscription. While a labeling regime may present difficulties related to the possibility of loss or alteration of the label, a registry regime is the means through which most property systems secure notice of the attributes of property rights. A registry regime provides notice at a relatively low cost, lower than for example a constructive notice requirement. Furthermore, a certain degree of standardization will spontaneously occur because market transactors will package their rights in well-known forms to increase their marketability. The combined effect of a registry system and spontaneous standardization will, to some extent, mitigate the information cost problems studied by Merrill and Smith.

Second, other critics have suggested that Merrill & Smith overstate the effectiveness of the *numerus clausus* principle in lowering information costs. While the *numerus clausus* rule limits the types of property rights parties can create to a dozen forms it still allows “an enormous amount of freedom and complexity”. For example, even though US property law limits the number of estates parties may create, it places

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36 Merrill & Smith, *supra* note at 24-35.
38 Hansmann & Kraakman, *supra* note at 392-393
39 Id., at 393
40 Id., at 394-395
41 Singer, *supra* note at 1025.
few limits on the conditions that, through covenants, may be imposed on land ownership. Similarly, in civil law systems, the right of superficies and *emphyteusis* give parties significant freedom to customize terms and conditions for land ownership. Also, through homeowners associations, or “apartment rights” in some civil law countries, owners can create highly complex and idiosyncratic packages of rights and duties. Given this complexity, these critics suggest, it is not plausible that the addition of new unusual property rights will generate the degree of confusion assumed by Merrill & Smith.  

b. The *numerus clausus* as a constraint on the content of property forms.

Scholars outside the law & economics camp have criticized explanations that focus on alienation, fragmentation and information costs as incomplete. The need to ensure the efficient functioning of the property system is an important key to the *numerus clausus* puzzle but there is more to it. As Nestor Davidson has noted, the fact that the list of allowed property rights is dynamic, that it changes over time, suggests that the *numerus clausus* serves another purpose, beyond lowering information or verification costs. Economic explanations of the *numerus clausus* have paid little attention to these changes. In particular, economic theories cannot explain why exiting property forms are eliminated. Dropping items from the menu, Davidson notes, cannot be explained with the need to lower verification or information costs. If this was the only function of the *numerus clausus* principle, pruning the list could be left to the marketplace with no need for the legislature to intervene. If property forms are legislatively removed from the list, it is because they no longer reflect the values and goals we, as a collectivity, envision for and seek to pursue through property.

In other words, the *numerus clausus* filters the content of property rights. It is the structural feature through which the state decides whether to confer on a certain legal relation the status of property right. The *in rem* status of property rights, i.e. the fact that they are valid against the world, confers on them an inherent public quality. To be effectively binding on all, property rights need to be recognized by society. Their content, i.e. the values and goals they advance and the type of social relations they generate, must be of a character we collectively approve of. Since “property is part of the way we define a legitimate social order, Joseph Singer argues, “certain property arrangements are defined as out of bounds”, as “incompatible with our way of life”. Because of this public quality of property, the state plays a different role than in other areas of private law. Rather than leaving decisions about the list of available property forms to private actors in their market relations, the state actively manages the list, expanding it and pruning it. The *numerus clausus* is a near-universal characteristic of property systems not only because a standardized list of property forms facilitates efficient market transactions, but also because it allows legislatures and courts to control the content of property rights which are binding on all.

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43 Davidson, *supra* note at 1629.
44 Akkermans, *supra* note, at 7.
45 Singer, *supra* note, at 1049.
46 Davidson, *supra* note, at 1649-1651.
The intuition that the *numerus clausus* serves as a filter on the content of property forms is an important one, but what is still largely missing in the *numerus clausus* literature is a qualitative analysis of the content of the property forms most recently added to the standard list. The *numerus clausus* can tell us a lot about the quality of property relations. How has the list of available property relations changed qualitatively over the last decades? Do recent additions to the list reflect a new way of thinking about the quality of property relations? If the *numerus clausus* is a filter for property values, is there anything new in the values and interests we associate with property?

Moments of creativity in property law tend to coincide with significant changes in social attitudes and in private and public values. Scholars who have studied the *numerus clausus* in a historical perspective agree that 19th and early 20th century transformations in the list of allowed property forms reflected a movement away from a feudal vision of social relations to a modern liberal one. The disappearance of the fee tail or of the estate in coparceny in the common law and the legislative elimination of the right of *emphyteusis* in civil law systems reflect this movement. The movement from a world where property entitlements are shared among owners and users organized in a rigid social and economic hierarchy to one where owners are given a relatively ample package of entitlements and encouraged to freely bargain in the market. Changes in property forms aimed at ensuring the free alienability of land which would result in social actors efficiently bargaining and cooperating over the productive use of land. For example, Wiegand has suggested that changes in the German system of property law in the 19th century were primarily intended to stimulate the economy through an efficient and clear transfer system.47 Joseph Singer has offered an account of changes in modern property forms that focuses not only on the concern with preventing a return of feudalism and promoting the alienability of property but also on changing ideas about racial and gender equality. Singer suggests that 19th and 20th century changes in the list of property forms reflect the widely held belief that “democracy is not a feudal society, is not a monarchy, is not apartheid, is not a male-dominated society”.48 Through the *numerus clausus*, US courts have outlawed “the creation of property rights that enact such prohibited social and political relationships” and have promoted freedom and equality in social relations.49

Do more recent changes in property forms reveal anything new in the way we collectively think about property? Is there anything new in the “multitude of clashing normative precepts” that find voice in the recognized property forms?50 In the next section I will offer a qualitative analysis of two recent instances of dynamism in the civil law list of property forms: the return of *emphyteusis*, a “medieval” property form, and the revival of a form of common ownership known in Roman law, *res communes omnium* (common goods). Both forms had been dropped from the 19th century civil law codes. The revival of these property forms, I argue, suggest an important change in the values of property law and the quality of social relations we seek to shape through property law. These forms reflect a growing consensus that, for certain resources, property entitlements

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48 Singer, supra note, at 1051.
49 Id., at 1051.
50 Davidson, supra note, at 1639.
should be structured and combined so as to allow representatives of all affected parties to deliberate over the use and management of the resource.

2. Experimentalism in Civil Law Property

a. The Return of Emphyteusis

i. The origins and features of emphyteusis

In civil law systems, *emphyteusis* is a right *in rem* that closely resembles ownership. It entitles one to use land owned by another for a long period, or even perpetually, in exchange for a payment called canon. It developed in late Roman law when, around the 4th century, the holder of use rights on municipal land became known as *emphytecarius*. The *emphytecarius*, i.e. the holder of the right of *emphyteusis*, had a bundle of entitlements that included the right to exclude, the right to use, as well as the right to transfer the *emphyteusis*. The holder of an *emphyteusis* also had the right to transfer the right to her heirs. In case of violations of her rights, the holder of an *emphyteusis* was granted an action similar to the *rei vindicatio*, the action granted to owners. Because the *emphytecarius’* bundle of entitlements resembled that of an owner and was protected with a similar action, Roman jurists at times described the *emphytecarius* as *dominus*, i.e. owner. At other times, they described the right of *emphyteusis* as a long lease.

*Emphyteusis* became a widely used property form in the medieval period and beyond, between the 11th and the 18th century. It was integral to the feudal system of land tenure, where it facilitated a shift of effective control over land from feudal lords to lower vassals. Today, historians of European law see *emphyteusis* as one of the most

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51 On the development of *emphyteusis* see Akkermans, supra note at 52-53 (tracing emphyteusis back to late Roman law forms. Pre-classical Roman law recognized a property form known as the right of *ager vectigalis*; it entitled a person to hold land that belonged to the state or to a municipality for a limited period of time in exchange for a payment of a ground rent or *vectigal*. The person with the *ager vectigalis* would be protected by a possessory interdict and, possibly, in late classical Roman also with an action comparable to the *rei vindicatio* (the action granted to owners). Later, the *ager vectigalis* started to be granted in perpetuity; the holder received a *ius perpetuum* that was inheritable and alienable. The land could also be pledged. The holder therefore had many of the entitlements of an owner. Starting from the 4th century the holder of *ager vectigalis*, as well as holders of other use rights on municipal land started to be called *emphytecarii*). See also Andre van der Walt, supra note at 234-235.

52 Van der Walt, supra note at 234.

53 See Van der Walt, supra note at 235 (noting that, despite this ambiguity in jurists’ description, the *emphyteusis* was a contract, until a constitution of the Emperor Zeno declared that it was a *sui generis* right. Justinian discussed *emphyteusis* in his *Corpus Iuris* and allowed it to be created by contract or legacy. Justinian clarified the legal nature of the right of *emphyteusis* by stating that the owner of the land had ownership, the holder of the *emphyteusis a ius in re aliena*).

54 The idea that property forms such as *emphyteusis* (described as forms of *dominium divisum*) facilitated a shift in effective control over land was developed by Dutch historians. See W Van Iterson, *Beschouwingen over Roverwisseling van Eigendomsverschuiving*, in *Verslagen en Mededelingen van de Vereniging tot Uitgave der Bronnen van het Oud-Vaderlands Recht*, 1971, part XIII n 3 407-466. A similar idea is developed by E Meynial, *Notes sur la formation de la theorie du domaine divise du XIIe au XIVe siecle dans le Romanistes*, in *Melanges Fitting* (1908) vol II 409-461. Among Italian historians see P.
imaginative creations of medieval jurists. For contemporary historians, *emphyteusis* has the virtues of “realism” and pragmatism that the modern Blackstonian concept of ownership as one owner’s despotic dominion lacks.\textsuperscript{55} The latter, Paolo Grossi argues, is an abstract concept that reflects an ideological commitment to individualism but fails to capture the complexity of property relations. By contrast, *emphyteusis* was a “naturalistic” concept of ownership that described actual use patterns in real life.\textsuperscript{56} Similarly, Luigi Capograssi, writing in the 1950s, described *emphyteusis* with language that closely resonates with contemporary ideas about property and natural resources. For Capograssi *emphyteusis* exemplifies a realistic focus on the “thing”, on the object of property rights. “While in the modern concept of ownership, things are objects to demolish, bombard, dismember and exploit, Capograssi wrote, in *emphyteusis* they are living things”.

Through *emphyteusis*, Capograssi continued, the individual “encounters the vital world of nature, the autonomous life of land and nature, realizing she is not alone in the world and understanding that, to flourish, she needs to be fraternal with nature”.\textsuperscript{57}

But this positive assessment of *emphyteusis* is a relatively recent phenomenon. At the time the modern civil codes were enacted, *emphyteusis* was seen as incompatible with dominant social values and, hence, was eliminated from the standard catalogue of property rights. Neither the French Code Napoleon of 1804 nor the Dutch Civil Code of 1838 recognized *emphyteusis*. The Italian Civil Code of 1865 did admit *emphyteusis*, but, in real life, *emphyteusis* disappeared. *Emphyteusis* seemed to conflict with two central values of modern society: the rejection of feudal hierarchies and the preoccupation with making land freely alienable in the market. *Emphyteusis* was criticized as the legal device that enabled the feudal system of landholding. Through a right of *emphyteusis*, an individual could be perpetually bound to a piece of land and burdened with the obligation to provide personal services. Also, by splitting control over land between two owners, *emphyteusis* contradicted widespread ideas about the benefits of private property and free market in land. The Physiocrats, the French 18\textsuperscript{th} century “philosophers-economistes”, emphasized the importance of granting one owner ample and freely transferable property

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\textsuperscript{55} See Meynial, supra note at 419 (arguing that forms of *dominium divisum* such as *emphyteusis* were developed to allow a more socially minded and therefore limited approach to property); PAOLO GROSSI, IL DOMINIO E LE COSE, (1992) at 21-55 (arguing that *emphyteusis* reflects the medieval shift from the subject/owner to the thing, from the subjective to the objective, from the abstractions of Roman law to the real use patterns. Forms of *dominium divisum* are one of the most original and imaginative products of the vibrant laboratory that was medieval law; an effort to make room within the concept of ownership for the multiple entrepreneurial users of land that had popped up in the everyday life of the late medieval economy. *Emphyteusis* is the product of a pragmatic, “naturalistic” and anti-formalist approach to law, typical of the late medieval period. A product of the very pragmatic focus on actual use patterns in real life and on limits to use).

\textsuperscript{56} Grossi, supra note at 24-25.

\textsuperscript{57} Giuseppe Capograssi, *Agricoltura, Diritto, Proprieta’,* in OPERE, vol V at 269.
rights. Later, the belief that only individual ownership will lead to efficient land use was one of the central tenets of 19th century economic theory. Dropped from the 19th century civil codes and considered obsolete by private parties, *emphyteusis* largely disappeared.

However, over the course of the 20th century, *emphyteusis* was re-introduced in the menu of standard property forms. In the Netherlands, *emphyteusis* was introduced by legislation in 1824 and later recognized by the Civil Code of 1992. In France, the *Cour de Cassation* had continued to recognize the right of *emphyteusis*, despite its absence in the Code Civil, and in 1902 the legislatures formally regulated *emphyteusis* in the *Code Rural*.

Among the European property systems that recognize *emphyteusis*, the Dutch is the most interesting for two reasons. First, the legal regime of *emphyteusis* is the most recent, having been reshaped in 1992. Second, in the Netherlands, *emphyteusis* is widely used in practice. It has become an important alternative to zoning and land use regulation. Starting in 1896, the city of Amsterdam decided it would no longer transfer ownership rights on public land, but instead it would grant rights of *emphyteusis*. This approach has now become standard in the Netherlands.

Art 5:89 of the Dutch Code states that “unless provided otherwise in the deed of creation, the holder of an *emphyteusis* will have the same power to enjoy the object as the owner”. In other words, the holder of an *emphyteusis* has the right to exclude, to use, to make decisions as to the management of the land, the right to receive the income produced by the land. The right to use includes the right to erect buildings on the land. Buildings are owned by the owner of the land, not by the holder of the *emphyteusis*; the owner will pay compensation when the right of *emphyteusis* ends. The holder of an *emphyteusis* also has a broad right to transfer her entitlements. The *emphyteusis* can be sold, transferred to one’s heirs and mortgaged. The holder of the *emphyteusis* may also parcel out some of her entitlements, for example by granting an easement. Along with entitlements, the holder of the *emphyteusis* also has duties, most importantly the duty to pay a canon. The parties may agree on additional duties. In fact, while the civil code provides the default regime for *emphyteusis*, it allows the parties to custom-tailor the content of the right. In the deed establishing the *emphyteusis*, the parties may agree on different terms, known as “conditions”. The “conditions” may deviate from the legal regime designed in the code or may supplement the latter with additional terms. The “conditions” are part of the property right itself and, hence, have *in rem* effect. The right of *emphyteusis* may be perpetual. To avoid burdening the land with an obsolete right of *emphyteusis*, art 5:97 of the Dutch code allows the parties to go to court to change the content of the right or to end it when circumstances have changed and twenty-five years since the creation of the *emphyteusis* have passed. While the holder of the *emphyteusis* has, for the duration of the right, a bundle of entitlements that resembles that of an owner,

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60 Akkermans, *supra* note at 281.
the owner of the land retains title, the right to transfer the title, the right to receive the canon payment. The owner will re-acquire the full ownership bundle when the emphyteusis ends.\textsuperscript{61}

ii. Emphyteusis and new values

Why was emphyteusis, expelled from 19\textsuperscript{th} century codes and practice, re-introduced a century later? A new appreciation of the role played by the numerus clausus principle is the key to the puzzle. In contemporary property systems, legislatures and courts see the numerus clausus not as a rigid limitation on the number of property forms available, but as a way to filter out property forms that are inconsistent with shared values. Awareness that the numerus clausus works as a substantive filter has made legislatures and courts more confident about their ability to filter out property forms that are feudal and anti-democratic while recognizing forms that respond to the increased need for flexibility and participation.\textsuperscript{62}

If the purpose of the numerus clausus rule was only to lower information costs by preventing owners from creating “fancies”, i.e. idiosyncratic property rights that are costly to process, we would not be able to explain why emphyteusis was first dropped and then re-introduced. A theory of the numerus clausus that focuses on information costs explains why legislatures and courts refuse to increase the number of property forms beyond optimal standardization but not why existing forms are eliminated. Further, the concern with information costs would likely militated against re-introducing emphyteusis. Emphyteusis has a significant “contract” dimension to it, it resembles contract more than property. It is a property form where the parties, the title owner and the holder of the emphyteusis, have significant freedom to customize the content of their rights. To be sure, the label “emphyteusis” is well known to (relatively sophisticated) prospective buyers in civil law systems and this basic familiarity mitigates information costs. The label alerts prospective buyers to the fact that the package of entitlements they are about to acquire may be highly idiosyncratic. The fact that the emphyteutical deed is recorded in public registries further mitigates information costs. Merrill and Smith however, rightly point out that, often, notice does not take care of high information costs because notice may be difficult and costly to process.\textsuperscript{63} Emphyteusis is a case in point; the special “conditions” negotiated by the parties are often complex and sophisticated. To fully understand them, prospective buyers need expert legal advice and further costly investigation.

Emphyteusis was first dropped and later reintroduced because of a shift in the values associated with property. In contemporary property systems, the risk of re-instating feudal hierarchies appears less real, while greater is the need to allow property forms that promote efficient and “participatory” use of resources.

In the medieval world, society was viewed as organized in a tight hierarchy based on personal status and privilege. This view of the proper social order worked in tandem

\textsuperscript{61} This default legal regime of emphyteusis is discussed in Akkermans, supra note at 280-283; See also CASES, MATERIALS AND TEXTS ON PROPERTY LAW, SIEF VAN ERP & BRAM AKKERMANS EDS, (IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE), (2012) at 273-279.
\textsuperscript{62} A similar idea is proposed by Akkermans, supra note at 457 (arguing that the numerus clausus fulfilled an anti-feudal function and that in modern property law, the feudal system although not forgotten is less relevant).
\textsuperscript{63} Merrill & Smith, supra note at 43-45.
with the rejection of the *numerus clausus* and the acceptance of the doctrine of *dominium divisum* to generate property forms that bounded people to land according to oppressive terms. By contrast, contemporary capitalist liberal-democratic societies rest on the assumption that the proper social order is one where free and equal individuals bargain over the terms of their cooperation. This view of the social order, together with the belief that the *numerus clausus* principle operates as a control on the substance of property forms, has made the risk of re-instating feudalism less real. To be recognized as a property right, a new property form has to be approved through the democratic process. Further, courts exercise a control on parties’ attempts to customize the content of the allowed property forms. In agreeing on additional “conditions” in the *emphyteutical* deed, the parties could potentially agree on “feudal” or oppressive conditions. But there are safeguards against this risk. In a famous 1977 case, the Supreme Court held that the conditions agreed upon by the parties have *in rem* nature insofar as “they have sufficient connection to the right of *emphyteusis*” and are not contrary to the nature of the right”. This court decision signaled the new attitude towards *emphyteusis* and paved the way for its inclusion in the 1992 Civil Code.

While the risk of re-instating feudal oppressive relations has become less real, *emphyteusis* offers important benefits as a tool for the “participatory” management of resources that implicate collective interests. In particular, in the Netherlands, *emphyteusis* has been used as a device for urban planning that promises flexibility, fairness and participation. Because of these promises, *emphyteusis* is seen as an alternative, or at least a complement, to zoning and top-down land use regulation.

In traditional zoning, in the US “Euclidean” zoning, the local government draws relatively rigid and general land use planning and leaves space for parties to bargain over adjustments such as variances or special use permits. This model has come under attack as both inefficient and unfair/discriminatory. First, zoning and land use regulations are deemed to be inefficient because they set relatively general limits and do not allow fine-grained regulation and planning. Critics observe that traditional zoning treats roughly similar land equally and has limited ability to take into account the unique features of a particular parcel or project. The possibility of more fine-grained planning is ensured through adjustments and appeal mechanisms that result in delays and are expensive, whether administrative or judicial. In other words, critics contend that traditional zoning underestimates the dynamism in local governments’ needs as well as in private actors preferences and overestimates the ability of local governments to predict new regulatory needs and anticipate market demand for new uses.

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Second, traditional zoning is criticized for failing to deliver a fair and participatory process. Regulatory goals are set unilaterally by the local government through a process that allows little input by the very actors who are being affected by the regulation, both developers as well the community. More specifically, traditional zoning is naïve as to its vulnerability to the pressure of powerful market and political actors. Changes in the economy as well as in demographics force local governments to continuously adjust zoning laws through an adjustment process where disempowered groups are not represented. This results in the disproportionate allocation of environmental disamenities to disempowered communities and in their disproportionate exclusion from environmental goods.

*Emphyteusis* promises an approach to land use planning that is more efficient and fair. It allows the municipality, representatives of the community and private parties to negotiate fine-grained land use plans and to custom-tailor the content of property rights. Because it allows negotiation over the specific content of property rights, *emphyteusis* has become, in recent years, synonymous with what European urban studies scholars call ‘cooperative’ or “contingent” land use governance.66 This new model of governance rests on the assumption that urban planning is a cooperative process that involves building consensus among multiple stakeholders, rather than top-down government regulation. *Emphyteusis* facilitates a new regulatory strategy that relies “a close relations between self-regulation and communal control and that takes the plurality of urban society as a point of departure”.67

For example, the city of Amsterdam publishes, and periodically revises, “general conditions” applicable to all *emphyteutical* rights. The “general conditions” are developed through a process that involves representatives of the affected parties, i.e. developers, as well as the representatives of the community. The “general conditions” restate and specify the legal regime of *emphyteusis* as delineated in book five of the Civil Code. They impose on holders of rights of *emphyteusis* both positive duties as well as restrictions. For example, article 13 of the “general conditions” published in 2000 by the city of Amsterdam imposes on holders of *emphyteutical* rights an obligation to develop and use the land in accordance with the “terms set in the deed of establishment”. Further, article 13 states holders of the *emphyteusis* have a duty to comply with the building parameters, the use objectives/restrictions and the maintenance requirements set in the deed. Article 15 of the “general conditions” refers the additional limits. Holders of *emphyteutical* rights have a duty to comply with the environmental parameters set by the city and a duty not to use the land so as to negatively affect the value of the land or to interfere with the public interest. Violations of these limits may result in the termination of the *emphyteusis*; the city will rescind the *emphyteusis* and seek damages.68 The “general conditions” also require holders of *emphyteutical* rights who to obtain the city’s consent previous to transferring their rights.69

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67 Wigmans, *supra* note at 216
68 General Conditions, City of Amsterdam (find link)
69 General Conditions, City of Amsterdam
In addition to the “general conditions”, the city of Amsterdam and the grantees of *emphyteusis* rights negotiate “special terms of agreement”. The special terms of agreement are part of the property right, they have *in rem* status. They are included in the deed and recorded. The “special terms of agreement” negotiated on the basis of the “general conditions” contain fine-grained norms that supplement existing zoning laws and land use regulations. Often, Dutch local governments use *emphyteusis* to achieve complex re-development plans. For example, in the early 1990s the city of Amsterdam planned the re-development of the X area of the city for purpose of an ethnically diverse residential and commercial area. The city assembled parcels by acquiring ownership from different owners. It then granted *emphyteusis* rights to developers. The special terms of agreement included in the deeds establishing the *emphyteusis* regulated in detail the nature, the characteristics and the timing of the development.

Another promise of *emphyteusis* is the possibility of adjusting the content of property entitlements over time. While the *emphyteusis* may be perpetual, the city and the right holder periodically renegotiate the special terms as well as the payment of the canon. The general conditions for the city of Amsterdam states that *emphyteusis* rights are granted for an indeterminate time, divided in terms of twenty-five years. At the end of each term, the parties can terminate the *emphyteusis* or revise the restrictions and obligations in the deed.

b. A new type of common ownership: ownership of *biens communs/beni comuni* (commons).

i. The revival of the Roman *res communes omnium*

The standard form of common ownership generally included in the list of property forms of civil law systems is co-ownership (*indivision, comunione*). It derives from the Roman law *communio* and is pretty straightforward. It can be created by law or through agreement of the parties. The typical example is that of two or more persons buying or acquiring through inheritance or legacy a parcel of land in common. Each co-owner has ownership rights, analogous to those of an individual owner, over her share; co-owners may ask for partition at any time; shares may be transferred or burdened with another property right, i.e. an easement. For over a century, co-ownership was the only form of common ownership available. In recent decades, common ownership has been an area of significant dynamism, with new forms added to list of property forms. The latest addition to the list may be a new type of “ownership of *beni comuni* or *biens communs* (common goods)”, which is currently sparking controversy in both France and Italy. Scholarly literature and legislative proposals suggest that *biens communs* or *beni comuni* are resources that are “functional to the exercise of fundamental rights” and implicate the

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70 Adolf Berger, *Communio* in *ENCYCLOPEDIC DICTIONARY OF ROMAN LAW* (1953) at 400.
71 On the new developments in the law of indivision in France see *CHRISTIAN ATIAS, DROIT CIVIL, LES BIENS, 8th ed* (2005) at 116-117; F Bayard-Jammes *La nature juridique du droit du coproprietaire immobilier. Analyse critique*, *BIBLIOTHEQUE DE DROIT PRIVE*, vol 409, (2003) at 345-347 (both arguing that co-ownership needs to be dealt with as a separate property right).
72 *Maria Rosaria Marella, Per un diritto dei beni comuni* (on file with author); *UGO MATTEI, BENI COMUNI. UN MANIFESTO*. (2012); *UGO MATTEI & ALESSANDRA QUARTA, ACQUA, BENE COMUNE* (2013)
“interests of future generations”. While natural resources are the most obvious example, there is significant controversy over what other resources may be considered are biens communs. Ownership of biens communs has most prominently come to the fore in recent debates about access to water utilities as a resource fundamental for human life. It is one of the rare instances where the availability of a new property form has attracted significant attention in the public opinion, well beyond the narrow circle of property lawyers.

The emerging “ownership of biens communs” is not new to civil law systems. Roman law recognized, alongside public and private property, a concept of res communes omnium, not capable of being owned by anyone. Justinian classified res (things) according to the special “bundle” of rights recognized over them, a matter affected by the nature of the thing. Res communes omnium were all flowing waters, as well as air and the sea shore. They belonged to all and no one, whether individual or state, could own them. This concept of res communes omnium produced much the same result as the public trust doctrine in the United States. In the 19th century civil law codes, the Roman concept of res communes omnium was not in the list of recognized property forms. In particular, as to water, the French Code Napoleon of 1804 states that water is owned either by the state or by private owners. The disappearance of biens communs and common waters reflected the commitments of the new political and economic order ushered in by the French Revolution. Property was the central pillar of the modern bourgeoisie order and

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73 See the Commissione Rodota per la modifica del codice civile in material di beni pubblici, June 14th 2007, Relazione (report on legislative proposal presented by the Commissione Rodota’ in Italy), available at http://www.giustizia.it/giustizia/it/mg_1_12_1.wp?contentId=SPS47617, and see discussion infra at 19.
74 Mattei & Quarta, chapter 1.
75 On res communis omnium see W. W Buckland, A TEXTBOOK OF ROMAN LAW (3rd ed revised by Peter Stein 2007) at 180; Inst II 1, Justinian’s INSTITUTES (translated by Peter Birks & Grant McLeod (1987), book two at 54.
76 Initially, public waters were those that were navigable or floatable. art 538 Code Civil: (“navigable or floatable rivers and streams, beaches, foreshore, ports, harbors anchorages and generally all parts of French territory which are not capable of private ownership are deemed to be part of the public domain”). The criterion of navigability was then replaced in 1919 (finance law April 8 1910 art 128) by the classification principle, an administrative classification procedure. Art L 2111-12 of the Code General de la Propriete des Personnes Publies: “the classification of a watercourse, lake or canal as part of the fluvial public domain of a public person is done for reasons of general interest with regards to navigation, preservation of the navigability of waterways, needs of industry and agriculture, needs of populations (nutrition) or flood protection”. The procedure is regulated by the code of the environment and there is compensation). As to private water, the law of April 8 1898 which was the main text concerning the legal regime of water until 1964 was organized around one single idea: limiting private ownership of water without calling into question the principle of ownership, so basically, calling it ownership but emptying it of its “ownership” content, less than the full bundle of entitlements, basically use only. Private ownership was recognized for rainwater, spring water, ponds and canals and (non-navigable) watercourses; for the latter, the law of 1898 introduced an original innovation: the disaggregation of the river bed and the running water. The bed belongs to the riparian owner, the water can only be subject to user rights with all the limitations of art 644 of the Code Civil (a person whose property borders running water other than that which is declared part of the public domain by art 538 in the title on different kinds of property may use it as it flows for irrigating his property. A person through whose property the water flows may even use it over the interval it runs through it provided he returns it to its ordinary course when it leaves his tenements); art 640 Code Civil: “lower tenements are subjected to those which are higher to receive waters which flow naturally from them without the hand of man having contributed thereto; a lower owner may not raise dams which prevent that flow. An upper owner may not do anything that worsen the servitude of the lower tenement”.

“every object necessarily had to belong to someone, either a private or the state”. In the new modern liberal order, the notion that land could be owned in common was seen with distrust. Lawyers and economists regarded the concept of res communes omnium as unworkable and inevitably leading to waste and inefficiency. Today, after two centuries of oblivion, French and Italian property lawyers are reviving and expanding the Roman concept of res communes omnium. The proposed addition of this new property form to the numerus clausus list is a response to the shortcomings of both private property and public property for governing resources that satisfy basic fundamental human needs.

Water is the bien commun most extensively discussed in property law literature, as well as in the public opinion, in the last couple of years. In both France and Italy, the water that comes out of our taps is public. In France, watercourses are classified as public property, i.e. property of the state, if they are relevant for the public interest, which includes navigation, the needs of industry and agriculture and the needs of the population. Similarly, the Italian environmental law code states that all superficial and subterranean waters are public. In both countries, water is managed according to an integrated river basin system that involves cooperation between state, regional and local authorities. Water supply and sanitation utilities are local services provided by municipalities. Municipalities own the infrastructure and either provide the services directly, “in house”, or delegate the management and service to a private or mixed private-public operator.

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77 DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION (2nd ed revised and updated by Marcella Nanni 2007) at 69.
79 Codice dell’ambiente, available at
80 On the French water regime see Sangare & Larrue, supra note at 213, see also, Conseil d’Etat, L’Eau et son droit, supra note at 68 (explaining that water is administered according to an integrated river basin management system. The Water Act of 1964 introduced a phase of “global management”, where distribution of water between different users, prevention of scarcity and pollution control were managed at a centralized level. A “national committee on water” was created, bringing together representatives of the state, regional organizations and users; The committee has a consultative role, it gives advice on the price/tariffs charged to the users as well as on the general quality of the service. The most important innovation was the creation of six basin agencies with six basins committee. Each composed of representatives of the state, regional bodies and users. The idea was to link more closely water management to the river system. The Water Act of 1992 introduced a new criterion, the integrated management of water resources. It involves “master plans” for water development and management (SDAGE), and local plans for water management and development at the basin level (SAGE). The water supply and sanitation utilities are local and decentralized public services but their management is incorporated in the wider frame of the basins authorities. In France, since the end of the 19th century, the municipalities, the “communtes”, which are the smallest administrative divisions in France are in charge of water utilities. Art L2123-1 of the Code General de la Propriete de Personnes Publques says that “public persons mentioned in art 1 can manage directly or delegate the management of their public domain in within the limits and conditions of the laws and regulations enacted. According to the latter, water utilities can be managed in one of two ways: 1. En regie municipal or quasi-regie: communes directly manage the utility themselves; 2. in-house by a single municipality or by a group of municipalities that create a common public entity that manages in house.
As in the United States, in Europe, in the last thirty years, there has been a consistent trend towards the “privatization” of water utilities. Experts explain this trend towards delegation to private operators as the result of the challenges involved in the provision of public water services. In particular, experts point to the enormous investments required to update ageing infrastructure and the higher operative costs determined by increased quality standards. Prevalent ideological beliefs favoring privatization of public services generally and the attractiveness of the water utilities market to multinational corporations have further reinforced this trend towards privatization. Beginning in the 1980s, in major French and Italian cities, water utilities, earlier run “in house” by the city, have been delegated to subsidiaries of the global water corporate “giants”, such as Veolia and Suez.

In the last five years, massive increases in water tariffs and lack of transparency and competition in the delegation process resulted have alerted citizens and water policy experts to the flaws of privatization. In both France and Italy, a vocal “water movement” has called for, and often successfully pushed for, a “re-publicization” of water services. Since 2010, Parisian water is back in public hands, and so is the case in Grenoble and in Aprilia, Italy. But the fact is that, as far as water is concerned, there seems to be little meaningful difference between public ownership and private ownership. As a tool for governing water, public ownership has important flaws. While a public owner cannot sell and is immune from loosing title or use entitlements by prescription, in all other respects it is no different than a private owner, with ample power to make decisions on the use of the resource as well as to transfer use rights. If the municipality transfers use rights to a private operator, it empties public ownership of most of its “publicness”. It grants a private operator long term use rights (ranging from twenty-five to seventy years) with minimal limits on both the right to manage the resource and the right to appropriate the income generated by the water services. Conversely, if the municipality manages the water services directly, it often acts as a “government extension of the Lockean idea”. The municipality’s duty to manage and use property in the “public interest”, or the idea that the state holds property in trust for the public are minor constraints on the municipality’s use and management rights. Municipal managers are likely to make decisions on the use and management of water with an eye to immediate budgetary...

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83 Robert W. Adler, The Law at the Water’s Edge: Limits to Ownership of Aquatic Ecosystems, in WET GROWTH. SHOULD WATER LAW CONTROL LAND USE? (ANTHONY CRAIG (TONY) ARNOLD ED 2005) 201 at 236 (arguing that public ownership has important flaws in the case of water and arguing for a concept of “non-ownership” of water. For a critical commentary (suggesting that a new concept of non-ownership may do little to solve the problems of water law see Holly Doremus, Crossing Boundaries: Commentary on “The Law at the Water’s Edge”, in WET GROWTH supra at 271.
constraints, institutional interests in maximizing resource development as well as the short-term economic interest of the human users to whom they are accountable.

But water implicates interests that go well beyond the short-term economic interest of human users. Water raises distributive questions. Potable water serves basic survival and health needs and hence should be equally accessible to all. Further, water involves questions of stewardship and protection of the interests of future generations. Water also implicates fundamental non-human, ecological interests. These interests are likely not to be represented when water is governed through private property or public property.

The emerging property form “ownership of biens communs or beni comuni” is meant to provide an alternative to public and private ownership. These new common ownership rights differ from public ownership in an important way. The public at large, the collectivity, has not only use entitlements but also management entitlements, i.e. control over management decisions.

ii. The emerging ownership of biens communs/beni comuni.

In Italy, a recent legislative proposal sketches the fundamental features of this new form of common ownership. In 2007, the Italian Ministry of Justice created a committee chaired by property scholar Stefano Rodota’, charged with the task of reforming the civil code’s rules on public ownership. The centerpiece of the legislative proposal prepared by the committee is the new category of beni comuni.

Beni comuni, the committee’s report suggests, are instrumental to “the enjoyment of fundamental rights and the autonomous development of the individual” and their use is to be protected for future generations. Examples of common goods include (but are not limited to) natural resources such as “water, parks, forests, glaciers, wildlife and protected natural areas”. Property scholars suggest that the category may be much broader than natural resources. Cultural resources, for example, may soon be considered beni comuni. In 2011, citizens and employees occupied the Valle Theater in Rome, a monument of baroque architecture and the oldest theatre in the city, protesting the city’s impending decision to lease the theatre to a private operator as a result of the budgetary crisis. Openly relying on the language and concepts of the Rodota Committee’s legislative proposal, the protesters declared the Valle theatre a bene comune. “The Valle Theater, the manifesto of the protesters declares, is neither private nor public; it is governed by the community of artists and citizens who produce and love culture”.

Beni comuni, the Rodota’ proposal states, may be owned by a private or a public entity. Scholars respond to the possible argument that declaring a privately owned

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85 See generally Eric T. Freyfogle, Ownership and Ecology, 43 CASE W RES L REV 1269 (1992-1993) (discussing the centrality of non-human as well as long term human interests in the law of natural resources); Id., Water Rights and the Common Wealth, 26 ENVTL L. 27 (1996). In France awareness of the multiple social, ecological and spiritual values implicated by water has led to the recognition of a “right to water”. In 2007, the environmental law code was amended to include the declaration that water is part of “le patrimoine commune de la nation”. The “protection, valorization and development of water in respect of natural equilibria, the amended Code continues, is of general interest”, and “each individual has the right to access potable water at conditions economically acceptable to all, in the manner and within the limits established by laws and regulations.”

86 Teatro Valle Occupato, Manifesto, available at http://www.teatrovalleoccupato.it/
resource a bene comune may amount to a taking requiring compensation by noting that the new category of beni comuni is grounded in art 43 of the Italian constitution which states that resources and services of significant general interest may be transferred to “groups of workers or users”. 87

The contours of the new property form are only vaguely sketched out in the Committee’s legislative proposal and the report that illustrates it. Scholarly commentary has elaborated at length on the reasons for the new property form but has not yet answered the many legal questions the new form raises. Ownership of beni comuni consists of a limited bundle of entitlements. First, there are limits to the right to transfer. When owned by a public entity, the latter may not transfer title but only use rights, for a limited term and with no possibility of extension. The idea informing the proposal, one commentator notes, is not to take beni comuni completely out of the market, but rather to prevent the problems of lack of transparency and management exclusively driven by profits exposed by the “water crisis”. 88

Second, use entitlements are limited. First, the private or public owner has a duty to grant the public access to the resource “in the manner and within the limits prescribed by laws and regulations”. But the public’s right of access is not the defining feature of this new property form. The real innovation, that distinguishes ownership of beni comuni from public property is that the public has the right to control the management of the resource. Citizens’ self-governance seems to be what beni comuni are about. The manifesto of the Valle Theater, drafted with the contribution of property scholar Ugo Mattei, emphasizes that “common” is different from “public”. Real democracy and participatory decision-making are not achieved by granting control to the state and to local governments”. 89 “Beni comuni, the manifesto continues, are not governed top down, rather they are self-governed”. 90 In the case of water, legislation that would implement the idea of citizens’ governance is currently being discussed. For example, art 10 of a legislative proposal presented by the “Italian water movements”, a network of civil society organizations, states that “in order to ensure democratic control over the management of water resources, local governments will establish mechanisms of “deliberative democracy” that would allow civil society organizations to directly participate in management decisions”. 91

Another aspect of citizens right to control the management of beni comuni is remedies. Any individual, the proposal states, is entitled to bring an action to enjoin management decisions that harm or threaten access to or the preservation of beni comuni. In other words, while only the state may bring an action for damages, any citizens may seek injunctive relief. In this respect, the legislative proposal sanctions a right that had earlier been recognized in a number of important court decisions. These decisions paved the way for the notion of ownership of beni comuni by recognizing that citizens have a right to participate in and control the management of water resources. In a 2009 case involving a controversy over water tariffs between the city of Aprilia’s “citizens’s

87 Marella, supra note at 3.
88 Id., at 11.
89 Teatro Valle Occupato, Manifesto supra note
90 Id.
91 the proposal is available at http://www.acquabenecomune.org/raccoltafirme/index.php?option=com_content&view=article&id=1060&Itemid=122
committee for public water” and the water corporate giant Aqualatina, the Consiglio di Stato decided that citizens have a right to seek injunctive relief against management decisions concerning “resources fundamental to human needs”.

In France, while a legislative proposal for a new property form is not yet on the agenda, water law is changing along similar lines. A 2010 report of the Conseil d’Etat, suggests that water is a bien commun.92 Again, participatory management entitlements are the feature characterizing bien communs. Water is public, i.e. owned by the state, but, in recent years legislation has reshaped the state’s use and management entitlements so as to allow the public to monitor and participate in water management decisions. The principle that citizens’ have a right to participate in policy decisions impacting the environment has recently acquired constitutional status. The constitutional Charter of the Environment, adopted in 2005, states that “every person has the right, under the conditions and terms established by law, to access the information about the environment in possession of public authorities and to participate in the public decisions that have an impact on the environment”93. And in recent years, legislation has significantly expanded the mechanisms for citizens participation in water policies. A 2009 law has recognized citizens’ right to receive information about water management, simplifying access to information as well as public inquiries in environmental matters.94 Further, recent amendments to the environmental code, have expanded participation participation of users and civil society organizations in water basin committees in charge of drawing water use plans.95

3. The numerus clausus and property values: property and deliberation

a. the numerus clausus and the cooperative control of the content of property forms.

The fact that these two property forms, emphyteusis and ownership of biens communs, were first eliminated from the list of recognized property forms and later reintroduced suggests that an explanation of the numerus clausus that focuses on information costs is only part of the story. Through the numerus clausus, courts, legislatures, market actors, and occasionally citizens, cooperate in exercising control over the content of property forms. Forms that are perceived as being at odds with current values are eliminated. New forms that emerge in the life of property law, if seen as promoting values and social relations of a quality we approve of, are admitted to the list.

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92 Conseil d'Etat, L’Eau et son Droit, supra note at 41-44 (discussing the legal bases for the recognition of a right to water in French law)
94 article 52 of loi 3 Aout 2009 available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020949548&dateTexte=&categorieLien=id
Emphyteusis was dropped because incompatible with the 18th and 19th rejection of feudal hierarchies and the related interest in the free alienability of land in the market. Similarly, ownership of res communes omnium or biens communs disappeared from the 19th century codes because of the individualistic sensibility of the modern liberal economic and political order ushered in by the French Revolution. It came to be seen as unworkable and leading to what today we would call the “tragedy of the commons”. But, in recent decades, through the cooperative effort of market actors, courts legislatures and citizens, emphyteusis and ownership of biens communs have been re-admitted to the list of standard property forms. Dutch cities and developers have retrieved emphyteusis because it suited their needs and the 1977 Supreme Court decision recognized and specified some of the features of emphyteusis. In 1992, at the moment of the revision of the Civil Code, the legislature deemed emphyteusis to be consistent with current values and sanctioned its official re-admission in the list. Similarly, in the case of biens communs, citizens mobilized for more equal access and control over water resources and the Consiglio di Stato recognized that citizens have a right to participate in and control the management of water. These ideas about citizens’ participation were later formalized in the Rodota’ Committee’s legislative proposal.

These two property forms, emphyteusis and ownership of biens communs were re-introduced because they have an important quality. In both, decisions over the use and management of the specific resource, water or land or a cultural institution, are made through a participatory deliberative process. Both property forms have mechanisms of deliberative democracy built in. They suggest that decisions over certain resources should be made not only through voting or bargaining, but through a deliberative process accessible to all. The way the list of standard property forms is changing reveals that, alongside the modern idea of property as the castle of an owner free to pursue individual self-realization, a new idea of property as democratic deliberation is emerging. If the resource owned is one’s home, a family heirloom, a car, the owner is the lord of her castle. Property entitlements are structured so as to reflect the idea that these objects are closely bound up with personhood, they are part of the way we constitute ourselves. Personal property is not the only realm of ample individual decision-making. In a market economy, the property system recognizes the benefits of granting individual owners ample use and management entitlements over productive resources, provided certain minimum terms are met. A commercial landlord has broad decision-making power over her property, as long as she complies with the minimum standards set in landlord and tenant law’s compulsory terms and implied warranties.

But for resources that are fundamental for the human community and involve long-range human interests or non-human, ecological interests, our property system is coming to reflect the idea that broader democratic deliberation is desirable. The redevelopment of a parcel of scarce urban land in the city of Amsterdam is a decision that concerns the human community. Decisions about physical urban form and design are closely interconnected with a network of social and economic relationships. They are critical to the community’s ability to preserve or increase its economic vitality as well as its “social capital”. Emphyteusis is a property form that recognizes this complexity and interdependence and favors as a deliberative process rather than private decision-making or top-down public regulation. The use and management of a privately owned spring water source in the Alps involves the economic and productive interests of the owner, the
community’s ecological, aesthetical or recreational needs and the stewardship duty owed to future generations. The emerging concept of ownership of *biens communs/beni comuni* leaves intact the owner’s “income rights”, but broadens participation in the decision-making process, beyond the narrow scope of private ownership or the opacity of public ownership.

b. Property Forms and Deliberative Democracy

These transformations in the standard list of property forms acknowledge that deliberative democracy is not only a form of politics, a matter for the organization of the state, but also a matter for property law. The idea at the core of deliberative democracy is free public reasoning among equals who are governed by the decisions.96 Political philosophers suggest that this idea of justification through public reasoning is an idealized procedure of deliberation, which can in turn serve as a model for collective decision making in various institutional and social arrangements.97 Property is one such institutional arrangement. The new property forms that are emerging point to the fact that property rules should not only facilitate efficient use of resources, but also provide favorable conditions for deliberation and participation while ensuring that participants are treated as free and equal in the ensuing discussion. *Emphyteusis* and the new common ownership rights tie the exercise of decision-making power over resources such as urban land or natural resources to conditions of public reasoning. These new property forms affirm the need to both increase the number of participants in the decision-making process and to require them to give reasons for their decisions.

Reason giving is the characteristic of deliberative democracy. Theorists of deliberative democracy argue that the reasons deliberative democracy asks citizens and their representatives to give “should appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject”.98 In other words, the reasons given in the deliberative process must be “public”, in the sense that their content must be accessible and understandable to those to whom they are addressed. The reasons given...

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96 Joshua Cohen, *Democracy and Liberty*, in *DELIBERATIVE DEMOCRACY*, (Jon Elster ed 1998) 185-231 at 186 (contrasting an “aggregative” conception of democracy, where decisions are collective if they arise “from arrangements of binding collective choice that give equal consideration to the interests of each person bound by the decision”, to “deliberative” democracy, where a decision is collective if it emerges “from arrangements of binding collective choice that establish conditions of free public reasoning among equals who are governed by the decisions”; in the deliberative conception, Cohen notes, “citizens treat one another as equals not by giving equal consideration to interests, perhaps some interests ought to be discounted by arrangements of collective choice, but by offering justifications for the exercise of collective power framed in terms of considerations that can, roughly speaking, be acknowledged by all as reasons”). See also Amy Gutman & Dennis Thompson, *Why Deliberative Democracy?* (2004) at 7 (arguing that deliberative democracy is “a form of government in which free and equal individuals and their representatives justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future”).

97 Cohen, *supra* note at 186 (arguing that because the requirements for free public reasoning among equals are not narrowly political, deliberative democracy is not exclusively a form of politics, it is a framework of social and institutional arrangements that facilitate free reasoning among equal citizens by providing favorable conditions for expression, association and participation while ensuring that citizens are treated as free and equal in that discussion”).

98 Gutman & Thompson, *supra* note at 3.
must be reasons that others, as free and equal, can accept. Public reasoning is not an unattainable objective for property forms. The inherent “public” nature of property, i.e. the fact that property rights are *in rem* thereby imposing duties not only on the owner but on the world at large, calls for deliberation. It demands that, when important resources are at stake, decisions be made through a reason given process open to citizens. To be sure, making decisions over the best use of land or water often involves complex technical notions and participants in the decision-making process will have to rely on experts. But the fact that expert opinion is involved does not mean that the reasons given are inaccessible. As long as experts describe their findings in way that citizens can understand, and as long as the expert opinion is pluralistic and subject to scrutiny, reliance on expert knowledge does not detract from the deliberative nature of the decision-making process.\(^9^9\) Also, not all issues require deliberation. Deliberative democracy makes room for other forms of decision-making, such as bargaining, voting or executive decisions, if the use of these other modes is itself justified in the deliberative process.\(^1^0^0\)

Property forms that encourage deliberation are desirable because they serve several distinct purposes. First, deliberation leads to better decisions. When the resource involved is one that has important public interest dimensions, decisions deliberated by a diverse group of actors are likely to be better decisions than decisions made by one owner, whether private or public. The very act of communication, i.e. the process of articulating reasons to others and defending them, makes it likely that the resulting decisions are informed and thought through.\(^1^0^1\) Additionally, deliberation produces better decisions because the act of deliberation involves not only choosing among alternatives but also generating new alternatives. Deliberation helps correct mistakes resulting from incomplete understanding. Decision makers inevitably make mistakes when they make collective decisions. A deliberative forum, through the “give and take” of argument, allows participants to learn from each other, correct their misapprehensions and develop alternatives that will more successfully withstand critical scrutiny.\(^1^0^2\) Finally, a deliberative process with broad participation delivers better decisions because it represents a wider set of interests and values. In turn, broader representation makes for Pareto-superior decisions or better decisions in terms of distributive justice.\(^1^0^3\)

Second, deliberation is a response to the fact of moral pluralism and disagreement. Pluralistic theories of property recognize that, property involves plural and incommensurables values and that choices cannot be made by considering the consequences of that choice for a single foundational value.\(^1^0^4\) We disagree on the values

\(^{99}\) Id., at 5
\(^{100}\) Id., at 18
\(^{101}\) Gutman & Thompson, *supra* note at 10 (arguing that “even with regard to decisions with which many disagree, most of us take one attitude towards those that are adopted after careful consideration of the relevant moral claims”).
\(^{103}\) Id., at 11.
\(^{104}\) See Gregory S. Alexander, *Pluralism and Property*, 80 Ford. L. Rev. 1017 (2011) at 1020, 1021 (contrasting monism and pluralism and discussing different types of pluralism in property law. Alexander notes that “Regardless of their understanding of values, monists make the same basic claim. There is, they claim, only one fundamental value, whether that value is framed in terms of goods or principles”. By contrast, for Alexander, “pluralists resist such reductionism. They hold that there may be multiple values that are equally valid and equally fundamental and that these values sometimes conflict with each other.
property rules should serve. Any decision regarding the use and management of resources that are important for the community implicates a host of values, from efficiency and autonomy to distributive justice, to responsibility and stewardship. These values are often in conflict, each dictating different outcomes, and decision makers have to make hard choices. These choices are made more acceptable to those who disagree or loose by the fact that they are adopted after careful consideration of the conflicting values implicated. Deliberative democracy does not eliminate the fact of moral disagreement. In fact, deliberative democracy does not offer a way to come to a definite conclusion; almost always, deliberative democracy has to be supplemented by other decision making procedures. But, deliberative democracy promotes the legitimacy of decisions in the face of moral disagreement. The most familiar theories of property, utilitarianism, libertarianism, liberal-egalitarianism, are “first-order” theories that seek to resolve moral disagreement by demonstrating that the alternative principles of their rivals should be rejected. Deliberative democracy is a “second order” theory that provides a way of dealing with the conflicting claims of first order theories. It makes room for the conflict that first order theories pretend to eliminate. Deliberation does not make conflicting values compatible, but it boosts the legitimacy of outcomes by asking participants to give reasons and to recognize the merit of their opponents’ reasons.

Third, deliberative mechanisms in property forms are not only valuable instrumentally, because they lead to better and more legitimate decisions, but they are also inherently valuable. Significant value lies in the very act of justifying decisions. In the Aristotelian view, our ability to live a well-lived life, a life of dignity, depends on “the cultivation of our specifically human capacity to reason in cooperation with

Moreover, as we shall later see, pluralists often regard conflicting yet equally valid moral values to be incommensurable in the sense that there is no possible hierarchical ordering of them in terms of importance or weight”. Alexander distinguishes between foundational pluralism, that is the view that holds “that pluralism exists all the way down to the most basic level so that there is no single value by which we can judge the goodness of all other values”: And normative pluralism, i.e. the view that “rejects the claim that one moral value prevails over all others (e.g., autonomy over equality). The normative pluralist denies that there is any one unitary normative standpoint from which all possible different moral values, which one might think of as “good-transmitters,” might themselves be evaluated. There is a plurality of good-transmitters, or value-bearers, but only one foundational good that they all bear. Thus, one may think that aggregate well-being is the foundational intrinsic good but also believe that there are many bearers of well-being”.

105 See HANOCH DAGAN, PROPERTY. VALUES AND INSTITUTIONS. (2011) (discussing the values that are part of a pluralistic theory of property: “Property is an umbrella for a set of institutions [bearing a mutual family resemblance], serving a pluralistic set of liberal values: autonomy, utility, labor, personhood, community, and distributive justice. Property law, at least at its best, tailors different configurations of entitlements to different property institutions, with each such institution designed to match the specific balance between property values best suited to its characteristic social setting”).

106 GUTMAN & THOMPSON, supra note at 10 and 27 ff (arguing that the general aim of deliberative democracy is to provide the most justifiable conception for dealing with moral disagreement in politics); Cohen, supra note at 187 ff (discussing the background fact of reasonable pluralism, i.e. the fact that there are distinct, incompatible philosophies of life to which reasonable people are drawn under favorable conditions for the exercise of practical reason).

107 Id., at 13.

108 Id., at 13.
Property forms with deliberative mechanisms built in facilitate a public-spirited, self-governing citizenry. The idea that property is necessary to promote a robust civic ethos has long been one of the themes of the civic republican discourse throughout American history. In Europe, the civic republican theme was rooted in Renaissance political thought and partially reflected in the life of the Italian medieval communes. It has been obliterated by the prevalence in property discourse of the classical liberal tradition of possessive individualism with its focus on shielding autonomous individuals from the potentially tyrannical demands of the collectivity. The current changes in property forms may be seen as signaling the emergence of a new “republicanized” version of social democracy.

The ideal of deliberative democracy that informs the emerging property forms is an attractive one, but it also raises questions. The first question is the extent to which emphyteusis and ownership of biens communs live up to the promise of promoting deliberative democracy. In the case of emphyteusis, the risk is that emphyteusis may be structured to promote bargaining and dealing among two parties with different leverage, the city and a developer, rather than deliberation by three free and equal actors, the city, the developer and the community. The promise of emphyteusis is to facilitate a mode of urban planning where there is a close connection between self-regulation, deliberation and communal control and one that “takes the plurality of urban society as a point of departure”. But emphyteusis may end up resembling too closely the bargaining process that happens in the traditional zoning process. First, the promise of community involvement in establishing and modifying the “general conditions” in the emphyteutical deed, may never materialize. The process may be structured so as to allow consensus building among the most powerful actors. Second, the parties involved will act as strategic actors rather than as deliberators. The process is likely to be more about strategic motives than reason giving. Similarly, in the case of ownership of biens communs the risk is a deliberative process that reflects current power equilibria rather than free public reasoning among equals. The precondition for deliberative democracy requires equal access to the deliberative forum. Critics of deliberative democracy point to the fact that, when power and wealth are distributed unequally and control access to the deliberative process, the results of deliberation will likely reflect these inequalities. And, again, participants in the deliberative process may strategically pursue preferences and political motives rather than give reasons. These objections are not fatal but they should induce caution. The introduction of property forms that have built-in mechanisms of deliberative democracy cannot be divorced from the commitment to larger structural changes that address inequalities in access to the deliberative forum that derive from wealth and entrenched power. As to strategic behavior, to be sure, the mere fact that conduct is linguistically mediated does not transform participants in the deliberative process in enlightened deliberators. Deliberation will always be supplemented with strategic bargaining. But still deliberation may operate as a constraint. The deliberative process by making actors see that some of their preferences or motives may not be

109 GREGORY S. ALEXANDER & EDUARDO PENALVER, AN INTRODUCTION TO PROPERTY THEORY (2012) at 82.
111 Wigmans, supra note at 217.
expressed in the form of acceptable reasons may help to limit the force of such motives and preferences.\textsuperscript{112}

The second question raised by these “deliberative” property forms is the risk of impoverishing the plurality of normative commitments of property by focusing on a purely proceduralist view of deliberation. Theorists of deliberative democracy are divided on whether deliberative democracy is a procedural or a substantive notion. On a purely proceduralist view, once the right procedures, and the conditions for those procedures to work well, are in place, any outcome that emerges from the deliberative process is right. A deliberative theory that includes substantive commitments (such as non-discrimination or equal opportunity), procedural theorists argue, improperly constrains democratic decision-making.\textsuperscript{113} Conversely, a substantive view of deliberative denies that procedures are sufficient. Good procedures can produce unjust outcomes.\textsuperscript{114} Joshua Cohen, in proposing a substantive view, argues that the idea of free and equal personhood that is at the core of deliberative democracy itself provides constraints on the substantive content of the outcomes of deliberative process. For example, the ideal of free and equal personhood itself precludes outcomes that are discriminatory or manifestly non-egalitarian, even if these outcomes result from good procedures.\textsuperscript{115} The idea of deliberative democracy built into the new property forms should be a substantive one that focuses on a pluralistic idea of human flourishing.\textsuperscript{116}

Conclusions

I have argued that, contrary to much comparative law wisdom, in the civil law, the \textit{numerus clausus} principle operates as relatively flexible constraint on experimentalism in property law. The standard list of property forms is pruned and expanded through a collaborative process that involves legislatures, courts, market actors and, at times, civil society. These actors cooperate to control the optimal number of forms in the list, to reduce information costs for third parties, and the content of the forms, to ensure they reflect values we approve of. The latest changes in the civil law list suggest a new emerging normative commitment to property forms that, for certain resources, promote mechanisms of deliberative democracy. This idea, I suggest, is an attractive one but one that is difficult to live up to. European property law should strive to keep its promises.

\textsuperscript{112} Cohen, \textit{supra} note at 199.

\textsuperscript{113} \textit{Gutman & Thompson}, \textit{supra} note at 23-26.

\textsuperscript{114} Id.,

\textsuperscript{115} Cohen, \textit{supra} note at 193-198.
