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# A Response to Democracy and Trusts

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# A Response to *Democracy and Trusts*

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We do know these stories. As Carla Spivack begins in her expansive and thoughtful piece, *Democracy and Trusts*, we know them and they truly do bear repeating.[1] Sometimes, even frequently, our laws reinforce preexisting injustices. Professor Spivack does not tarry in pointing this out; it informs her entire introduction. Personally, the case that she first describes, *Scheffel v. Kreuger*,[2] remains one of the most visceral and upsetting cases I recall from my law school studies. Upsetting, unsparing, and awful facts are, for both better or worse, embraced as teachable moments in the case books from which we learn. This one deeply upset me. Not only did the court completely absolve an abuser from his liability but, more importantly, ruthlessly cut off his victim from just, or really any, compensation, just because the defendant's only assets were tied up in a spendthrift trust.[3] Professor Spivack uses *Scheffel*, and other similar cases, as a foil for a paramount issue in contemporary trusts and estates law: whether modern developments in the law, including the spread of spendthrift trusts which insulate trust funds from both voluntary and involuntary creditors, the loosening of the rule against perpetuities, and the advent of the self-settled asset protection trust, are beneficial to our society as a whole and compatible with our form of self-government.

*Scheffel* was the case chosen by Jesse Dukeminier and Robert Sitkoff to demonstrate a critical concept in their case book.[4] That trusts are unique. That they can be specially bound to certain uses, prohibited from others. And, as set forth in *Scheffel*, they could even be protected from the reach of otherwise-deserving creditors. I was immediately struck that if they chose this case, then there must be something powerful lurking at the margins. In what world would it be just for an abuser to be absolved, simply because his assets were entrusted? If a set of facts as unconscionable as those in *Scheffel* could not overturn this type of protection, there *must* have been something equally compelling on the other side of what feels to be a grave injustice. But what is it?

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1 Carla Spivak, *Democracy and Trusts*, 42 ACTEC L. J. 311 (2017).

2 782 A.2d 410 (N.H. 2001).

3 *Id*.

4 Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts and Estates 703-17 (9th ed. 2013).

In arguing that the result in *Scheffel* is not justifiable, Professor Spivack hinges her position on the Numerus Clausus (hereafter, the "NC"), which implicitly undergirds the U.S. property system and occasionally impacts it with more obvious effect.[5] It operates as a "strong presumption against judicial recognition of new forms of property rights," funneling efforts to create new forms of property into the legislative process.[6] Property rights that are wholly conceived by individuals, such as a "new kind" of a bequest, fail because they have not been legislatively authorized.[7] She focuses on two main justifications for this limitation: efficiency and democracy. She then goes on to analyze whether either rationale could justify these recent developments in the law of trusts. She ultimately argues that neither can do so and that a correct application of the NC would lead to their removal from the list of legitimate property rights.

Professor Spivack asserts that any new form of property interest must not only be legislatively tested but should also be viewed through the NC's policy lenses to boot.[8] In her view, the NC has never been applied to the beneficial interest side of trusts because, formally, trusts are something of a loophole due to the natural split between legal title and beneficial title.[9] To Professor Spivack, the beneficial interests of trusts should be reconsidered in light of the NC. I found this difficult to accept though, for a few reasons. First of all, the NC has never been explicitly embraced by US law and its role therein is uncertain.[10] While some courts, in deciding to invalidate certain property dispositions, have considered it, it is not an explicit part of the common law, unlike in civil law.[11]

In discussing the NC, Professor Spivack makes an abrupt pivot in her analysis that I am not certain is warranted. After moving on to the dual policy rationales she believes underlie the NC, she suddenly turns those rationales into a double-barreled test for the modern interests that trouble her.[12] I agree that it is critically important to question whether these types of property interests serve efficiency and democracy. Those are both important public policy concerns and should always be weighed. The "non-rights" to entrusted property on the part of unwilling creditors, as discussed in her introduction, are indeed very concern-

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5 *See* Spivak, *supra* note 1, at 314-15.

6 Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 46-47 (2000).

7 Johnson v. Whiton, 159 Mass. 424, 425 (1893).

8 *See* Spivak, *supra* note 1, at 314.

9 DUKEMINIER & SITKOFF, *supra* note 4, at 393-96.

10 Merrill & Smith, *supra* note 6, at 9.

11 *Id*.

12 Spivak, *supra* note 1, at 323-34.

ing. And commentators have frequently assailed the mechanisms by which large swaths of capital may be captured and hoarded.[13] Yet while it was clear to me that our shared interests in efficiency and democracy favor a system of specifically enumerated property rights, it was unclear to me that every form of property that clears the legislative mandate of the NC must also always serve one or both of these rationales forever after. In suggesting so, Professor Spivack is asking for a new mode of existence for the NC. Rather than a filter to be cleared, it would become a roving sentry.

In their article on the NC, Thomas Merrill and Henry Smith describe it as "not inconsistent with private ordering and freedom of contract."[14] They seem to view the NC as striking a balance with other interests and not as an absolute. By standardizing property rights via legislature, it becomes possible to prevent excess fragmentation of rights, which drives up the information costs for all market participants.[15] But it does still allow for the adoption of enough different, even complicated, forms of property interests to insure that there is enough flexibility for sophisticated goals to be achievable.[16] The NC, then, may be characterized as a balance between the creation of some additional property interests and the creation of too many—not as a pure filter against interests that do not fit through the gates of requisite policy tests. So, even if the arguments questioning the efficiency and democratic value of these property forms carry weight, they may not reach the counter-weight arguments that balance the NC approach to property rights. It is a filter that is justified by economic and democratic concerns but it is not necessarily an economic, democratic filter by operation.

It should also not be overlooked that these forms of property interests in trusts *have* been adopted by numerous legislatures, and thus satisfied the NC. I do not intend to cry "gotcha" in noting this. But even one legislative journey merits serious consideration, and dozens, more so. Professor Spivack sees this clearance as only "theoretically" lending approval to these new interests.[17] She hand-waves any such process as the result of "one-sided lobbying by a small segment of society without input."[18] But this quote is largely unsupported in her text. I will not pretend that her assertions are baseless. This is a significant debate—one that dominated my study of these questions in law school. But to

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13 *See generally* Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L. REV. 257 (2015).

14 Merrill & Smith, *supra* note 6, at 8.

15 *Id*. at 26.

16 *Id*. at 35.

17 Spivack, *supra* note 1, at 328.

18 *Id.* at 329.

sidestep any consideration of the merit of these developments and an examination of the process that bore them is to leave this article incomplete. Professor Spivack also does not engage with some of the countervailing arguments in favor of the modern developments. Proponents of these new trust forms have offered policy justifications for them. She acknowledges that such arguments exist, but says that she considers them "exhausted," rarely addressing them directly.[19] Conversely, the critics of these types of interests receive considerable focus.[20] At a minimum, there are further arguments that she disregards and the article might be stronger if it considered them.[21]

I was also confused by Professor Spivack's proposed solution to the problems that she has described; it is somewhat antithetical to her own arguments. She urges the courts to step in, as the plaintiff begged in *Sheffel*, in order to undo these wrongs.[22] So ultimately, an article that lauds the NC as a solution to controversial developments in the law, may actually be advocating for its abandonment. Her call for a more public conversation of these issues, on the other hand, is laudable.[23] If successful, such an effort might lead to future democratic responses, which would be in keeping with all of the values that Professor Spivack embraces in her article.

Returning to *Scheffel*, Professor Spivack's own emphasis on the efficiency justification for the NC may also hint at that other force that is driving not only modern trust law, but our conception of property in the common law. As discussed above, Merrill and Smith wrote that the NC ensures that there is enough flexibility among the types of recognized property interests that it becomes possible to combine them in unique ways and to achieve complicated, desired results.[24] They compare the building blocks of different property interests to language and note that truly original ideas may be created using the letters and words that we already have.[25] Trusts are famously fluid; they may be created on a whim to serve a nearly unlimited array of purposes.[26] Why do that, why give so much power, unless this flexibility is absolutely essential to the purpose of trusts and that to demand more formality, to put limits on

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19 *Id.* at 314.

20 *E.g.*, *id.* at 321-23.

21 *E.g.*, Gideon Rothschild, Daniel S. Rubin & Jonathan G. Blattmachr, *Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch?*, 32 VAND. J. TRANSNAT'L L. 763, 777 (1999) (discussing the public policy goal of keeping trust capital . . . within the United States and subject to the jurisdiction of the U.S. judicial system").

22 Spivack, *supra* note 1, at 335-36.

23 *Id.* at 338.

24 Merrill & Smith, *supra* note 6, at 35.

25 *Id.*

26 *See* DUKEMINIER & SITKOFF, *supra* note 4, at 583.

the types of terms that they may include, or to question their true efficiency risks losing that imperative.

That the United States of America is aggressively marketed as the freest society in human history will likely always inform our laws, sometimes to the benefit of all and sometimes to the benefit of few. Freedom as to our own property is a significant part of that foundation. When I first read *Scheffel*, I eventually decided that the casebook editors were including it, in all its horrors, to underscore the idea that individuals would always have the right to manage their own property, even where such management might risk injustice. That the courts would hopefully, but probably not always, be able to address these injustices seems an implicit part of that. We have certainly chosen to legislate and govern so as to insure that this compromise remains. Perhaps because to overcorrect, to try and prospectively prevent every harm or injustice, would sacrifice too much of the character that made our society the relative success that it is, for better and worse.