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# "Undemocratic" Trusts and the *Numerus Clausus* Principle

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In *Democracy and Trusts*, Professor Carla Spivack argues that, pursuant to the *numerus clausus* principle, a court is empowered to impair legislation authorizing a certain trust form where the legislation was not the product of "democratic decision-making."[1] This imaginative claim is predicated upon two antecedent claims. First, Professor Spivack argues that the *numerus clausus* principle should apply to equitable interests.[2] Second, she argues that the *numerus clausus* principle does not invest legislatures with the sole authority to determine allowable property forms; rather, courts also have an important role to play in composing the list of property forms.[3] This review essay will first briefly consider the two antecedent arguments before evaluating Professor Spivack's main claim that, in certain circumstances, the *numerus clausus* principle bestows upon courts a type of veto power over trust legislation.

## I. The *Numerus Clausus* Principle

The principle of *numerus clausus* ("the number is closed") provides that a private individual or individuals may not create a new form of property or change the content of an existing form of property.[4] The principle applies to property forms but not to contracts because the content of a property form binds all who deal with the property but the content of a contract binds only the parties to the contract.[5] *Numerus clausus*, as it is widely understood, however, is not a limitation on legislative power. Rather, a legislature remains free despite the principle to authorize a new form of property or a change to the content of an existing form of property.[6]

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

2 *Id*. at 315.

3 *Id*. at 335-36.

4 *Id*. at 315.

5 Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L. J. 1, 8 (2000). *See also* Spivack, *supra* note 1, at 317.

6 Spivack, *supra* note 1, at 322.

Some scholars, most notably Professors Thomas Merrill and Henry Smith, have justified the *numerus clausus* principle on efficiency grounds.[7] The principle limits the burdens that a private property owner can pass on to third parties. In so doing, the principle promotes efficient market transactions in that it allows one to transact with respect to certain property with less concern for unknown burdens imposed on the property by previous owners.[8] Thus, Merrill and Smith view the legislature's task in managing the property list as one of seeking an optimal relationship between information costs, which rise as the number of property forms rises, and frustration costs, which rise as the number of property forms falls and parties are less able to achieve their goals in a cost-effective manner with the existing property forms.[9]

Other scholars argue the *numerus clausus* principle is grounded principally in respect for democratic decision-making.[10] Property law limits the rights of everyone in society with respect to the property interest at issue. For this reason, the argument goes, only a democratically-elected legislature should be empowered to create a new form of property right or alter the content of an existing property right.[11]

## II. Professor Spivack's First Antecedent Argument: The *Numerus Clausus* Principle Should Apply to Equitable Interests

The *numerus clausus* principle is thought by some to have applied traditionally only to legal interests but not to equitable interests.[12] Some have justified this dichotomy on the grounds that third parties deal only with the trust's underlying assets held by the trustee in legal fee simple and not with the beneficiary's equitable interest.[13] Thus, the underlying assets of the trust remain subject to the *numerus clausus* principle.

Professor Spivack argues at length, however, that the *numerus clausus* principle should be applied to a beneficiary's equitable interest in the trust.[14] The core of her argument is that an equitable interest can burden a third party just as much as a legal interest can.[15] For example,

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7 Merrill & Smith, *supra* note 5, at 24-42.

8 *Id.* at 27.

9 *Id.* at 35-40.

10 *See, e.g.*, Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 Cornell L. Rev. 1009, 1051-52 (2009).

11 Spivack, *supra* note 1, at 322.

12 *Id*. at 323.

13 *Id*. (citing Merrill & Smith, *supra* note 5, at 34); *see also* Merrill & Smith, *supra* note 5, at 57.

14 Spivack, *supra* note 1, at 323-27.

15 *Id*. at 327.

the creditors of the settlor of a domestic asset protection trust (DAPT) generally may not attach the settlor's interest in the trust.[16]

Once we understand that an equitable interest can burden an entity that is not a party to the creation of the interest, the efficiency and democratic decision-making rationales for the *numerus clausus* principle would seem to have as much force in the context of an equitable interest as when applied to a legal interest.[17] The principle promotes efficiency in that the purchaser of an equitable interest or the creditor of a trust beneficiary need not be concerned about unstandardized burdens crafted by the settlor. The democratic-decision-making rationale is served if any burdens imposed on the purchaser/creditor are crafted by a democratically-elected legislature rather than a private settlor.

While Professor Spivack thus offers a plausible argument for applying the *numerus clausus* principle to equitable interests, she does not consider any negative consequences of such application. For example, a great utility of the trust form is its flexibility to be adapted to the specific wishes of each settlor and the personal needs of each beneficiary. One might reasonably question whether subjecting equitable interests to the *numerus clausus* principle will impair the trust's inherent flexibility and, therefore, its utility. Professor Spivack's argument, therefore, may have benefitted from a discussion of how application of the *numerus clausus* principle to equitable interests might impact trust flexibility.

## III. Professor Spivack's Second Antecedent Argument: Courts Should Have a Role in Composing the List of Property Forms

Typically, the *numerus clausus* principle is defined as requiring *legislative* action to alter the form or content of property rights.[18] Professor Spivack argues, however, that courts should have a role in composing the list of property forms. Specifically, she argues that interest group capture in property law both justifies and necessitates judicial action.[19] She frames her argument principally as furthering the democratic-decision-making rationale of the *numerus clausus* principle.[20] Her argument might profitably be reframed to fit within the efficiency rationale as well.

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16 *Id*. at 324-25.

17 *See id*. at 327, 329-30.

18 *See, e.g.,* Yun-chien Chang & Henry E. Smith, *The* Numerus Clausus *Principle, Property Customs, and the Emergence of New Property Forms*, 100 Iowa L. Rev. 2275, 2276 (2015).

19 Spivack, *supra* note 1, at 331-35.

20 *Id*.

Merrill and Smith, the principal proponents of the efficiency rationale, allow that there is no reason inherent in a common law system that would preclude judicial alteration of the list of property forms.[21] Rather, they argue, courts engage in prudent self-restraint in leaving this field to the legislature.[22] Merrill and Smith further posit that such judicial restraint promotes efficient market transactions in that, for several reasons, "legislated changes in property forms produce information to third parties at less cost than judicially mandated changes."[23]

Still, Merrill and Smith would not assign all responsibility for legal change in property forms to the legislature in cases where the disadvantages of legislative rulemaking outweigh these information cost efficiencies.[24] Among the disadvantages that Merrill and Smith consider is the influence of special interest groups on legislative rulemaking.[25] They conclude for several reasons, however, that "interest-group rent-seeking" is relatively less likely in the context of decisions about property forms than in other areas.[26]

The proliferation since the late 1990s of legislation authorizing DAPTs and dynasty trusts undermines this conclusion. Indeed, Professor Spivack makes a compelling case that the proliferation of DAPTs and dynasty trusts is a product of legislative capture.[27] Thus, one might reasonably conclude that in the context of new trust forms the disadvantages of legislative rulemaking may outweigh the efficiency advantages.

## IV. Professor Spivack's Main Argument: The *Numerus Clausus* Principle Allows a Court to Invalidate a Statute Establishing a Trust Form When the Statute Was Not the Product of Democratic Decision-Making

Even if one takes as a given that the *numerus clausus* principle applies to equitable interests and allows for courts to have a role in composing the list of property forms, Professor Spivack's principal argument is still a leap beyond. In short, Professor Spivack argues for an application of the *numerus clausus* principle that would empower a court to remove from the list of property forms an equitable interest that a legislature has added to the list by statute. Unfortunately, Professor Spivack fails to clearly delineate the sources or limits of court power under her

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21 Merrill & Smith, *supra* note 5, at 10.
22 *Id*. at 10-11.
23 *Id*. at 58. *See also id*. at 61-66.
24 *Id*. at 66.
25 *Id*. at 60-61.
26 *Id*. at 67.
27 Spivack, *supra* note 1, at 331-34.

theory of the *numerus clausus* principle. At times, Professor Spivack focuses on process suggesting that a court may veto legislation where the legislative process that added the equitable interest was not sufficiently democratic.[28] Elsewhere, she focuses on substance suggesting that a court may act when the substance of legislative trust law reform conflicts "with the principles and expectations of a democratic society whose market actors are expected to treat one another with decency and respect."[29]

Specifically, Professor Spivack argues that the proliferation of statutes authorizing DAPTs and dynasty trusts represents a "failure of the democratic process" in that this legislation "has been the result of lobbying by the wealthy, their lawyers, bankers, and trust managers, at times in the face of popular rejection of these innovations."[30] She expresses concern that, under such circumstances, legislatures have ignored the overall interests of society, instead choosing to protect the wealthy few.[31] Moreover, she fears that these legislated trust forms will exacerbate wealth inequality and, thereby, "eviscerate property's role in a democratic society: the role of allowing some degree of equal access to material self-expression, opportunity, remedies and input into ownership norms, as well as bearing out peoples' expectations about interpersonal interactions."[32] Relying and building on the scholarship of Professors Avihay Dorfman, Joseph Singer, and Anna Di Robilant, who espouse a democratic model of property law, Professor Spivack would apply the *numerus clausus* principle broadly so that "numerus clausus limits the burdens which can be imposed [by a legislature] on third parties to those that comport with social expectations and fairness."[33]

Professor Spivack's proposal might be criticized on both practical and structural grounds. With respect to the practical, the proposal leaves a number of critical questions unanswered. Professor Spivack gives little indication as to how a court should determine if a legislature's enactment of a trust statute was sufficiently democratic, or if the substance of a statute comports with society's principles and expectations of decency and fairness. Moreover, she does not explicitly detail the consequences that would follow from a judicial finding that a trust statute has failed her test. Thus, her theory seems incomplete.[34]

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28 *Id*. at 327.

29 *Id*. at 322.

30 *Id*. at 331.

31 *Id*.

32 *Id*. at 339.

33 *Id*. at 322.

34 *See* Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. Toronto L.J. 467, 513-14 (2011).

Professor Spivack does distinguish property forms that she concludes were the product of democratic decision-making from DAPTs in that the former resulted from a "clash of interest groups resulting in compromise" while DAPT legislation has not.[35] If this is offered as a proposed standard, the proposal is problematic. A standard that judges the validity of trust legislation on whether the legislation garnered engagement on two sides would encourage opponents of proposed trust legislation to play dead during the legislative process. Moreover, such a standard would complicate trust litigation enormously. Thus, Professor Spivack's proposal risks undermining the certainty and ease of administration that are prized features of U.S. donative transfers law.[36] In this way, Professor Spivack's *numerus clausus* principle would seem to be at odds with the efficiency rationale that she suggests grounds her principle.

Professor Spivack also leaves unaddressed the concern that the same moneyed interests that have sought to influence the legislative process to advance their private interests would seek to exert similar influence over the judicial process were courts to apply the *numerus clausus* principle broadly as she advocates.[37] Where state judges are elected, such interests should be expected to insert themselves into judicial elections. Where judges are appointed, such interests should be expected to lobby the executive and the legislative branches for the appointment of judges who are likely to be sympathetic to the moneyed interests.

Professor Spivack's proposal is arguably structurally inconsistent in additional ways. The proposal is not so much an extension of the *numerus clausus* principle as it is an inversion of the principle. The principle traditionally has been seen as a reservation of power to the legislature to which courts have deferred for reasons of either efficiency or respect for democratic decision-making. Professor Spivack's proposal turns the traditional *numerus clausus* principle on its head: her principle is a limitation on the legislature whose judgment as to policy a court would be free to supplant with its own.

Courts, however, have no authority to overturn legislation on the grounds that the legislation reflects an unwise policy choice.[38] Rather,

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35 Spivack, *supra* note 1, at 328-29. *See also id.* at 325-26.

36 *See* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 Ariz. L. Rev. 1063, 1076-77 (1999).

37 *See* Merrill & Smith, *supra* note 5, at 68.

38 Scheffel v. Krueger, 782 A.2d 410, 412 (N.H. 2001); JOHN HART ELY, Democracy and Distrust: A Theory of Judicial Review 4 (1980).

the legislature has the final say on policy matters.[39] Thus, Professor Spivack's response to the legislative proliferation of "undemocratic" trust forms is itself deeply anti-democratic.[40]

Professor Spivack raises a number of significant concerns about the arguably pernicious effects of DAPTs and dynasty trusts on third parties and on society generally.[41] She argues that the broad application by courts of the *numerus clausus* principle that she proposes would force a discussion of the role that trusts should play in our property regime.[42] Such a debate is well worth having. That important policy discussion, however, would be better focused on the legislature.

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39 *See* MISS. CODE ANN. § 91-9-503 (2017) (superseding by statute Sligh v. First Nat. Bank of Holmes Cty., 704 So. 2d 1020 (Miss. 1997) (holding that there is a tort creditor exception to the enforcement of a spendthrift clause in Mississippi)).

40 *See* Dorfman, *supra* note 34, at 513.

41 Spivack, *supra* note 1, at 324-27.

42 *Id*. at 335-37.