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**PROPERTY AND DEMOCRATIC DELIBERATION:  
THE *NUMERUS CLAUSUS* PRINCIPLE AND DEMOCRATIC  
EXPERIMENTALISM IN PROPERTY LAW**

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**Property and Democratic Deliberation:  
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Experimentalism in Property Law†**

ABSTRACT

*First-year law students soon become familiar with the numerus clausus principle in property law. The principle holds that there is a limited menu of available standard property forms (the estates, the different types of common or joint ownership, the different types of servitudes) and that new forms are hardly ever introduced. Over the last fifty years, however, property law has changed dramatically. A wealth of new property forms has been added to the list. This dynamism in the list has remained largely unexplored and is the subject of this Article. This Article focuses on a selection of recently created property forms, which share an important quality. They establish mechanisms of democratic and deliberative governance for resources as diverse as natural resources, scarce urban land, historic landmarks, or cultural institutions. The study of these property forms sheds new light on how the numerus clausus principle works in practice and on why it exists in the first place. It also discloses a fundamental transformation in the way we think about the institution of property and the benefits we may draw from it. We have come to believe that, for some critical resources that involve public interests, use and management decisions should be made not by a single owner, whether private or public, but through a process that is democratic and deliberative. This Article examines sympathetically but critically this aspiration to deliberative democratic governance in property law.*

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\* Associate Professor of Law, Boston University School of Law. I wish to thank Greg Alexander, Talha Syed, Oren Bracha, Eduardo Penalver, Nestor Davidson, Marc Poirier, Hanoch Dagan, Bram Akkermans, Andre Van der Walt, Joe Singer, Henry Smith, John Goldberg and Duncan Kennedy for comments and suggestions. I also wish to thank the students in the Private Law Workshop and the Comparative Law Seminar at Harvard Law School and participants in the 2013 Progressive Property Conference and the Boston University Law School Faculty Workshop. Emily Strauss, Alyce Hui-Chun Chen, Felix Roscam Abbing provided superb research assistance. Errors are mine alone.

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## INTRODUCTION

In the United States, first-year law students learn that there is a limited menu of available standard property forms. The menu includes the “estates” (the fee simple absolute, the defeasible fee simple, the life estate and the lease), the basic forms of concurrent interests (tenancy in common, joint tenancy, marital property, trusts, condominium), and the four types of servitudes (easements, profits, real covenants and equitable servitudes).<sup>1</sup> On the other side of the Atlantic, their French, Italian or German colleagues also learn that the menu of property rights is limited, comprised of ownership, *emphyteusis*, *superficies*, real servitudes, the right of usufruct, the right of use and the right of habitation.<sup>2</sup> The idea that property law recognizes only a limited menu of mandatory forms is known as the *numerus clausus* principle.

There is, moreover, a second dimension to the *numerus clausus* claim. As the word “*clausus*” suggests, the list is “closed.” Not only is the *number* of forms in the list limited, but the *content* of the list – the specific admitted forms – is understood by property lawyers to be stable. In civil law systems, scholars note that the list has changed little since Justinian’s time.<sup>3</sup> Meanwhile, in the United States, “there are no significant examples of judicial abolition of existing forms of property” and courts generally “have declined to create new ones.”<sup>4</sup>

This is astonishing when we consider how much property law has changed over the last fifty years. In the United States, newly admitted forms include common interest communities, the community land trust, an expanded public trust ownership and digital servitudes. In Europe, there has also been significant “dynamism” in the list of property forms.<sup>5</sup> Rather than inventing new items for the *numerus clausus*, European legislatures have reintroduced previously eliminated property forms. Some European countries have revived *emphyteusis* (long lease), a property form that originated in late Antiquity. In Italy, a 2007 legislative proposal seeks to re-introduce a long-forgotten Roman law property form, “ownership of common goods.”

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1. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1, 12-17 (2000) (discussing the full menu of property forms in U.S. law).

2. BRAM AKKERMANS, *THE PRINCIPLE OF Numerus Clausus in European Property Law 19-80* (2008) (tracing the history of the *numerus clausus* principle from Pre-Classical Roman law to the French Code Napoleon and discussing the seven classical civil law property forms).

3. *Id.*, at 19-80 (showing the stability of the classical seven civil law property forms from Roman law to the modern nineteenth century codes).

4. Merrill & Smith, *supra* note 1, at 20.

5. I borrow the term “dynamism” to describe changes in the list from Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1610 (2008) (discussing the idea of dynamism in standardization).

The dynamism in the list of standard property forms has remained largely unexplored, and is the subject of this Article which focuses on a number of property forms that have been added to the standard list in relatively recent times. These forms are by no means the only new additions to the list, but they share a crucial characteristic. To varying degrees, they each establish mechanisms of democratic and deliberative governance for resources as diverse as natural resources, scarce urban land, historic landmarks, or cultural institutions. Homeowners in a “common interest community” can participate in designing and governing the space where they live by collectively imposing restraints on the alienation of individual units, architectural restrictions, and use restrictions. Similarly, a “community land trust” allows residents who have invested in the revitalization of a depressed neighborhood to collectively retain control over its development, keeping homes affordable. Additionally, through an expansive interpretation of the public trust doctrine, U.S. courts have designed a special form of ownership for natural resources, democratizing both access to and governance of all water suitable for recreation purposes, groundwater, and beaches. Finally, the new digital property servitudes enable individuals and communities to figure out on their own how to bypass the strictures of intellectual property law and secure access to creative works. In Europe, *emphyteusis* makes the land use planning process more democratic by allowing all affected parties to participate in establishing conditions and restrictions on the use of land. Similarly, “ownership of common goods” aims at democratizing the governance of resources that are essential to fundamental rights (housing, resources of cultural or historic significance) or that may implicate interests of future generations (water, natural resources).

The study of these property forms sheds new light on how the *numerus clausus* principle works in practice and why it exists in the first place. It also reveals an important transformation in the way we think about private property and the benefits we may draw from it. Specifically, this Article supports an account of contemporary property law that is rooted in democratic values.<sup>6</sup> Democratic property theory has emerged as a viable alternative to law & economics, efficiency-focused property accounts. This Article expands existing democratic accounts of property at a descriptive as well as at a normative level.

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6. A democratic theory of property law has been proposed by Joseph W. Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2008-2009) [hereinafter Singer, *Democratic Estates*]; *id.*, *Property as the Law of Democracy* (on file with author); see also, generally, Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L. J. 467 (2011) (outlining the main themes of a democratic legitimation for property rights).

Descriptively, the study of these new additions to the inventory of recognized property forms suggests that important developments in both U.S. and European property law embody the commitment to democratic values. The *numerus clausus* principle operates as a flexible constraint that allows for significant experimentalism in property law. The reason for this constraint on property experimentalism is rooted in a democratic conception of the content of property forms, as well as of the process through which they are generated. As others have noted, because property rights have an inherent public quality (i.e., they impose duties on all non-owners), we want them to embody democratic values we collectively approve of. Additionally, we want property forms to be generated through a democratic process. New property forms have to pass muster with democratically elected legislatures.<sup>7</sup> Expanding on existing democratic accounts of property, this Article shows yet a deeper democratic layer of the process by which new forms are added to the standard list. It is not always the case, as many suggest, that new property forms are generated by market actors seeking their own economic self-interest and subsequently ratified by legislatures.<sup>8</sup> Rather, it is often the case that citizens motivated by public values generate new forms that are then approved by the legislature. In other words, civil society's democratic creativity plays an important, and largely overlooked, role in the evolution of property law.

Further, at a normative level, the addition of these new property forms suggests that there is something new and appealing in the multitude of clashing normative ideals we seek to pursue through property in contemporary liberal democracies.<sup>9</sup> The property forms discussed in this Article reflect an emerging aspiration to deliberative democracy. They suggest that decisions concerning the use and management of resources that implicate fundamental public inter-

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7. On the democratic justification for the *numerus clausus* principle, see Dorfman, *supra* note 6, at 490 (discussing the "public" and fundamentally relational nature of property rights as "the authority to fix the normative standing of others in relation to an object") and at 503 (arguing that property forms must pass muster of democratically elected legislatures to be truly "co-authored" and "self-given"); Singer, *Democratic Estates*, *supra* note 6, at 1048 (discussing the estates system and arguing that "whether the [property] relationship is legitimate depends on a moral judgment that the relationship is acceptable in a free and democratic society [. . .]. In a free and democratic society, some relationships are out of bounds."); *see also* Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1566-1567 (2003) (arguing that the *numerus clausus* principle shapes our social values and that "limiting the number of property forms and standardizing their content facilitates the roles of property in consolidating expectations and expressing ideal forms of relationship").

8. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1025 (2008) (arguing that "private property owners work to maximize property value as a function of three dimensions through contract").

9. Davidson, *supra* note 5, at 1639 ("[I]t is clear that a multitude of clashing normative precepts find voice in the forms.").

ests should be made not by a single owner, whether private or public, but through a deliberative-democratic process in which all affected parties participate as equals and give one another reasons that are mutually acceptable.

The idea that property regimes should foster democratic and deliberative decision-making has been largely overlooked by democratic property theory. It draws from and expands on two existing, and at times seemingly contradictory, ideas about the benefits of property as a device for managing resources. A rich strand of thought, from Adam Smith to the law and economics movement, argues that property facilitates the efficient and productive use of resources by encouraging individual owners' decision-making and bargaining.<sup>10</sup> A parallel strand of "civic republican property theory"<sup>11</sup> emphasizes that the core purpose of property is to fulfill some prior normative vision about how the social order should be structured.<sup>12</sup> The emerging commitment to deliberative democracy in property mediates between these two visions. It suggests that, in the liberal-democratic social order, resources that implicate public interests should be governed through processes that are inclusive and focused on reason-giving. For these resources, only deliberative democratic governance processes will produce use and management decisions that are both efficient and just.

Drawing on democratic theory, this Article examines, sympathetically but critically, the aspiration to democratic deliberative governance in property. Ideally, property forms that establish democratic deliberative governance mechanisms yield decisions that are more informed, more inclusive, because they reflect a wider range of views, and more legitimate, because adopted after extensive reason-giving. But deliberative democracy is a controversial and ambitious idea. This Article addresses some of the objections that may be leveled against deliberative property forms. For some, deliberative democracy sacrifices substantively desirable or just outcomes for the sake of inclusive, deliberative, or otherwise fair processes. Others note that deliberative democracy is a revolutionary political ideal, one requiring dramatic changes in political institutions, both in the bases of collective decision-making and also in the distribution of resources. These critics question whether deliberative democratic property forms uphold their promise under non-ideal, real-world circumstances. For instance, deliberative democratic property forms may not be feasible due to the sheer number of affected parties that need consultation and/or their lack of expertise. Further, deliberative democracy in property may be unrealistic because it is premised on

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10. On this strand of thought, see *infra* 31 and accompanying footnotes.

11. *Id.*

12. GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY* 2 (1997).

an illusory assumption that participants will be able and willing to transcend their narrow self-interests and starting preferences. Finally, deliberative democratic property forms may simply mirror the existing distribution of power. They may fail to involve, if not actually exclude, potential participants, including those least able to participate on account of resources or education, those marginalized on account of race, gender, or sexuality, or those with ideologically radical views.

This Article is structured in two Parts. Part I surveys the democratic deliberative property forms. Part II draws the implications of the addition of these new property forms. Part II.A discusses how the development of these forms illuminates the justification and the actual operation of the *numerus clausus* principle. Part II.B examines and responds to the possible theoretical and practical objections to deliberative democratic property forms.

#### I. THE NEW “DELIBERATIVE AND DEMOCRATIC” PROPERTY FORMS

This part surveys six new, or relatively recent, property forms. These forms have either been added to the list of standard property forms or are currently being discussed by legislatures. The scope of the survey is not limited to the United States; it extends to European civil law countries. These additions are not the only instances of change in the list. For example, think of the changes in the area of landlord and tenant law that occurred in the United States starting in the 1960s. Courts significantly altered the rights and duties arising from a residential lease to ensure greater social and economic security for weaker parties.<sup>13</sup> Or think of the addition of a new property form, the *Anwartschaftsrechte* (“acquisition right”), in German law or the *fiducie* (a trust-like device) in French law.<sup>14</sup> Both seek to promote greater flexibility in economic transactions by expanding owners’ ability to plan and control the use of their property.

The six forms discussed in this Article are distinctive because they seek to promote deliberative and democratic decision-making by the multiple actors affected by the use of resources that implicate public values and collective interests. These resources include scarce urban land, housing, water, historic landmarks or cultural institutions.

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13. For a discussion of the changes in landlord and tenant law, see JOSEPH W. SINGER, *PROPERTY* 435-90 (3d ed. 2009).

14. AKKERMANS, *supra* note 2, at 217, 248.

### A. *Common Interest Communities*

Alexis de Tocqueville famously observed that the principle of association shapes American society.<sup>15</sup> Americans have long believed that *vita activa*, participation in self-governance, is the cornerstone of a healthy community.<sup>16</sup> In the American imagination, the town meeting best captures this belief in the benefits of active participation in self-governance.<sup>17</sup> In U.S. property law, the image of the town meeting is most closely associated with common-interest communities, a 1960s addition to the list of standard U.S. property forms. Common-interest communities (CICs) are residential communities that are created by “stacking” covenants containing a variety of restrictions on residents’ use of their property. The restrictions may vary widely and may concern anything from restraints on alienation of the individual units, to aesthetics and architecture, to “no pets” clauses, to the family status of resident members.<sup>18</sup> What defines CICs is the homeowners association’s power to enforce existing restrictions and adopt new ones, as well as to assess and collect fees.<sup>19</sup>

CICs emerged as popular attitudes about development and ideal living arrangements changed in the mid-twentieth century.<sup>20</sup> Earlier development patterns, most notably the spread of the suburban single-family detached house had facilitated the crumbling of Americans’ communal ties. By the 1960s, a new romance of community life encouraged developers to advertise homes in CICs as “pieces of ready-made communities.” A passage from a 1975 Florida court decision describing a CIC as “a little democratic sub society” has been widely quoted in subsequent case law.<sup>21</sup> More recently, in a 2007 decision, the Supreme Court of New Jersey recognized the special social

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15. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 128-29 (Schocken ed. 1961), *quoted in* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 *CORNELL L. REV.* 1, 1-2 (1989-1990) (discussing the importance of community and participation in our national character and the fundamental normative questions it poses).

16. *Id.*

17. David C. Drewes, *Putting the “Community” Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review*, 101 *COLUM. L. REV.* 314, 315 (2001) (arguing that when Americans think of community they think of the town meeting and that the notion that citizens should be actively engaged in civic and political affairs has prevailed throughout most of American history).

18. SINGER, *supra* note 13, at 367 (discussing the legal structure of common interest communities).

19. *Id.* See also Drewes, *supra* note 17, at 316 (“The unique characteristic that separates CICs from other servitude-bound property is that these communities enforce their covenants and govern themselves through a community association”).

20. See Alexander, *supra* note 15, at 7-12 (discussing two visions of residential life: the nineteenth century vision which idealizes residential life outside the city in single family dwellings and the search for “community” which emerges in the mid-twentieth century and emphasizes shared values and connectedness).

21. *Hidden Harbour Estates Inc. v. Norman*, 309 So.2d 180 (Fla Dist. Ct. App. 1975).

fabric of CICs and their role as centers of civic engagement.<sup>22</sup> In the *Twin Rivers* case, the court concluded that a CIC's restrictions on posting of signs and use of community rooms was neither the exclusive province of private contract law nor the free speech guarantees of the New Jersey constitution reserved for constitutional actors. Rather, the court emphasized that homeowners associations play an important role in the civic life of New Jersey and thereby created a new constitutional standard.<sup>23</sup>

Whether CICs are actual laboratories of self-governance is a matter of debate among property scholars.<sup>24</sup> Critics contend that the aspiration to participatory democracy within CICs evoked by court decisions is often illusory.<sup>25</sup> The deferential legal treatment that these CICs have received from courts has resulted in "the establishment of a stultifying culture of top-down decision-making within CIC which is anathema to "community."<sup>26</sup> Critics point to several reasons why the existing legal regime of CICs frustrates the goal of participation in self-governance.

First, they suggest that CICs are often creatures of coercion, dominated by the developer's control, rather than voluntary associations.<sup>27</sup> Courts and scholars have largely viewed CICs as voluntary associations created by private agreements.<sup>28</sup> Accordingly, they have argued that courts' review of the association's "constitution," i.e., the restrictive covenants contained in members' deeds or in the "declaration" recorded in the registry of deeds, should be minimally intrusive. The result is a hands-off judicial policy, whereby restrictions are re-

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22. Comm. For a Better Twin Rivers v. Twin Rivers Homeowners Ass'n, 929 A 2d 1060 (N.J. 2007). For an analysis of the case, see generally Paula A. Franzese & Steven Siegel, *The Twin Rivers Case: Of Homeowners Associations, Free Speech Rights and Privatized Mini-Governments*, 5 RUTGERS J. OF L. & PUB. POL. 729 (2008).

23. Franzese & Siegel, *supra* note 22, at 748, 750.

24. See Alexander, *supra* note 15, at 43-47 (arguing that the vision of participatory democracy within CICs is often illusory and analyzing the factors that undermine participation); Drewes, *supra* note 17, at 333-38 (arguing that the current legal regime of CICs has contributed to the establishment of a stultifying corporate culture of top-down decision making that undermines participation); Paula A. Franzese, *Does it Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 560 (2002) (suggesting that the patterns of regimentation that accompany CIC living promote cultures that do more to destroy community than to build it) and at 588 (arguing that traditional common interest communities overemphasize restrictive covenants as well as control and compliance to the detriment of social networks and participation); Ross Thomas, *Ungating Suburbia: Property Rights, Political Participation and Common Interest Communities*, 22 CORNELL J. L. & PUB. POL'Y 205 (2012) (arguing that the homogenous character of CICs results in the deterioration of the quality of public debate and of the quality of American citizenship more generally).

25. Alexander, *supra* note 15, at 43.

26. Drewes, *supra* note 17, at 314.

27. *Id.* at 325; Alexander, *supra* note 15, at 44.

28. On the private and voluntary nature of CICs, see generally Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988).

viewed for reasonableness, and courts are reluctant to strike down restrictions as “unreasonable.”<sup>29</sup> But, critics argue, the reality is quite different. The idea that members/buyers have consented to a “constitution” is an overstatement. The various contractual pathologies that affect other kinds of covenants are no less present in the context of CICs.<sup>30</sup> Buyers tend to ignore or insufficiently review restrictions. Further, they often fail to accurately assess what their preferences will be in the future. The coercive, rather than deliberative and democratic, nature of the CICs is further reinforced by the fact that such “constitutions” tend to be overly restrictive and difficult to amend.<sup>31</sup> The deferential “reasonableness” standard applied by courts has encouraged developers to draft highly restrictive constitutions in order to secure a greater return on their investment. If the constitution prohibits *ex ante* as many uses as possible that prospective buyers may want to avoid, buyers will be apt to pay more for the units.<sup>32</sup>

Second, critics note that the governing structure of CICs, far from being democratic and deliberative, is a top-down structure that most closely resembles a corporate management model.<sup>33</sup> In buying into a CIC, residents tend to hand over the reins to a board of directors, which serves as a unitary locus of power with broad authority to enforce existing restrictions and create new ones.<sup>34</sup> Empirical studies suggest that this top-down governance structure discourages participation and results in apathy, alienation, and frustration on the part of residents.<sup>35</sup> An additional factor hampering participatory democracy in CICs is the fact that voting rights are reserved to owners.<sup>36</sup> This practice, critics note, “disenfranchises renting residents and enhances the power of non-resident owners who own more than one unit in the development.”<sup>37</sup>

In recent years, a wealth of property writing has focused on how to realize CICs’ promise of deliberative democracy. Some propose that judges conduct a more vigorous procedural review of the rules enacted by the homeowners’ association.<sup>38</sup> Currently, courts subject these rules to a substantive reasonableness standard, but are reluctant to find them unreasonable. The above-mentioned proposal would alter this standard, and focus on how a rule was adopted. If the gov-

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29. Drewes, *supra* note 17, at 327-28.

30. Gregory S. Alexander, *The Publicness of Private Land Use Controls*, 3 EDINBURGH L. REV. 176, 180 (1999); Drewes, *supra* note 17, at 326.

31. Drewes, *supra* note 17, at 328-29.

32. *Id.*

33. *Id.* at 335-36.

34. *Id.* at 333.

35. Alexander, *supra* note 15, at 43; Drewes, *supra* note 17, at 334.

36. Alexander, *supra* note 15, at 45.

37. *Id.*

38. Drewes, *supra* note 17, at 338-41.

erning board acted as “facilitators of deliberation” and the process by which the rule was adopted included the participation of the association’s membership, judges would be more willing to find the rule reasonable.<sup>39</sup> By contrast, if a restriction was passed without much effort to elicit members’ participation and the decision was made without much deliberation, the court would be inclined to find the rule unreasonable.<sup>40</sup> Similarly, others suggest incorporating the “right to heterogeneous communities” into the current reasonableness standard of review. In reviewing the reasonableness of an association’s rule, courts should focus on the fundamental right to live in “heterogeneous laboratories of democracy.”<sup>41</sup>

Still others suggest that a first step in the task of revitalizing the participatory and democratic nature of CICs is to turn to the guidelines contained in the Restatement (Third) of Servitudes.<sup>42</sup> For example, to preclude developers from protracted despotic control over rules and bylaws, the Restatement suggests that developers turn control over to the community association “after the time reasonably necessary to protect their interests in completing and marketing the project.”<sup>43</sup> Furthermore, the Restatement counters the current tendency to adopt overly restrictive rules by limiting associations’ powers to regulate conduct inside given units to rules aimed at curbing nuisance-like activities that interfere with other owners’ use and enjoyment.<sup>44</sup> Finally, CICs’ “constitutions” should liberalize the amendment process<sup>45</sup> and encourage residents’ involvement by, for example, making participation on an association’s committee as mandatory as payment of fees.<sup>46</sup>

### B. *The Community Land Trust*

The Community Land Trust (CLT) is a property form developed in the 1970s as a response to the need for affordable housing and

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39. *Id.* at 339.

40. *Id.* at 339.

41. Thomas, *supra* note 24, at 233-34 (Thomas argues, at 229, that the current reasonableness standard is insufficient in two respects: a) the concept of reasonableness is subject to substantial disagreements; b) unless reasonableness implies an external community standard, courts will uphold most rules as reasonable for the purpose of the internal community; Thomas suggests that the value that is missing from current solutions to the CICs dilemmas is “meaningful political participation.” Thomas focuses on the federalist concept of “laboratories of democracy” but emphasizes the need for diversity and inclusion).

42. Franzese, *supra* note 24, at 591; *see also* Paula A. Franzese, *Building Community in Common Interest Communities: The Promise of the Restatement (Third) of Servitudes*, 38 REAL PROP. PROB. & TR. J. 17, 30-43 (2003-2004).

43. Franzese, *supra* note 24, at 591.

44. *Id.*

45. *Id.* at 592.

46. Drewes, *supra* note 17, at 340.

greater democratic community control.<sup>47</sup> The CLT “combines a new approach to the ownership of land and housing with a new approach to the democratic stewardship of this property.”<sup>48</sup> A CLT is a non-profit community housing development organization that acquires land through donation or purchase, with the intention of holding title in perpetuity, thereby removing land from the open market. CLTs vary in structure and organization, but share four key features: land ownership, ground leases, resale restrictions, and democratic governance.<sup>49</sup> The CLT retains title to the land, but sells buildings to qualified buyers. Buyers own the building or apartment outright and lease the ground beneath it from the CLT for a renewable term of ninety-nine years. The lease may be transferred, assigned and devised to one’s heirs. Hence, scholars describe the CLT as “a lease in fee,” a fee simple “subject only to the payment of rents reserved.”<sup>50</sup> When leaseholders sell their buildings and terminate their ground leases, the CLT retains a fixed-price preemptive right enabling it to buy the building at the owner’s original cost with adjustments for inflation, improvements, or depreciation. This preemptive right ensures that the CLT will be able to buy back the building and keep the cost of housing low for low-income buyers.<sup>51</sup>

Since its origins in the 1970s, the CLT has embodied an aspiration to democratic governance. In the words of John Emmeus Davis, a scholar and activist involved in the development of CLTs since the early 1980s, the CLT remains “faithful to the democratic precepts that were ubiquitous among non-profit organizations that develop low-cost housing or re-develop low-income communities.”<sup>52</sup> The roots of the CLT’s commitment to democratic governance, its open membership and governing board on which many interests are represented, date back to the civil rights movement.<sup>53</sup> The first CLT

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47. Matthew Towey, *The Land Trust Without Land: The Unusual Structure of the Chicago Community Land Trust*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 335, 338-41 (2008-2009) (discussing the origins of the CLT and the affordability challenge in the wake of the financial crisis with a particular focus on Chicago).

48. JOHN EMMEUS DAVIS, STARTING A COMMUNITY LAND TRUST: ORGANIZATIONAL AND OPERATIONAL CHOICES 1 (2007), available at <http://www.burlingtonassociates.com/CLT-resources/starting-a-clt-organizational-and-operational-choices/>.

49. Towey, *supra* note 47, at 342.

50. Christopher A. Seeger, *The Fixed-Price Preemptive Right in the Community Land Trust Lease: A Valid Response to the Housing Crisis or an Invalid Restraint on Alienation?*, 11 CARDOZO L. REV. 471, 475 (1989-1990).

51. *Id.* at 475-76.

52. JOHN EMMEUS DAVIS, A PRIMER ON MEMBERSHIP DEVELOPMENT FOR COMMUNITY LAND TRUSTS, [http://www.burlingtonassociates.com/files/5113/4461/5453/4-A\\_Primer\\_on\\_Membership\\_Development.pdf](http://www.burlingtonassociates.com/files/5113/4461/5453/4-A_Primer_on_Membership_Development.pdf) (last visited Jan. 29, 2014).

53. On the origins of the CLT’s democratic impulse and the civil rights movement, see Sarah Ilene Stein, *Wake Up Fannie, I think I got Something to Say to You: Financing Community Land Trust Homebuyers Without Stripping Affordability Provisions*, 60 EMORY L.J. 209, 215 (2010-2011); Towey, *supra* note 47, at 341; see also *Interview of John Emmeus Davis, Cofounder of Burlington Associates in Community Development and Dean for the National CLT Academy*, available at <http://www.burlingtonas>

was established in rural Georgia in the late 1960s. It acquired 5,000 acres of land, which were then held in trust for the perpetual use of rural farmers. Among the leaders of the first CLT was Slater King, a first cousin of Martin Luther King.<sup>54</sup>

Open membership is a classic characteristic of the CLT. The statutory definition states that the CLT has “membership that is open to any adult resident of a particular geographical area and specified in the bylaws of the organization.” CLT experts emphasize that open membership development is crucial to the success of a CLT, since it ensures that the CLT remains faithful to its mission. Members must approve any sale of the CLT land and any amendment to the bylaws. Specifically, members must approve any amendment to the fixed-price resale formula. Thus, democratic governance helps the CLT resist short-term pressures and temptations that can compromise the organization’s long-term commitment to stewarding land.

CLTs usually draw their membership from a number of constituencies. Typically, CLTs give automatic membership to anyone living on the land leased from the CLT, whether homeowners or tenants.<sup>55</sup> But experts note that, for a CLT to be successful in revitalizing a run-down neighborhood, two other constituencies are crucial: homeowners not living on CLT land, and tenants not living on CLT land.<sup>56</sup> Experts reason that, in a gentrifying neighborhood where housing prices are soaring, support from non-CLT homeowners and renters is crucial to ensure that the CLT is successful in moderating speculation and preserving access to homeownership.<sup>57</sup> Non-profit organizations serving the same population as the CLT, and government agencies to whom the CLT must look for funding and regulatory approvals, are also usually represented in the CLT membership.<sup>58</sup>

The CLT governance structure further reflects the commitment to democracy and deliberation. Members elect a board of directors. Typically, the CLT’s bylaws require the board to represent three distinct groups: homeowners who lease land from the CLT; local residents who do not own CLT homes and local government officials; and funders and developers “who are presumed to speak for the public interest.”<sup>59</sup> Alongside the board, a number of committees are charged with special tasks, including an outreach and publicity committee, a fundraising committee, and a leaseholder services

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sociates.com/files/3013/4461/1910/8-John\_Emmeus\_Davis\_Interview-\_Democracy\_Collaborative.pdf at 4.

54. *Interview with John Emmeus Davis, supra* note 53, at 4.

55. Davis, *supra* note 52, at 3.

56. *Id.* at 3

57. *Id.* at 3.

58. *Id.* at 4.

59. Towey, *supra* note 47, at 344.

committee. These committees include individuals who do not serve on the board, as well as those who do.<sup>60</sup>

The deliberative and democratic features of the CLT are often criticized as inefficient. Democracy, critics argue, is “a little too messy,” “slows things down,” and “gets in the way.”<sup>61</sup> But in the CLT movement, many believe that there are practical, moral, and political reasons for preserving and defending the democratic governance structure that characterizes the classical CLT model.<sup>62</sup>

### C. *The Public Trust Doctrine*

Through a continuously evolving interpretation of the public trust doctrine, U.S. courts have designed a form of ownership specific to certain natural resources.<sup>63</sup> This form accommodates private property and public concerns through continuous state supervision of trust resources, regardless of whether they are in public or private hands.<sup>64</sup> The public trust doctrine is a democratizing force in natural resources law, granting public access both to resources and to the decision making processes concerning these resources.<sup>65</sup>

The scope of the public trust doctrine was originally defined in a number of nineteenth century cases, including, most famously, in *Illinois Central Railroad Co v. State of Illinois*.<sup>66</sup> In 1896, the Illinois legislature had granted an extensive tract of submerged land of incalculable value underlying Lake Michigan to the Illinois Central Railroad Company. Later, the legislature, regretting its generosity, repealed the grant and brought an action to have the 1869 grant de-

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60. Davis, *supra* note 52, at 7.

61. *Interview with John Emmeus Davis, supra* note 53, at 11.

62. *Id.*

63. Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 651 (2009-2010) (suggesting that the public trust doctrine alters the shape of the owner's bundle of sticks, by limiting one stick, development rights).

64. *Id.* at 650.

65. Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. J. 573, 580 (1988-1989) (arguing that the various types of remedies courts prescribe for trust violations have an overarching theme, public access, either to the trust resources themselves or to decision makers with authority to allocate trust property and that this theme makes the doctrine a democratizing force, preventing monopolization of trust resources and promoting natural resource decision making that involves and is accountable to the public). *See also* Marc R. Poirier, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion and Shared Public Uses of Natural Resources*, 15 SOUTHEASTERN ENVTL. L. J. 71, 109 (2006) (explaining that environmental justice advocates now focus on both substantive and procedural remedies, realizing that “the management of natural resources is subject to an ongoing process of revision, all stakeholders must be given access to decision-making processes in order to have a better shot at appropriately nondiscriminatory and distributively fair substantive results).

66. 146 U.S. 387 (1892). For an extensive discussion of the case, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* 68 MICH. L. REV. 471, 489-91 (1969-1970).

clared invalid. The Supreme Court upheld the state's claim and stated that title to the land underlying navigable waters is "a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein, freed from the obstruction or interference of private parties."<sup>67</sup> Since the Illinois Central Railroad case, courts have broadened the scope of the doctrine, including more resources within its sweep and expanding its purposes.<sup>68</sup> The public trust doctrine has been extended to non-navigable waters affecting navigable waters, to all waters suitable for recreation, and to groundwater and dry sand beaches. The purpose of the doctrine has extended beyond the original purposes of navigation and fishing to include recreation and ecological preservation.<sup>69</sup>

Not only have courts expanded the resources to which the public trust doctrine applies and the purposes it serves, they have also broadened the remedies prescribed for trust violations. Natural resources scholars note that these remedies possess the unifying theme of the democratizing natural resources law.<sup>70</sup> The public trust doctrine, they argue, operates to promote public access to trust resources and participatory deliberation in the decision-making processes where use and management policies are adopted.<sup>71</sup>

The public easement is the most familiar remedy associated with the public trust doctrine.<sup>72</sup> Courts have long interpreted the doctrine to impose an easement of public access to trust resources. In the earliest U.S. public trust case, *Arnold v. Mundy*, the court held that a riparian owner who had planted oysters in a tidal reach of a river had no trespass claim against the defendant who harvested the oysters. The outcome of the case granted the public an easement of access to the beds of tidal waters. The beach cases illustrate most vividly where the public trust doctrine grants an easement of public access. In *Matthews v. Bay Head Improvement Association*, the New Jersey Supreme Court held that the public had a right of access to dry sand areas owned by a non-profit corporation. The court reasoned that ownership of land flowed by tidal waters is vested in the state in trust for the people. The court also found that "ancillary to the public's right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body."<sup>73</sup>

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67. 146 U.S. 387 (1982).

68. Michael C. Blumm, *The Public Trust Doctrine, A Twenty-First Century Concept*, 16 HASTINGS W-NW. J. ENVTL. L. & POL'Y 105, 106-07 (2010).

69. *Id.*

70. Blumm, *supra* note 65, at 580.

71. *Id.*

72. *Id.*

73. 471 A.2d 355 (N.J. 1984).

Scholars have emphasized another avenue to democratization implicit in the easement of public access: addressing discrimination.<sup>74</sup> The theme of discrimination underlies many New Jersey beach cases. Most New Jersey beach cases involve a conflict between a public (town residents) and another public (everyone else). The exclusion is explicitly based on local residency, which correlates with race and wealth. In *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the New Jersey Supreme Court ruled that a municipality could not charge non-residents higher fees than residents to use the beach.<sup>75</sup> By insisting on the general public's right of beach access, the court sought to undermine divisive and discriminatory social activism.<sup>76</sup>

A second, less familiar remedy for trust violations focuses on securing access to decision-making processes. Joseph Sax's 1970 article, which revived the public trust doctrine, characterized the doctrine as a tool for perfecting the political and administrative processes in which decisions concerning the use, allocation, and preservation of trust resources are made.<sup>77</sup> In particular, Sax focused on what he called "low visibility" decisions.<sup>78</sup> Decisions are often made by administrative agencies or by private parties to whom the state has delegated control of the trust resource. These decisions, Sax noted, are invisible in that they are made without notice that might inform and energize the general public whose interests these decisions may affect. Sax proposed redressing a process defect through a process remedy. For example, the requirement of explicit administrative authorization for transfers of trust resources would put the public on notice, allowing the public to organize and exert political pressure to safeguard the resource.<sup>79</sup> In recent decades, the question of access to decision-making processes has received a great deal of attention. Environmental law experts have put the question of community disenfranchisement in environmental decisions front and center. Communities are where the environment and human health are inex-

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74. Poirier, *supra* note 65, at 105.

75. 294 A.2d 47 (N.J. 1972)

76. Poirier, *supra* note 65, at 106.

77. Sax, *supra* note 66, at 496-502, (discussing low visibility decisions); for a commentary that emphasizes the process and democratization theme in Sax' article, see William Araiza, *Democracy, Distrust and the Public Trust: Process-based Constitutional Theory, the Public Trust Doctrine and the Search for a Substantive Environmental Value*, 45 UCLA L. Rev. 385 (1997).

78. Sax, *supra* note 66, at 496-502.

79. Sax, *supra* note 66, at 496-97 (discussing the Massachusetts response to the problem of low-visibility policy decisions, and noting that "by a simple but ingenious flick of the doctrinal wrist, the court has forced agencies to bear the burden of obtaining specific, overt approval of efforts to invade the public trust").

trically intertwined, yet communities and their residents are the least involved in decision-making.<sup>80</sup>

Courts have made progress in developing process remedies for trust violations. In particular, courts have relied on the administrative law “hard look” doctrine.<sup>81</sup> Under the “hard look” doctrine, a reviewing court must intervene when the agency “has not really taken a hard look at the salient problems, and has not genuinely engaged in reasoned decision-making.”<sup>82</sup> Courts have relied on the “hard look” doctrine to require agencies to offer detailed explanations of their decisions and to allow a broad range of affected interests to participate effectively in the regulatory process. The result has been judicial emphasis on fair and participatory processes rather than on particular substantive results.<sup>83</sup> For example, in *Kootenai Environmental Alliance v. Panhandle Yacht Club*, the Supreme Court of Idaho held that decisions regarding the transfer or use of a trust resource may only be taken through open and visible processes, “where the public is in fact informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon.”<sup>84</sup>

#### D. *The New Digital Servitudes*

New personal property servitudes developed in the context of digital property are arguably the most recent innovation in the list of property forms.<sup>85</sup> In some instances, they demonstrate some of the democratic and participatory features of the property forms discussed above.

Personal property servitudes are not new, and courts have occasionally enforced them. In 1955 the New Hampshire Supreme Court enforced an equitable servitude on a jukebox. The servitude imposed a rent payment of sixty percent of the receipts, prohibited removal of the jukebox, required it to be operated, and prohibited installation of

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80. Robert W. Collin & Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 J. ENVTL. L. & LITIG. 37, 39-44 (1998) (discussing the disconnection between residents and environmental decisions); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L. J. 3, 17-28 (1998) (discussing three models of environmental decision making: the ideal of expertise and the traditional administrative system, the idea of pluralism and the modern administrative system and the ideal of modern civic republicanism and the proposed administrative system).

81. Blumm, *supra* note 65, at 590; Poirier, *supra* note 65, at 109.

82. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971).

83. Blumm, *supra* note 72, at 590.

84. *Kootenai Environmental Alliance v. Panhandle Yacht Club* 671 P.2d 1085 (Idaho 1983).

85. Davidson, *supra* note 5, at 1611 n.62; on the new servitudes, see generally Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2004); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L. J. 885 (2007-2008).

any similar equipment during the period of the lease. The agreement made the servitude binding on the parties' successors and assignees.<sup>86</sup> Commentators observe that, as the jukebox example suggests, there may be business reasons for enforcing personal property servitudes.<sup>87</sup> Contractual restrictions on the distribution of goods are a business strategy that allows vendors to control how their products are priced and marketed.<sup>88</sup> Courts, however, have traditionally viewed personal property servitudes with skepticism,<sup>89</sup> because they make property transactions that could otherwise be frequent, simple, and fast more information-intensive and time-consuming.<sup>90</sup>

Despite this skepticism, in recent decades, personal property servitudes have acquired new salience in the field of digital property.<sup>91</sup> For example, purchasers of computer programs and digital music are asked to agree to licenses that limit how they, and anyone who uses the software, may use the product.<sup>92</sup> In some cases, these digital property servitudes are justified by the same business reasons that induced the jukebox vendor to impose use restrictions. Through the digital property servitudes, developers of computer programs and digital products impose restrictions on the reproduction of the product, the redistribution of the original copy, the possibility of reverse-engineering the object code, etc.<sup>93</sup> But in other cases, the new servitudes reflect a commitment to democratic access and deliberation similar to the one we have seen in land use and natural resources law.

The Creative Commons licensing platform is an excellent example. The Creative Commons movement seeks to promote

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86. *Pratte v. Balatsos*, 113 A.2d 492 (N.H. 1955); for a discussion of the case, see Robinson, *supra* note 85, at 1451.

87. Zechariah Chafee Jr., *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250, 1258 (1956); Robinson, *supra* note 91, at 1452 ("My purpose here is merely to establish that personal property servitudes, while exceptional, do still appear in the law and can serve legitimate purposes in commercial transactions just as Chafee originally surmised they might").

88. Robinson, *supra* note 85, at 1452.

89. Shaffer Van Houweling, *supra* note 85, at 914-16 (discussing the reasons for courts' skepticism and identifying three sets of reasons: 1) concerns related to notice and information costs; 2) concerns about dead-hand control and the "problem of the future" and 3) concerns about harmful externalities).

90. *Id.* at 915 (arguing that slowing down the process of transferring personal property by imposing restrictions that require time and effort to understand and account for is more problematic than clogging up land transfers. The difference, Van Houweling argues, is relative transaction costs: but for the complications caused by running restrictions, chattels would be liquid flowing easily to their highest value use).

91. See generally Robinson, *supra* note 84; Shaffer Van Houweling, *supra* note 84.

92. A typical example of the new servitudes is the license presented to anyone who downloads a copy of Microsoft's Office program, prompting the recipient to click "I agree" to a number of restrictions, before the software installs; see Shaffer Van Houweling, *supra* note 84, at 889 and 931.

93. *Id.* at 930.

participatory creation and innovation by offering a licensing platform that works like a servitude. Authors make their creative works available to the public for many uses that copyright law would otherwise forbid, but they also impose restrictions. Authors can authorize use by choosing from a menu of standardized terms: they can require attribution, i.e., credit to the author; they can authorize all uses for non-commercial purposes; they may authorize the use of verbatim copies and prohibit the creation of derivatives; or they may require the creators of derivative works to subject subsequent users of their derivatives to the same license that governs the original.<sup>94</sup>

Underlying the Creative Commons license is the desire to use servitudes to promote democratic access to a resource that is fundamental to human flourishing: ideas and creative works. Ideas and intellectual creations are in many respects similar to natural resources and the environment.<sup>95</sup> For both, democratic access and participatory governance are critical. As one scholar noted, “concern with the public’s ability to build upon a body of intellectual works that are freely available as raw material for new generations of creativity and innovation echoes environmentalists’ concern with the public’s ability to enjoy healthy air, water, and open spaces.”<sup>96</sup>

Property rights are usually associated with the idea of exclusion.<sup>97</sup> Increasingly protectionist intellectual property rights limit access to creative resources. Legislation seems to offer no remedy, since the legislative process is captured by the content industry that has an interest in controlling access to ideas. The Creative Commons licensing platform challenges the property/exclusion intuition by using a property form, a servitude, to promote participatory self-governance and democratic access. The license/servitude seeks to allow a community of authors to voluntarily undertake a self-governance project. It enables “individuals and communities to figure out, on their own, a way to bypass the increasingly protectionist global intellectual property regime.”<sup>98</sup> Additionally, the Creative

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94. See Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 390-91 (2005-2006).

95. The analogy between the environment and ideas is often described with the formula “cultural environmentalism”; see James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 *DUKE L.J.* 87, 108-14 (1997); see also Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 *LAW & CONT. PROB.* 23, 23-25 (2007).

96. Shaffer Van Houweling, *supra* note 85, at 23.

97. On property as exclusion, see generally Henry E. Smith, *Exclusion v. Governance, Two Strategies for Delineating Property Rights*, 31 *J. LEG. STUD.* 453 (2002) (arguing that there are two strategies for delineating property rights, i.e., exclusion and governance, and that exclusion constitutes the core of property because it is more efficient in terms of information costs); see also Thomas W. Merrill, *Property and the Right to Exclude*, 77 *NEBR. L. REV.* 739 (1998) (generally, arguing that the right to exclude is the core entitlement in the owner’s bundle of sticks).

98. Elkin-Koren, *supra* note 94, at 376.

Commons platform relies on the servitude form to enhance the very sharing, distribution and re-use of creative works that intellectual property rights limit, without sacrificing author's self-interest.<sup>99</sup>

In turn, this sharing promotes democracy and deliberation. As Yochai Benkler argues, the structure of information production is critical to democracy in two ways.<sup>100</sup> Direct democratic discourse and participation in formal governance would not be possible without sustainable, widely accessible, and effective communication by individuals and groups.<sup>101</sup> Furthermore, the possibility of sharing creative works allows "semiotic democracy"; it enables individuals and groups to participate in producing culture and meaning rather than simply receiving meanings produced by a small number of professional makers of meaning in the cultural industry.<sup>102</sup>

### *E. Emphyteusis (Long Lease)*

Imagine that the city of Amsterdam seeks to promote mixed-use redevelopment of an industrial harbor area currently in decline. The redevelopment plan will establish high-quality waterfront housing alongside areas devoted to commercial and light industrial uses. The redevelopment project seeks to counter the destruction of the rural environment due to urban sprawl, and to enhance the quality of the urban environment.<sup>103</sup> Inflexible application of traditional top-down planning instruments, such as zoning and environmental regulations, is likely to hinder the proposed development.<sup>104</sup> Modern or Euclidean zoning, the traditional tool most obviously used to plan new building developments, divides cities into separate residential, commercial, and industrial uses, often precluding mixed-use development.<sup>105</sup> Similarly, environmental regulations are likely to set rigid limits that impede mixed-use, such as noise regulations that prevent

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99. *Id.* at 377 and 378.

100. Yochai Benkler, *Freedom in the Commons. Towards a Political Economy of Information*, 62 DUKE L.J. 1245, 1262 (2003) (arguing that the model of mass media communications that dominated the twentieth century suffers from two types of democratic deficits that could be alleviated by a greater role for commons-based production. The first deficit concerns effective political participation, the second deficit concerns cultural politics, or the question of who gets to decide the cultural meaning of social choices and conditions).

101. *Id.* at 1263.

102. *Id.* at 1265.

103. See Willem Korthals Atles & Milly Tambach, *Municipal Strategies for Introducing Housing on Industrial Estates as Part of Compact-City Policies in the Netherlands*, CITIES, 25(4) 218-29 (2008) (discussing several case studies of recent mixed-use development projects in Dutch cities).

104. *Id.* at 220 (arguing that "heavy-handed application of the relevant rules can sound the death knell to such developments").

105. *Id.* at 220 (noting that "the possibilities of mixing industry and housing in a given area may be limited not only by planning instruments created to promote functional separation of uses but also by environmental regulations promulgated to limit nuisance and protect residents from environmental hazards").

certain kinds of construction.<sup>106</sup> In a world governed by these traditional instruments, the city and the developers will bargain over adjustments to the existing regulatory landscape.

The project, however, will impact a much wider constituency than the city and the developers. In an ideal world, the redevelopment project would be subject to a deliberative process that is inclusive, efficient, and predictable. First, approval of and amendments to the project would occur through a process whereby all affected parties have the opportunity to present their arguments, rather than through bargaining among the city and the developers. The interests of the un-represented or under-represented segments of the community should be of particular concern. For example, the poor and minority citizens living in adjacent areas might face gradual displacement or changes in their quality of life due to increased traffic congestion or noise levels.<sup>107</sup> Second, the deliberative process should allow ample room for considering a variety of alternative solutions that accommodate the interests of the affected parties. Solutions may include in-kind remediation of the noise or traffic problem, matching the magnitude of the harm with rough precision; alternatively, a solution might be the provision of unrelated amenities or public goods such as a park or a school.<sup>108</sup> Third, the adjustments to existing land use regulations should achieve compromise between predictability and flexibility. The developer would likely want some guarantee that the agreed upon regulatory adjustment will be “frozen” for a certain period of time to protect security of his investment. The city, on the other hand, would probably seek to retain some flexibility in responding to fluid regulatory needs, as well as to secure anti-entrenchment protection that would allow future city governments to revisit the regulatory choices.<sup>109</sup>

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106. *Id.* at 226 (suggesting that “noise abatement permits that allow companies to make more noise on paper than they actually emit will be revised to include more realistic limits since excessive nominal limits place undue restrictions on the housing construction that is permitted”).

107. Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 40, 77 (2000-2001) (describing the problem of as “underregulation,” i.e., “the phenomenon of selling violation rights too cheaply, in currency unsatisfactory to, or never received by those who are impacted by the violation” and noting that “it is quite possible that the controlling interests in a community might reach an agreement with a landowner that is fully satisfactory to both of the bargaining parties but which imposes unremediated negative externalities on third parties—whether a minority within the community, or individuals outside the political subdivision”).

108. *Id.* at 5, 28 (discussing the problem of “blocked and inefficient exchanges,” i.e., the idea that bargaining limits “prevent mutually beneficial land use deals and generate vast inefficiencies that harm landowners and communities”). See also David A. Dana, *Land Use regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997) (arguing that the nexus and proportionality tests in exactions can diminish allocative efficiency).

109. See Christopher Serkin, *Public Entrenchment through Private Law: Binding Local Governments*, 78 U CHI. L. REV. 879, 892-94 (2011) (discussing how, in the

In Dutch property law, as in other civil law systems, there is a property form known as *emphyteusis*, or long lease, that promises to solve some of the challenges presented by our imaginary redevelopment project.<sup>110</sup> *Emphyteusis* is not a new property form. It is a form originating in late Antiquity that was dropped from the Dutch Civil Code of 1948 and re-introduced in the Civil Code of 1992. *Emphyteusis* is a right *in rem* that entitles one to use land owned by another for a long period, or even perpetually, in exchange for a payment called “canon.” The holder of an *emphyteusis* has the right to exclude, the right to use the land and to make decisions as to its management, and 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 the 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 by, for example, granting an easement.

In addition, the parties can custom-tailor the content of the right. In the deed establishing the *emphyteusis*, the parties may agree on additional rights and duties known as “conditions,” which are periodically revised to meet changing needs. The “conditions” are part of the property right itself and, hence, have *in rem* effect (i.e., they are valid against the world). While the holder of the *emphyteusis* has, for the duration of the right, a bundle of entitlements that resembles that of an owner, the owner of the land retains title, the right to transfer title, and the right to receive the “canon” payment.<sup>111</sup>

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United States, “development agreements” between local governments and developers result in loss of regulatory flexibility and entrenchment for the local government).

110. U.S. property scholars have proposed a variety of alternative solutions where our imaginary re-development project would take shape through a process that is participatory, inclusive and efficient. See Fennell, *supra* note 107, at 68-74 (envisioning a “call option” that would permit landowners to engage in otherwise forbidden uses by providing in-kind remediation of cognizable negative externalities. The “call option” would be alienable allowing the community to effectively buy veto rights with respect to the proposed use. The “call option” would be coupled with statutory and procedural protections to ensure that minority interests are heard before any land use deal is struck); See also Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 847, 893-910 (1983) (proposing a new jurisprudence of piecemeal changes that treats piecemeal changes as dispute mediations and tests fairness and due consideration in light of the local opportunity for “voice,” i.e., participation, and “exit,” i.e., departure. This solution echoes the prescriptions of deliberative democrats: Rose envisions a mediation process that would expand the parties’ arguments and information and deliver outcomes that accommodate the parties’ interests and are suggestive, but not decisive, for future accommodations).

111. See 5 BURGERLIJK WETBOEK [BW][CIVIL CODE] art. 89-97 (Neth.), translated in HANS WARENDORF ET AL., *THE CIVIL CODE OF THE NETHERLANDS* (2009) (outlining the default legal regime of *emphyteusis*); See also CASES, MATERIALS AND TEXTS ON PROPERTY LAW, at 273-79, 280-83 (Sjef van Erp & Bram Akkermans eds., 2012).

*Emphyteusis* allows what urban studies scholars describe as a strategy of “collaborative” land use planning.<sup>112</sup> This “collaborative” strategy replaces top-down regulation with consultation between all interested parties, and aims at innovatively solving the problems of urban development and at reaching an outcome acceptable to all stakeholders.<sup>113</sup> Starting in 1896, the city of Amsterdam decided it would no longer transfer ownership rights on public land, but instead would only grant rights of *emphyteusis*.<sup>114</sup> The city of Amsterdam publishes, and periodically revises, “general conditions” applicable to all *emphyteutical* rights.<sup>115</sup> The “general conditions” include environmental parameters, use restrictions, and land use planning goals. They contain both mandatory rules and default rules. The “general conditions” function similarly to what in the United States is called a “general plan.” Just as the plan is supposedly “created in an atmosphere of calm and deliberation,”<sup>116</sup> “general conditions” are developed by the municipal council through a process that involves representatives of the affected parties, i.e., developers, as well as representatives of the community and experts.

In addition to the “general conditions,” the city, the developers, and community representatives discuss “special terms”: fine-grained, project-specific rules that supplement or deviate from the default terms in the “general conditions.”<sup>117</sup> “Special terms” allow the city to control the details of the development project in a way that is not possible through traditional land use planning tools. Also, the process of hammering out the “special terms” promotes the goals of informed deliberation and participation. Observers note that local governments tend not to operate very effectively in the cool, abstract, deliberative setting in which a “general plan” or “general conditions” are developed. Rather, they argue, concrete problems and actual

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112. On “collaborative” land use planning, see Sarah Elwood, *Neighborhood Revitalization through Collaboration: Assessing the Implications of Neoliberal Urban Policy at the Grassroots*, 58 *GEOJOURNAL* 121, 123-25 (2002) (discussing the arguments against and in favor of “collaborative” strategies and arguing that the discourse of collaboration can give community groups greater leverage to demand involvement and to insert their own knowledge and needs); Korthals & Tambach, *supra* note 102 (describing the new “city and the environment approach” adopted by Dutch cities); Gerard Wigmans, *Contingent Governance and the Enabling City. The Case of Rotterdam*, 5 *CITY*, 216, 218 (2001).

113. Korthals & Tambach, *supra* note 103, at 6.

114. AKKERMANS, *supra* note 2, at 281.

115. CITY OF AMSTERDAM DEV. CORP., GROUND LEASE IN AMSTERDAM 7 [hereinafter GROUND LEASE IN AMSTERDAM], available at [http://www.amsterdam.nl/publish/pages/407897/ab\\_2000\\_engduits\\_web\\_1.pdf](http://www.amsterdam.nl/publish/pages/407897/ab_2000_engduits_web_1.pdf).

116. Rose, *supra* note 109, at 874.

117. GROUND LEASE IN AMSTERDAM, *supra* note 115, at 7; see also CITY OF AMSTERDAM DEV. CORP., THE USE OF PUBLIC GROUND LEASE IN EUROPEAN CITIES 11 (2005) [hereinafter PUBLIC GROUND LEASE IN EUROPEAN CITIES], available at [http://www.amsterdam.nl/publish/pages/418782/use\\_of\\_public\\_ground\\_lease\\_in\\_european\\_cities.pdf](http://www.amsterdam.nl/publish/pages/418782/use_of_public_ground_lease_in_european_cities.pdf) at 11.

projects help focus attention and lead to superior collection of information.<sup>118</sup> These observers suggest that local governments give less careful consideration to an advance general plan than they do to actual specific proposals. Similarly, public participation is likely to be stronger and more effective when the actual development project is on the table. Again, “advance general planning may fail precisely because public attention may not come into focus until the plan’s implications become concrete.”<sup>119</sup>

A further advantage of the *emphyteusis* is its flexibility. The lease is divided into “periods” of twenty-five years. At the end of each period, the “canon,” or rent, is re-assessed and the most recent version of the city of Amsterdam’s “general conditions” automatically applies to the *emphyteusis*. The division in periods serves two goals. First, re-assessment of the canon/rent ensures that the whole community, rather than solely the individual developer, will benefit from the increase in the value of the land.<sup>120</sup> Increases in the value of the land granted in *emphyteusis* are only partially attributable to the developer’s investment. They are, in significant part, generated by public investment, changes in the regional economy, and changes in the way real estate is regulated, financed, and taxed. The periodic revision of the canon/rent allows the city to capture the increased value of the land, thereby generating a new source of revenue for the community. Second, the division in periods serves broader community interests by allowing for a balance between regulatory flexibility and predictability. The general conditions in effect at the time the *emphyteusis* is granted will be frozen for twenty-five years, thereby protecting the developer’s security of investment. On the other hand, the automatic applicability of the most recent version of the “general conditions” at the end of the twenty-five years period performs an anti-entrenchment effect. The local government’s ability to entrench its urban policy has opportunity costs, e.g., the loss of future regulatory flexibility. It also has democratic costs in that it affects the ability of the local government to respond to its constituents and is not bound by the preferences of the past.<sup>121</sup> The automatic application of the revised general conditions at the end of each twenty-five year term mitigates these costs. Thus, an old medieval form may successfully promote the goals of democratic deliberation, efficiency, and predictability.

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118. Rose, *supra* note 110, at 874-75.

119. *Id.* at 875.

120. GROUND LEASE IN AMSTERDAM, *supra* note 114, at 7; PUBLIC GROUND LEASE IN EUROPEAN CITIES, *supra* note 116, at 11.

121. Serkin, *supra* note 108, at 945-50 (discussing the costs of entrenchment).

F. *Common Goods* (beni comuni)

*Teatro Valle* is the oldest theater in Rome; a historic landmark, it was inaugurated in 1727. Marquis Capranica commissioned the design of the theater to architect Tommaso Morelli and its 1818 renovation to architect Giuseppe Valadier, both major figures in the Roman eighteenth and nineteenth century architectural scene. Marquis Camillo Capranica, the theater's founder and first owner, intended it to be his private theater. For three centuries, *Teatro Valle* has been at the center of Rome's cultural life. In 1850, an heir of Marquis Capranica married Italian actress Adele Ristori who became the "director" of the theater and made it the favorite Roman venue of the most prominent actors from Tommaso Salvini to Sara Bernhardt.<sup>122</sup>

*Teatro Valle* later became public property, managed by the *Ente Teatrale Italiano* (ETI). When, in 2010, the ETI was shut down as a result of budgetary cuts, the government announced its intention to sell *Teatro Valle* to a private investor to be converted into a restaurant. In June 2011, a group of employees, citizens, and artists occupied *Teatro Valle*, declaring it a "*bene commune*" (common good) to be governed through inclusive public deliberation.<sup>123</sup> As of today, the *Teatro Valle* is governed by the "*Teatro Valle Bene Comune* Foundation" established by the occupiers.<sup>124</sup>

These occupiers were legally savvy. They retrieved a property form, "common goods," that can be traced back to Roman law. Roman law recognized, alongside public and private property, the category of *res communes omnium*, common property incapable of being owned by anyone.<sup>125</sup> *Res communes omnium* were all flowing waters, as well as air and the sea shore.<sup>126</sup> Just as with *emphyteusis*, the property form "common goods" had disappeared from modern property law. It was omitted from the Italian Civil Code of 1865 as well as from the current code (enacted in 1942). But "common goods" are now back. The Italian legislature is considering re-introducing this property form. In 2007, the Ministry of Justice created a committee chaired by Professor Stefano Rodotà,<sup>7</sup> a prominent property scholar, charged with the task of reforming the civil code's rules on public ownership.

122. On the history of the *Teatro Valle*, see 2 SAVERIO FRANCHI, *DRAMMATURGIA ROMANA* 1701, LXXVI ff. (1997).

123. For the story of the occupation of the *Teatro Valle* in English, see Ines Della Valle, *Teatro Valle Occupato* GOETHE INSTITUT CULTURAL INNOVATORS NETWORK, <http://www.goethe.de/ins/eg/prj/cin/mov/tea/enindex.htm> (last visited Jan. 29, 2014).

124. *TEATRO VALLE OCCUPATO* <http://www.teatrovalleoccupato.it/> (last visited Jan. 29, 2014).

125. 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 54 (transl. by Peter Birks & Grant McLeod, 1987).

126. Inst. II 1, JUSTINIAN'S INSTITUTES, *supra* note 125.

The centerpiece of the legislative proposal prepared by this committee is “common goods.”<sup>127</sup>

The revival of “common goods” responds to the shortcomings of both private property and public property for governing resources that implicate significant public interests. Water is the most obvious example. In fact, the concept of “common goods” was first revived in the debate over public water utilities. The water that comes out of Italian taps is public and municipalities own the infrastructure that delivers it.<sup>128</sup> However, beginning in the 1980s, Italian cities have “privatized” water utilities, entering long-term leases with the subsidiaries of global water corporate “giants” such as Veolia and Suez. Experts explain this trend towards privatization by citing the challenges involved in the provision of public water services.<sup>129</sup> In the last decade, massive increases in water tariffs, lack of transparency, and competition in the leasing process have alerted citizens and water policy experts to the shortcomings of privatization.<sup>130</sup>

Water experts note, however, that public ownership of water has similar flaws, and in fact there seems to be little meaningful difference between public and private ownership of water. While a public owner cannot sell and is immune from losing title or use entitlements by prescription, in all other respects it is no different than a private owner, with similar powers to make decisions on the use of the resource as well as to transfer use rights. If the municipality transfers

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127. See *Commissione Rodota per la modifica del codice civile in materia di beni pubblici*, June 14th 2007, *Relazione*, available at [http://www.giustizia.it/giustizia/it/mg\\_1\\_12\\_1.wp?contentId=SPS47617](http://www.giustizia.it/giustizia/it/mg_1_12_1.wp?contentId=SPS47617); see discussion *infra*. The literature on *beni comuni* is extensive. See generally UGO MATTEI, *BENI COMUNI, UN MANIFESTO* (2012); STEFANO RODOTA', *IL TERRIBILE DIRITTO. STUDI SULLA PROPRIETA' PRIVATA E I BENI COMUNI* (2013); ALBERTO LUCARELLI, *LA DEMOCRAZIA DEI BENI COMUNI* (2013); MARIA ROSARIA MARELLA, *OLTRE IL PUBBLICO E IL PRIVATO. PER UN DIRITTO DEI BENI COMUNI* (2012).

128. On the legal regime of water in Italy, see generally ALESSANDRA GORIA & NICOLA LUGARESÌ, *The Evolution of the National Water Regime in Italy* (2002), <http://www.euawareness.nl/results/Italy-cs-kaft.pdf>; see also UGO MATTEI & ALESSANDRA QUARTA, *ACQUA BENE*, *COMUNE* 17, 26, 11-12 (2013) (discussing the *Galli* law of 1994 which sought to remedy some of the dangers of privatization, the *Decreto Ronchi* of 2008 which facilitated privatization and explaining the privatization of water services, and its recent reversal, in the Italian city of Aprilia).

129. See, for example, Craig Anthony (Tony) Arnold, *Water Privatization trends in the United States, Human Rights, National Security and Public Stewardship*, 33 *WM. & MARY. ENV'T L. & POL. REV.* 785, 793-99 (2008) (discussing the causes of the trend toward public water utilities privatization); on privatization and its causes in Europe, see Bernard Barraque', *Past and Future Sustainability of water policies in Europe*, 27 *NAT. RES. FORUM* 200, 207-09 (2003).

130. On the shortcomings of privatization of public water utilities and the “water crisis” that affected many Italian and French cities in the 1990s, see Raymond Avrilier, *A Return to the Source. Re-Municipalization of Water Services in Grenoble, France in RECLAIMING PUBLIC WATER* 63 (2005); see also Martin Pigeon, *Un Eau Publique pour Paris. Symbolism and Success in the Heartland of Private Water in REMUNICIPALIZATION. PUTTING WATER BACK INTO PUBLIC HANDS* 25-28 (Martin Pigeon et al. eds., 2012).

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 of private ownership.<sup>131</sup> The municipality’s duties to manage and use property in the “public interest” or to hold the property in trust for the public are, in practice, 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 constraints, institutional interests in maximizing resource development, and the short-term economic interest of the human users to whom they are accountable.

In view of these problems, Italy has spawned a vocal “water movement” which has called for a new legal conceptualization of water beyond private or public ownership. Water implicates interests that go well beyond the short-term economic interest of human users and raises distributive questions. Potable water serves basic survival and health needs and, hence, should be equally accessible to all. Furthermore, water involves questions of stewardship and protection of the interests of future generations.<sup>132</sup> Water also implicates fundamental non-human, ecological interests. These interests are not likely to be represented when water is governed through private property or public property. The concept of “common goods” is being revived to provide an alternative to public and private ownership. Ownership of “common goods” differs from public ownership in an important way, because it gives citizens collectively not only use entitlements, but also the right to participate in management decisions.

The legislative proposal produced by the Rodota’ Committee does not yet work out the fine details of the new property form, but it gives a good glimpse of how it is to be structured. “Common goods,” the report suggests, are resources that have two characteristics. First, they are instrumental to “the enjoyment of fundamental rights and the autonomous development of the individual” and, second, their use

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131. 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? 201, 236 (Anthony Craig (Tony) Arnold ed., 2005) (arguing that public ownership has important flaws in the case of water and arguing for a concept of “non-ownership” of water).

132. 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); Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27 (1996).

is to be protected for future generations.<sup>133</sup> Examples of “common goods,” the proposal suggests, include (but are not limited to) natural resources such as “water, parks, forests, glaciers, wildlife and protected natural areas.” The story of the *Teatro Valle* suggests that the category “common goods” may be much broader than natural resources. The manifesto drafted by the occupiers suggests that Teatro Valle is “inextricably linked to the right to culture, a fundamental human right” and its preservation for future generations is critical to stem the commodification and impoverishment of our social and cultural life.<sup>134</sup> This language echoes the requirements for common goods proposed in the Rodota’ report.

“Common goods,” the Rodota’ report states, may be owned by a private or a public entity. Ownership of “common goods” consists of a limited bundle of entitlements. First, there are limits to the right to transfer. When the resource is in public hands, the public owner may not transfer title at all, but may only transfer use rights, for a limited term and with no possibility of extension. The idea informing the proposal, one commentator notes, is not to take “common goods” completely out of the market, but rather to prevent the problems of lack of transparency and management exclusively driven by profits that were exposed by the “water movement.”

Second, use entitlements are limited. 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 real innovation that distinguishes ownership of “common goods” from public property is that the public has the right to participate in the management of the resource. Citizens’ participation seems to be what “common goods” are about. The occupiers’ manifesto emphasizes that “common” is different from “public.” “Real democracy and participatory decision-making, the manifesto reads, are not achieved by granting control to the state and to local governments.”<sup>135</sup> The manifesto further emphasizes that common goods “are not governed top down, rather they are self-governed.”<sup>136</sup>

An important component to deliberative democracy in the context of common goods is institutional structure. The bylaws of the *Teatro Valle* translate the commitment to broad public deliberation into a complex institutional structure, consisting of an “Assembly” and a “Council.” Any citizens willing to be bound by the by laws may

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133. *Commissione Rodota’ per la modifica delle norme del codice civile in materia di beni pubblici* (June 14, 2007), *Proposta di Articolato*, available at [http://www.giustizia.it/giustizia/it/mg\\_1\\_12\\_1.wp?contentId=SPS47617](http://www.giustizia.it/giustizia/it/mg_1_12_1.wp?contentId=SPS47617), article 1, 3 (c).

134. *Statuto Fondazione Teatro Valle Bene Comune* (20/12/2011), *Preambolo*, at 3.

135. *Teatro Valle Occupato, Manifesto (Istruzioni per L’Uso Collettivo)*, available at <http://www.teatrovalleoccupato.it/category/beni-comuni>.

136. *Id.*

become a member of the Assembly.<sup>137</sup> In language reminiscent of the Paris Commune of 1871, members are called “*comunardi*.”<sup>138</sup> The *comunardi*’s prime duty is responsible participation in the governance of the theater.<sup>139</sup> The Council supervises the artistic direction of the theater, inviting proposals from the public and managing the budget according to principles of “justice, sustainability and ecology.”<sup>140</sup> Similarly, in the case of water utilities, legislation that would implement the idea of a citizens’ participation is currently being discussed. For example, art 10 of a legislative proposal presented by the “Italian water movements” states that “in order to ensure democratic control over the management of water resources, local governments will establish mechanisms of deliberative democracy.” These mechanisms, the proposal continues, “allow civil society organizations to directly participate in management decisions.”<sup>141</sup>

Citizens’ right to participate in the management of “common goods” is also reflected in the available remedies. Any individual, the Rodota’ proposal states, is entitled to bring an action to enjoin management decisions that harm or threaten access to the preservation of “common goods.” 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 endorses a right that had earlier been recognized in a number of important court decisions that paved the way for the notion of ownership of “common goods.” In a 2009 case, involving a controversy over water tariffs between the city of Aprilia’s “citizens’s committee for public water” and the water corporate giant Aqualatina, the court (the *Consiglio di Stato*) decided that citizens have a right to seek injunctive relief against management decisions concerning “resources fundamental to human needs.”<sup>142</sup>

## II. THE *NUMERUS CLAUSUS* PRINCIPLE AT WORK: EXPERIMENTALISM AND DELIBERATIVE DEMOCRACY

This part offers a structural and qualitative analysis of the *numerus clausus* principle. The six deliberative democratic property forms surveyed in Part I cast new light on the way the *numerus clausus* principle works in practice as a structural feature of property

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137. *Statuto Fondazione Teatro Valle Bene Comune*, *supra* note 133, arts. 3.2 and 3.3.

138. *Id.* art. 3.2.

139. *Id.* art. 3.3.

140. *Id.* art. 11.3.

141. Proposta di Legge D’iniziativa Popolare Concernente Principi per la Tutela, il Governo e la Gestione Pubblica delle Acque e Disposizioni per la Ripubblicizzazione del Servizio Idrico, [http://www.acquabenecomune.org/raccoltafirme/index.php?option=com\\_content&view=article&id=1060&Itemid=122](http://www.acquabenecomune.org/raccoltafirme/index.php?option=com_content&view=article&id=1060&Itemid=122) (last visited Jan. 29, 2014).

142. Consiglio di Stato, sentenza 5501/2009, <http://www.acquabenecomune.org/aprilia/Sentenza-del-Consiglio-di-Stato-n,2239.html> (last visited Jan 29, 2014); for a discussion of the decision, see MATTEI & QUARTA, *supra* note 127, at 11-12.

systems. The new property forms also reveal something important about the quality, the new emerging values, of property law.

A. *How the Numerus Clausus Principle Works by Constraining Experimentalism in Property Law*

Between the 1950s and the present, six new property forms with deliberative democratic features were added to the list of standard property forms. And, as noted, these are by no means the only additions. This suggests that the list of property forms is revised and expanded more frequently than conventional *numerus clausus* wisdom allows. The *numerus clausus* principle therefore does not really mean that the list of property forms is “closed,” that the *number* of forms is fixed, and the content of the list—the specific admitted forms—is stable. Rather, the *numerus clausus* principle imposes two basic, complementary, constraints on the creation of new forms. One is structural; it concerns the number of forms. The other is substantive, it concerns their content.<sup>143</sup>

1. The Structural Constraint: Limiting the Number of Property Forms

There are good reasons for preventing an excessive expansion in the number of available property forms. The distinctive feature of property forms is that they are *in rem*, i.e., they are valid against the world. All non-owners need to know what the characteristics of each form are, what duties they impose, and what rights they create. Law and economics scholars argue that, by limiting the number of property forms, the *numerus clausus* principle reduces the information costs incurred by third parties who seek to acquire property rights or to avoid violating them.<sup>144</sup> Merrill and Smith persuasively argue that the optimal number of property forms is one that strikes a good balance between information and frustration costs.<sup>145</sup> Too many idiosyncratic property forms would generate high information costs for both prospective buyers and potential violators who need to learn about the attributes of the property form they encounter.<sup>146</sup> Too few property forms would frustrate the parties’ ability to achieve a variety of economic and social goals cost-effectively.<sup>147</sup>

Scholars, who embrace the “virtue” theory of property or the “democratic” theory of property,<sup>148</sup> argue that information costs ex-

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143. Davidson, *supra* note 5, at 1600 (noting that structure and content together are important to unraveling the problem of the *numerus clausus*).

144. *See generally* Merrill & Smith, *supra* note 1.

145. *Id.* at 24-40.

146. *Id.* at 26-34 (discussing measurement-cost externalities).

147. *Id.* at 35-38 (discussing frustration costs).

148. For a description of the various theories that go under the label “progressive property” (including the “virtue” theory and the “democratic” theory); *see* Singer,

plain the *numerus clausus* principle only partially.<sup>149</sup> The account of the development of new deliberative democratic property forms provided in Part I supports this view; fitting these new forms within the informational costs framework is problematic for two specific reasons. First, in Part I, we observed an interesting type of dynamism, one that has received virtually no attention in the *numerus clausus* literature. Some forms, such as *emphyteusis* and common goods, were first eliminated from and later re-admitted to the list of available property forms. Information costs provide no explanation for the exit and reenter of these property forms.

Second, the deliberative democratic property forms that have been added to the standard list rely on a “governance strategy,” rather than an “exclusion strategy.”<sup>150</sup> Property forms that rely on exclusion lower information costs by giving the owner virtually all control over the resource and by imposing a simple duty of abstention on non-owners.<sup>151</sup> By contrast, property forms that rely on a governance strategy have two characteristics: first, they involve multiple entitlement holders and, second, they regulate in a fine-grained manner the internal relations among entitlement holders.<sup>152</sup> Because of these two characteristics, governance property forms impose high information and administrative costs.<sup>153</sup> Thus, we are presented with a paradox: the *numerus clausus*, a structural principle purportedly designed to lower information costs, has nonetheless allowed the introduction of new forms that are costly to process.

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*Democratic Estates*, *supra* note 6, at 1041-45; Gregory S. Alexander, *Pluralism and Property*, 80 *FORDH. L. REV.* 1017, 1017, 1024-32 (2011-2012) (describing these theories as “social obligation” theories discussing individual “social obligation” theorists).

149. Singer, *Democratic Estates*, *supra* note 6, at 1024-26 (noting that Merrill & Smith’s information costs theory is a welcome corrective to the traditional suspicion of the estates system but doubting that the information costs account actually explains the estates system); Davidson, *supra* note 5, at 1600 (noting that structure and content together are important at unraveling the problem of the *numerus clausus*).

150. For a discussion of “governance property” and “exclusion property,” see *generally* Gregory S. Alexander, *Governance Property*, 160 *U. PA. L. REV.* 1853 (2011-2012); for a discussion of an “exclusion strategy” as opposed to a “governance strategy”; see *generally* Smith, *supra* note 97.

151. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 *COLUM. L. REV.* 773, 790-91 (2001) (arguing that an exclusion strategy relies on simple, bright-line rules. It establishes use entitlements in two stages. First, it identifies the particular resource and specifies which person is the owner of the resource. Second, it gives the owner virtually all control on the resource and confers on non-owners a duty of abstention, i.e., a duty to stay off).

152. See Alexander, *supra* note 149, at 1856 (defining governance property as entailing multiple owners and governance norms regulating owners internal relations). See also Merrill & Smith, *supra* note 151, at 790 (noting that “The *in personam* strategy proceeds by directly specifying use rights as between specified individuals. It indicates which of the designated individuals is entitled to engage in which uses of particular resources).

153. See Smith, *supra* note 96, at S455 (noting that governance rules pick out users and uses in more detail, imposing a more intense informational burden on a smaller audience of duty holders).

## 2. The *Numerus Clausus* Principle and the Democratic Process and Nature of Property

The recent introduction (or reintroduction) of informationally inefficient property forms demonstrates that there must be some other logic underlying the *numerus clausus*. Democratic values provide the most plausible justification. Because property forms have an inherent public quality,<sup>154</sup> we want them to be introduced through democratic processes and to reflect values we approve of collectively. Property forms are “public” because they are *in rem* (i.e., valid against the world), creating rights and obligations even for non-owners and, thus, shaping social relations.<sup>155</sup> Through property rights, the state delegates owners the authority to confer rights and duties on all others.<sup>156</sup> For this authority to be legitimate, citizens should collectively exercise some control over the content of new property forms and the way they are created. Their content, i.e., the values and goals they advance and the type of social relations they generate, must be of a character the collectivity approves of.<sup>157</sup> Also, the new

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154. See Davidson, *supra* note 5, at 1649 (arguing that “the world of property, amenable to private ordering, is and has always been a public institution in its basic constitution”); Gregory S. Alexander, *Property’s Ends: The Publicness of Private Law Values* 2 (on file with author) (explicating how at as a conceptual matter the private values of property relate to and interact with property’s public values, so that the two dimensions of property’s value constitution cohere rather than conflict).

155. For an account of the owner’s bundle of sticks that sees “use control” as the central stick, see Eric R. Claeys, *Bundle of Sticks Notions in Legal and Economic Scholarship*, 8 (3) *ECON. JOURNAL WATCH* 205, 208 (2011) (I prefer to define “property” as a right securing an interest in determining exclusively the use of an asset external to the owner’s person) Larissa Katz, *The Regulative Function of Property Rights*, 8 (3) *ECON. JOURNAL WATCH* 236, 240 (2011) (“The crucial feature of ownership is the authoritative nature of owners’ decisions: owners make decisions about things that command deference from others.” Thus, “[o]wnership, like sovereignty, relies on a kind of notional hierarchy, in which the owner’s authority to set the agenda is supreme, if not absolute, in relation to other private individuals”); Adam Mossoff, *The False Promise of the Right to Exclude*, 8(3) *ECON. JOURNAL WATCH* 255, 255 (2011) (the *right to property* secures a use-right in, agenda- setting control over, or a sphere of liberty in using this thing).

156. Singer, *Democratic Estates*, *supra* note 6, at 1047 (arguing that property concerns relations among persons, that property rights should be understood not merely by reference to the powers and rights they give the owner but by reference to the impacts of the exercise of those powers on others and the shape and character of the social relationships engendered by those rights and powers); Dorfman, *supra* note 6, at 489 (arguing that private ownership commands deference not merely to what an owner plans to do with an object but rather to her decision concerning the permissibility of others using her object, regardless of her own plans for it).

157. See Davidson, *supra* note 5, at 1602 (“[U]nderstanding the *numerus clausus* as the mechanism through which legal systems determine the conditions for legal relations to be recognizes as property underscores the proposition that property while amenable to private ordering is and has always been a public institution in its basic constitution”); see also Singer, *Democratic Estates*, *supra* note 6, at 1048 (arguing that since property is part of the way we define a legitimate social order, certain property arrangements are defined as out of bounds, as incompatible with our way of life); Dagan, *supra* note 7, at 1566-67 (arguing that the *numerus clausus* principle shapes our social values and that “limiting the number of property forms and standardizing

property forms must be ratified through democratic processes.<sup>158</sup> The *numerus clausus* principle allows this democratic control on both the process through which new property forms are created and their content. Analytically, these two are distinct. A democratic process can result in the adoption of undemocratic forms of property. For example, citizens may conclude, within the democratic process, that, in certain areas, other values or forms of human interaction are more important than the democratic deliberative control of resources. And deliberative democratic forms of property may be added by a non-democratic process.

Explaining the *numerus clausus* principle as a mechanism to promote democratic values and processes helps make sense of the two puzzles discussed earlier. First, why were *emphyteusis* and “common goods” originally dropped from and later re-admitted to the list of property forms? These two forms were initially discarded because nineteenth century legislatures saw them as being at odds with two central values of modernity: 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 hierarchical 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. No longer ideologically compatible with the thinking of the day, *emphyteusis* was eliminated.

Similarly, “common goods” split control over resources between multiple owners and contradicted emergent ideas about the benefits of private property and a free market in land. The Physiocrats, the French eighteenth century “*philosophers-economistes*,” emphasized the importance of granting one owner ample and freely transferable property rights.<sup>159</sup> Later, the belief that only individual ownership will lead to efficient land use was one of the central tenets of nineteenth century economic theory.<sup>160</sup> “Common goods” was thus struck from the list.

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their content facilitates the roles of property in consolidating expectations and expressing ideal forms of relationship”).

158. Dorfman, *supra* note 6, at 468, 501-03 (arguing that the principle of *numerus clausus* reflects a concern about legitimate political authority, it pertains to the normative power of legislating new property rights and their correlative obligations. For Dorfman, the principle of *numerus clausus* is a restriction on private legislation of new forms of property rights and the underlying ideal of political legitimation that grounds this principle is democratic self-governance).

159. On the centrality of land ownership in Physiocratic philosophical/economic theory, see Warren J. Samuels, *The Physiocratic Theory of Property and the State*, 75 THE QUARTERLY JOURNAL OF ECONOMICS 96 (1961); Thomas P. Neill, *The Physiocrats' Concept of Economics*, THE QUARTERLY JOURNAL OF ECONOMICS 532, 534-38 (1949).

160. See, e.g., Pio Barsanti, *La Socialità nel Sistema della Proprietà Privata* 86-100 (1892). See also Anna di Robilant, *Common Ownership and Equality of Autonomy*, 58 MCGILL L. J. 263 (2012).

Today, these two property forms have been, or are being, re-introduced because they resonate with the call for deliberative democratic alternatives over private or public top-down governance of resources. Vast constituencies, from citizens to economic actors to policy experts have come to believe in the benefits of democratic deliberative governance for resources as diverse as scarce urban land, fragile natural resources, historic landmarks, or cultural institutions.

Focusing on democratic values also helps make sense of the second puzzle. If the *numerus clausus* principle is designed to lower information costs, why has it allowed a significant expansion of governance property forms that are costly to process? Information costs are neither the only nor the fundamental concern. In the last fifty years, we have seen a significant expansion of governance property forms even in cases where economic theory would recommend exclusion. Law and economics scholars argue that exclusion works well when the number of potential claimants to the resources is large and the resource can be defined at a relatively low cost (for example, a parcel of urban land). By contrast, governance property is appropriate for a limited number of special resources that are difficult to delineate because they are large, or fugitive, or inherently uncertain (for example, grazing land, fisheries or water for irrigation).<sup>161</sup> For these resources, exclusion is costly and the benefits of a fine-grained regulation of use entitlements are significant.

But introduction of deliberative democratic property forms suggest that, in practice, things are different. In practice, we don't reserve governance strategy for only those situations where physical and economic characteristics such as size, instability of the resource stocks, or highly rivalrous consumption make exclusion impractical or costly. Instead, we have increasingly relied on governance property when the resource implicates fundamental public values.<sup>162</sup> The case of *Teatro Valle* in Rome is illustrative. From one perspective, *Teatro Valle*, is just a unit of real estate for which exclusion is neither costly nor impractical. However, for the common goods movement, it is much more than a unit of real estate. It has historically been a central piece of Italian culture. As such, it implicates a fundamental public value: cultural democracy.<sup>163</sup> A form of ownership that democ-

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161. Merrill & Smith, *supra* note 151, at 798 ("Governance rules also have unique advantages when we deal with resources that are difficult to package into easily measured and monitored parcels such as are required for exclusion strategies to work. Land and tangible objects can be marked with boundaries, which are visible to others and can be monitored for violations. But other types of re-sources, such as ocean fisheries, submerged oil, clean air, and ideas, are much more difficult to divide into parcels.").

162. See Alexander, *supra* note 154, at 2 (discussing how private and public values are intertwined in property law and listing, among the public values, equality, inclusiveness, community, participation, self-constitution).

163. See Benkler, *supra* note 100, at 1262.

ratizes the governance of the *Teatro Valle* enables citizens to participate in producing culture and meaning, rather than merely receiving meanings produced by the cultural industry. It is this fundamental public value that justifies a form of ownership that entails high administrative and information costs.

3. Expanding the Democratic Account of the *Numerus Clausus* Principle: How the List is Pruned and Expanded

Democratic accounts of the *numerus clausus* principle suggest that the inherently public quality of property rights justifies substantive and procedural limits on the creation of new property forms. New property forms must reflect values the collectively approves of and must be ratified through democratic processes. But how does the process of creating new forms and pruning old ones happen? Who are the actors involved?

Existing democratic accounts of the *numerus clausus* principle do not provide satisfactory answers to these questions. Property scholars describe the process of managing the list as one where market actors generate new property forms that best suit their economic needs and legislatures ratify the new property forms. These scholars argue that there are good reasons why new property forms need legislative ratification and why courts are not the appropriate source of innovation in property law. Merrill & Smith suggest that legislative ratification is preferable because it ensures that newly created property forms are set forth in a text that is clear, stable, easy to identify, universal in its application and comprehensive in its scope.<sup>164</sup> Similarly, Avihay Dorfman argues that only property forms enacted by the democratically elected legislature will be truly “co-authored” and “self-given” by the collectivity.<sup>165</sup> A closer look at how some of the deliberative democratic property forms were introduced complicates this neat picture of market actors generating new forms and legislatures ratifying them. It expands our understanding of the procedural and institutional dimension of the *numerus clausus* principle in two significant ways.

First, it shows yet a deeper democratic layer of the process by which new forms are added to the standard list. The existing literature on the *numerus clausus* has largely ignored the role citizens and social movements play in the creation of new property forms. It is not always the case that new property forms are generated by market

164. Merrill & Smith, *supra* note 1, at 60-65 (discussing six advantages of making legislatures the agents of change: clarity, universality, comprehensiveness, stability, prospectivity, implicit compensation).

165. For Dorfman, court decisions are neither co-authored, because they involve only the particular parties to the dispute, nor self-given, because the final decision is made by an unelected judge; see Dorfman, *supra* note 6, at 505, 508-10.

actors seeking their economic self-interest and subsequently ratified by legislatures.<sup>166</sup> Rather, it is often citizens motivated by public values who generate new forms that are then approved by the legislature.

Admitting a new property form to the *numerus clausus* list may seem a task remote from the concerns of the vast majority of citizens. But the debate over “common goods” in Italy presents a different scenario—one where a large network of locally based “movements for the recognition of common goods” are campaigning for the creation of a new property form. Widely disparate constituencies, from users of water utilities to individuals active in the world of arts & sciences to environmentalists, are vocal in arguing that justice and efficiency both require more equal access to resources that satisfy basic needs, and are further demanding a voice in their management. The movements have found an ally in a group of property scholars who have given legal form to their arguments. Similarly, in the United States, the development of the community land trust involved a cooperative effort of citizen-activists and experts. In the 1970s, the impetus for the creation of the community land trust came from a wide movement of neighborhood residents and community development organizations. The legal structure of the community land trust was then sketched in a number of influential policy papers published by the Institute for Community Economics in the 1980s. In turn, these publications served as the foundation for federal legislation.<sup>167</sup>

Moreover, in addition to illustrating the depth of public participation in the introduction of new property forms, understanding the *numerus clausus* as a product of democracy also illuminates the role courts play in the management of the *numerus clausus* list. Hanoch Dagan’s suggestion that courts may function as public *fora* of grassroots democracy has remained an isolated intuition in the *numerus clausus* literature.<sup>168</sup> However, the process by which some of the deliberative democratic property forms were introduced confirms this intuition. Courts have functioned as catalysts of democratic movements’ demands. For example, in the case of common goods, a 2009

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166. See, e.g., Bell & Parchomovsky, *supra* note 8, at 1025.

167. Towey, *supra* note 47, at 338-39 (noting that what is now considered the classic CLT structure was sketched in a number of influential policy papers in the 1970s, in particular, *The Community Land Trust Handbook*, published by the Institute for Community Economics in 1982. These publications were so influential in the understanding of the CLT structure that their approach to the CLT served as the foundation for federal legislation, the Cranston-Gonzales Act of 1992).

168. Hanoch Dagan, *Judges and Property*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW 7-8* (Shyam Balganeshe ed., 2013) (arguing that “the story about the evolution of common law is largely that of a series of cautious, incremental changes resulting from the interpretation of the existing legal landscape, which eventually generate new and at times innovative doctrines” and suggesting that “the possibility, however limited, that courts function in property matters as public fora of grassroots democracy on the other, and a priori preference for legislation seems questionable”).

decision of the Italian *Consiglio di Stato* gave legal form to the core argument of the social movements: that all citizens should have a voice in the management of resources that serve basic needs. The decision fleshed out one of the critical features of the new property form: anyone can seek an injunction against management decisions that threaten common goods.<sup>169</sup> Similarly, in the United States, decades of innovative and expansive judicial interpretations of the common law public trust doctrine have *de facto* designed a new property form for natural resources. This increasingly broad expansion of the doctrine by courts played an important part in kindling the environmental movement in the early 1970s.<sup>170</sup> “Environmental activists, one observer notes, widely hailed the emergence of the new public trust as the legal tool that would finally empower them against powerful private and government interests they believed imperiled natural resources nationwide.”<sup>171</sup> Thus, although courts seem intuitively undemocratic, they have actually promoted the democratic creation of new property forms by the citizens.

*B. The Quality of the New Property Forms: The Commitment to Deliberative Democracy*

1. Property and Deliberative Democracy

The property forms discussed in Part I share an important quality. To varying degrees, they each have built in mechanisms of deliberative democracy. They suggest that decisions over specific resources should be made not by a single owner, whether private or public, but through a deliberative process accessible to a large number of affected parties. My argument is not that these property forms actually realize the ideal of deliberative democracy. This claim would, obviously, be untenable.<sup>172</sup> Rather, I argue that these property forms reflect an aspiration to deliberative and democratic decision making that is often imperfectly realized.

These relatively recent additions to the list of standard property forms reveal something new about the way, in contemporary liberal democracies, we think about property. We have come to believe that property can and should foster democratic deliberation over the use of some critical resources. This new, still emergent, idea about the benefits of the institution of property builds on and expands on two

169. Consiglio di Stato, sentenza 5501/2009, available at <http://www.acquabene.comune.org/aprilia/Sentenza-del-Consiglio-di-Stato-n,2239.html>.

170. Haochen Sun, *Toward a New Social-Political Theory of the Public Trust Doctrine*, 35 VERMONT L. REV. 563, 566 (2011).

171. Erin Ryan, *Public Trust and Distrust: Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 479–80 (2001).

172. See, for example, the literature on the flaws of the common interest community as a democratic forum, *supra* note 24.

existing, and at times seemingly contradictory, ideas about the benefits of property as a device for managing resources.

The first idea is the idea of property as its owner's "castle."<sup>173</sup> This idea has shaped the way the institution of private property has developed in modern times. In the modern European and American tradition, the image of property as the castle delivers two important benefits. The first benefit is individual self-realization. By granting owners broad control over their property, modern property law sought to promote owners' material ability to determine and pursue their ends and the related sense of stability, identity, and responsibility.<sup>174</sup> The idea of property as its owner's castle also yields a second benefit: the efficient use of resources. Securing owners' broad control over their property also allows efficient bargaining over the most productive use of resources. In this regard, the image of property as its owner's castle was critical to one of the major structural changes of modernity. The shift from the feudal social order where land was unproductive because tied up in a hierarchy based on status and privilege, to the modern social order where owners are free to trade and compete with one another.<sup>175</sup>

The second idea about property and its benefits is the civic republican idea of "property as propriety." Historians and theorists of property have traced throughout American history a vision of property as the foundation for creating and maintaining the proper social order.<sup>176</sup> On this view, the core purpose of private property is not to facilitate the satisfaction of individual preferences or to increase productivity, but to realize some prior normative vision about how society and the institutions that govern it should be structured.<sup>177</sup> To be sure, defining what the proper social order is, and has always been, a controversial question. In American history, there have been different substantive visions of the proper social order and, hence, multiple versions of the "proprietary" conception of property.<sup>178</sup>

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173. For a discussion of the castle model of property, see Joseph W. Singer, *The Ownership Society and Takings of Property: Castles, Investments and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 314-16 (2006).

174. The self-realization benefit of property is discussed in the literature on property and "personhood"; see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1981-1982) (arguing that "[t]he premise underlying the personhood perspective is that to achieve proper self-development, to be a person, an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights").

175. See Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folktales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 131 (1998-1999) (emphasizing the link between property, trade and competition); See Jedediah Purdy, *A Freedom-Promoting Approach to Property. A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1251-58 (2005) (discussing the origins of the freedom promoting-approach in the thought of Adam Smith).

176. See generally ALEXANDER, *supra* note 12, at 1.

177. *Id.* at 3.

178. *Id.* at 2-3.

The creation of new deliberative democratic property forms suggest that, alongside the “castle” and “propriety” ideas of property, a third is emerging. Property can deliver yet another benefit: it can foster democratic deliberation over the use of some critical resources. In other words, a desirable social order is one where these resources are governed through a process that is inclusive and focused on reasoning. In turn, such open and deliberative process will produce better decisions, decisions that are both more efficient and more just.<sup>179</sup> Property forms that promote these processes thus reflect a collective judgment that our society as a whole ought to move in a more democratic direction.

Certainly, the property as the castle owner conception has not disappeared. If the resource owned is personal (one’s home, a family heirloom, a car, etc.), the owner is the lord of her castle. Property entitlements are structured so as to reflect the idea that these items are closely bound up with personhood, they are part of the way we constitute ourselves.<sup>180</sup> Personal property is not the only realm where individuals have extraordinary latitude in making decisions about property. 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. For example, 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 satisfy basic human needs, involve long-range human interests, or involve non-human, ecological interests, our property system is coming to reflect the idea that democratic deliberation is desirable. The re-development of a parcel of scarce urban land in the city of Amsterdam is a decision that is critical to the community’s ability to preserve or increase its economic vitality as well as its “social capital.”<sup>181</sup> Similarly, decisions about the lease of an Alpine water spring involve economic and productive interests, the community’s ecological, aesthetical, or recreational needs, and the stewardship duty owed to future generations. Deliberative democratic property forms recognize the complexity and interdependence of these decisions.

At the core of deliberative democracy is the idea of free public reasoning among equals who are governed by the decisions.<sup>182</sup> Delib-

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179. See *infra* at Part II.B.2.

180. See generally Radin, *supra* note 173.

181. See Sheila Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 527-29 (2006).

182. Joshua Cohen, *Democracy and Liberty*, in DELIBERATIVE DEMOCRACY 185, 186 (Jon Elster ed., 1998) (contrasting an “aggregative” conception of democracy, where decisions are collective if they arise “from arrangements of binding collective choice

erative democracy has two features that enable it to balance these complex interests.<sup>183</sup> First, it involves collective decision-making with the participation of all who will be affected by the decision or their representatives.<sup>184</sup> Second, it requires reason giving, reasons offered by and to participants in the decision making process.<sup>185</sup> It is critical to the deliberative democratic process that the reasons given be reasons that others, as free and equals seeking fair terms of cooperation, can accept.<sup>186</sup> In other words, the reasons must be “public,” in the sense that their content must be accessible and understandable to those to whom they are addressed.<sup>187</sup>

The idea of deliberative democracy is as old as democracy itself. In his eulogy of Athenian democracy, Pericles noted “instead of looking on discussion as a stumbling block in the way of action, we think it an indispensable preliminary to any wise action at all.”<sup>188</sup> The delegates to the French *Assemblée Constituante* of 1789 expressed similar democratic deliberative ideals. Emmanuel Joseph Sieyès insisted that democracy is about “proposing, listening, concerting, and changing one’s opinion in order to form in common a common will.”<sup>189</sup> In the first U.S. Congress, the representatives rejected a proposal to give citizens, as part of the Bill of Rights, “a right to instruct their officials.” Roger Sherman argued that “if they were to be guided by instructions, there would no use for deliberation.”<sup>190</sup>

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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 GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 7 (2004) (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”).

183. See Jon Elster, *Introduction*, in GUTMANN & THOMPSON, *supra* note 182, at 8 (arguing that theories of deliberative democracy differ widely and identifying two common core ideas: the democratic idea and the deliberative).

184. *Id.*

185. *Id.*

186. See GUTMANN & THOMPSON, *supra* note 182, at 3 (arguing that the reasons given in the deliberative process “should appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject”).

187. *Id.* at 4.

188. Elster, *supra* note 183, at 1.

189. *Id.* at 3.

190. *Id.* at 4.

Around the 1990s, deliberative democracy enjoyed a revival among theorists of democracy.<sup>191</sup> This revival has largely overlooked the development of deliberative property forms, but the addition of deliberative property forms to the standard list signals something novel and important. It suggests that deliberative democracy is not only a form of politics, a matter for the organization of the state. Deliberation should extend more broadly, beyond the existing representative institutions of liberal democracy. The deliberative democratic ideal of justification through inclusive public reasoning can serve as a model for collective decision-making in variety of institutional and social arrangements.<sup>192</sup> Property is such an institution where an expansion of deliberative democracy is desirable.

## 2. The Benefits of Deliberative Property Forms

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 involves public interests, 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.<sup>193</sup> To begin with, deliberation facilitates the revelation of information. Participants are prone to reveal relatively nuanced information about their preferences and whether these preferences are

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191. JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND V* (2000) (arguing that, prior to the deliberative turn, democratic theory understood democracy largely in terms of aggregation of preferences or interests into collective decisions through devices such as voting and representation).

192. Theorists of deliberative democracy are divided on whether deliberative democracy should apply only to the core institutions of liberal democracy or, more broadly, to a variety of social arenas. See GUTMANN & THOMPSON, *supra* note 182, at 32. Among the former, Jürgen Habermas argues for democracy only in those institutions that are at the core of a constitutionally organized democracy. Habermas offers two reasons for this limitation: a) the demands of deliberation cannot be generally applied even to all governmental institutions; for example executive agencies or governmental institutions that protect familial privacy should not be forced to deliberate publicly; b) extending the deliberative mandate to all institutions would threaten the freedom of citizens; society must remain relatively unstructured to allow for free-will formation. See Jürgen Habermas, *Deliberative Politics*, in *DEMOCRACY* 107, 114-15, 120-21 (David Estlund ed., 2002). Among the latter, see Cohen, *supra* note 182, 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”).

193. GUTMANN & THOMPSON, *supra* note 182, 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”).

weak or strong.<sup>194</sup> Additionally, 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 and to correct their misapprehensions.<sup>195</sup> Furthermore, deliberation produces better decisions, because the act of deliberation involves not only choosing among alternatives but also generating new alternatives that will more successfully withstand critical scrutiny. Deliberation is a means for lessening the impact of bounded rationality, the fact that our imagination and analytical abilities are limited and fallible.<sup>196</sup> Faced with a complex problem, participants pool their limited capabilities through discussion, increasing the odds of making good decisions.<sup>197</sup> 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.<sup>198</sup>

Second, deliberation is a response to the fact of moral pluralism and disagreement. Currently, a great deal of literature addresses the fact of value pluralism in property law. Pluralistic theories of property recognize that property involves plural and incommensurable values, and that no single foundational value may be dispositive of a property decision.<sup>199</sup> We disagree on the values 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.<sup>200</sup> These values are often in conflict, each dictating different outcomes, and decision makers have to make hard choices.

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194. See James D. Fearon, *Deliberation as Discussion*, in *DELIBERATIVE DEMOCRACY*, *supra* note 182, at 45-46.

195. Elster, *supra* note 183, at 11.

196. Fearon, *supra* note 194, at 49.

197. *Id.*

198. *Id.* at 11.

199. See Alexander, *supra* note 147, at 1020, 1021 (contrasting monism and pluralism and discussing different types of pluralism in property law. Alexander notes that “[r]egardless 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. 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”).

200. 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

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.<sup>201</sup> For example, the decision-making procedure outlined in the bylaws of the *Teatro Valle* is one of mixed arguing and voting. Similarly, *emphyteusis* has a mixed system where deliberation among the multiple stakeholders is followed by bargaining between the city and the developers. Regardless of what other procedure is used to supplement deliberation and arrive at a decision, democratic deliberation boosts the legitimacy of decisions in the face of moral disagreement.<sup>202</sup> Hard decisions are made more acceptable to those who disagree by the fact that they are adopted after careful consideration of the conflicting values implicated. 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.<sup>203</sup> Deliberative democracy is a “second order” theory that provides a way of dealing with the conflicting claims of first order theories.<sup>204</sup> It rests

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match the specific balance between property values best suited to its characteristic social setting”).

201. See GUTMANN & THOMPSON, *supra* note 182, at 18; Elster, *supra* note 183, at 5-7 (arguing that when a group of equal individuals are to make a decision on a matter that concerns them all and the initial distribution of opinion falls short of consensus, they can go about it in three different ways: arguing, bargaining and voting. Political decision making usually involves all three procedures. Voting will tend to arise when an issue has to be decided urgently, bargaining will tend to arise when participants have unequal rates of time discounting or through logrolling due to the unequal intensity of preferences over the issues to be traded against each other); see also JOSHUA COHEN, DELIBERATION AND DEMOCRATIC LEGITIMACY 5 (1989), <http://philosophyfaculty.ucsd.edu/faculty/rarneson/JCOHENDELIBERATIVE%20DEM.pdf>, (arguing that, while ideal deliberation aims to arrive at a rationally motivated consensus, even under ideal conditions there is no promise that consensus will be reached. If it is not, “then deliberation concludes with voting, subject to some form of majority rule. The fact that it may so conclude does not, however, eliminate the distinction between deliberative forms of collective choice and forms that aggregate non-deliberative preferences. The institutional consequences are likely to be different in the two cases, and the results of voting among those who are committed to finding reasons that are persuasive to all are likely to differ from the results of an aggregation that proceeds in the absence of this commitment”).

202. GUTMANN & THOMPSON, *supra* note 182, at 10, 27-29 (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 182, at 187-89 (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). Critics argue that deliberative democracy is not necessary at all in justifying political decisions, see Joseph Raz, *Disagreement in Politics*, 43 AMERICAN JOURNAL OF JURISPRUDENCE 25 (1998) (arguing that the process of justifying an outcome to the people who are bound by it contributes anything of significance to its legitimacy or justice and that decisions have all the authority they need if they are right or just).

203. GUTMANN & THOMPSON, *supra* note 182, at 13.

204. *Id.* at 13.

on the idea of “agreeing to disagree.”<sup>205</sup> In other words, deliberation does not make conflicting values compatible, but it boosts the legitimacy of outcomes by asking participants to agree on the principle of “mutual respect,” i.e., to give reasons and to recognize the merit of their opponents’ reasons.<sup>206</sup>

Third, deliberative democratic mechanisms in property forms are not only valuable instrumentally simply because they lead to better and more legitimate decisions, 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 others.”<sup>207</sup> Property forms with built-in deliberative mechanisms encourage 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.<sup>208</sup> 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 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.<sup>209</sup>

### 3. The Problems of Deliberative Property Forms

A variety of objections, both theoretical and practical, have been leveled against deliberative democracy. These objections are not fatal to deliberative property forms but they do call for answers.

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205. *Id.* at 79 (arguing that mutual respect is a form of agreeing to disagree).

206. *Id.* (arguing that mutual respect demands more than toleration; “it requires a favorable attitude toward and constructive interaction with the persons with whom one disagrees. It consist in a reciprocal positive regard of citizens who manifest the excellence of character that permits a democracy to flourish in the face of (at least temporarily) irresolvable moral conflict” and at 80 arguing that mutual respect makes two demands of persons: that one presents one’s own moral position and that one acknowledge the moral status of one’s opponents’ argument).

207. GREGORY S. ALEXANDER & EDUARDO PENALVER, AN INTRODUCTION TO PROPERTY THEORY 82 (2012). *See also* Alexander, *supra* note 150, at 1876 (arguing that governance property contributes to the development of virtues. It inculcates certain important virtues more effectively than does exclusion property and that virtue development is both a distinctive characteristic of governance property institutions and a major reason for their remarkable growth). *See also* GUTMANN & THOMPSON, *supra* note 182, at 80 (arguing that the value of mutual respect which is the foundation of the idea of deliberative democracy can contribute not only to social good but also to individual virtue).

208. *See generally* ALEXANDER, COMMODITY & PROPRIETY, *supra* note 12.

209. *See generally* ERIK J. OLSEN, CIVIC REPUBLICANISM AND THE PROPERTIES OF DEMOCRACY 222 (2006) (examining the relationship between property, civic republicanism and democracy in European social thought as well as in Post-Socialist thought and arguing for a “republicanized” version of social democracy).

a. Deliberative property forms sacrifice just outcomes for the sake of inclusive deliberation

A fundamental theoretical objection against deliberative property forms is that they sacrifice substantively desirable or just outcomes for the sake of inclusive, deliberative or otherwise fair processes. The principles of deliberative democracy, critics may argue, do not prescribe the substance of the decisions but only the procedures by which the decisions are made.<sup>210</sup> A deliberative, inclusive, and fair procedure justifies any outcome reached through that procedure, even if the outcome itself is not just or fair. In other words, deliberative democracy does not give justice any special priority over process.<sup>211</sup>

For example, imagine the lease of a publicly owned water spring, a “common good,” to a private bottled water company. The municipality has to decide whether to lease the spring at all, and if so, what the conditions of the lease will be (the rent, the quantity of water the company can take, the environmental safeguards the company has to adopt, etc.). Imagine that the affected parties (the municipality, representatives of the various regional water authorities, representatives of local residents, environmental organizations) deliberate, through a fair and inclusive procedure, to lease the water spring at a low rent and with few and insignificant restrictions. Or imagine that the governing board of a community land trust (properly representing all the relevant constituencies) proposes an amendment to the bylaws, which decrees that unit owners who are behind with rent payments have to perform forced labor. The members of the community land trust, following a fair and inclusive procedure, deliberate and adopt the amendment. In both examples, opponents of the decision will argue that, however valuable deliberation may be, it should not take precedence over just outcomes. In the first example, they will argue that the lease decision violates fundamental precepts of environmental justice. It gives away a scarce common good—high quality alpine water—for private profit. Further, it encourages the bottled water industry, which has detrimental effects on the environment. In the second example, opponents will note that the amendment to the community land trust’s bylaws violates fundamental principles of human dignity. Opponents of these decisions will argue that in cases of this kind, where the stakes are high and the answer is clear, the deliberative inclusive nature of the process should not trump a just outcome.

How can deliberative democrats respond to this objection? One can argue that deliberative democracy in property is not a merely

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210. GUTMANN & THOMPSON, *supra* note 182, at 23-24.

211. *Id.* at 40.

procedural theory.<sup>212</sup> Rather it is a more substantive conception. This substantive conception is inherent in the core idea of deliberative democracy: free public reasoning among equals. Deliberative democracy asks participants to offer reasons that can be accepted by free and equal persons seeking fair terms of cooperation. This very idea of free and equal personhood rejects outcomes that, although reached by fair and inclusive procedures, violate fundamental principles of human agency, dignity, or integrity.<sup>213</sup> In other words, outcomes of the deliberative process need to reflect what it means to respect individuals as free and equal citizens. The amendment to the community land trust's bylaws prescribing forced labor for unit owners who fail to pay the rent violates human dignity and agency and is thus clearly at odds with this principle.

Deliberative democrats can also suggest that deliberation is usually the least unsatisfactory way to arrive at just decisions. Deliberation is not a panacea that can turn bad outcomes into good ones, but it is better than the alternatives. Importantly, the deliberative process is dynamic and keeps open the possibility to continue the dialogue. For Amy Gutmann and Denis Thompson, deliberative democracy asks free and equal citizens and their representatives to engage in public reasoning with the aim of reaching conclusions that are "binding in the present but open to challenge in the future."<sup>214</sup> In the example where the community leased the water spring at conditions that violate principles of environmental justice, the demand for justification will persist after the decision. Retrospective accountability may contribute to better decision making in the future by calling participants in the decision-making process to critical account after the fact.<sup>215</sup> To further promote this retrospective accountability, deliberative property institutions should recognize the provisional

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212. See GUTMANN & THOMPSON, *supra* note 182, at 23-24 (describing, and rejecting, a purely proceduralist view of deliberative democracy.) According to a purely procedural notion, deliberative democracy does not prescribe the substance of the decisions but only the procedures by which decisions are made and the conditions necessary for the procedures to work fairly. Hence, citizens and their representatives, within broad procedural limits, should be as free as possible to determine the content of laws. Including substantive principles in the deliberative ideal would in effect preempt the moral and political authority of citizens. Racial and religious discrimination are wrong but the question of whether a particular decision should be so described or whether wrong decisions should be overridden by more compelling considerations should be left to citizens and their accountable representatives not to theorists and their substantive principles.

213. *Id.* at 24. See also Cohen, *supra* note 182, at 192-93 (suggesting that a purely procedural conception limited to values such as openness and impartiality associated with fair process is incorrect and proposing a substantive conception that descends from the core idea of free reasoning among equal citizens).

214. GUTMANN & THOMPSON, *supra* note 182, at 6-7.

215. *Id.* at 45.

nature of decisions and provide mechanisms for regular reconsideration of decisions, such as sunset rules that force reviews of policies.<sup>216</sup>

b. Deliberative democracy in property is unfeasible

A second set of objections focuses on practical challenges, questioning the feasibility of deliberative democracy in property. Deliberative property forms may not be feasible owing to the sheer number of affected parties needing consultation, and/or their lack of expertise. Social choice theorists fear that deliberative democratic institutions may open the door to an unmanageable proliferation of participants with limited competence to make decisions on highly complex matters.<sup>217</sup>

Deliberative democrats have good responses to the numbers and expertise objections. As to numbers, deliberative democrats acknowledge that the room cannot hold everyone, but note that changes in information technology have greatly facilitated mass involvement in different kinds of processes, at different levels. Furthermore, it is important to remember that direct democracy, with citizens gathering in assemblies, is not the only way to institutionalize deliberative democracy.<sup>218</sup> The democratic part of deliberative democracy is satisfied when all who will be affected by the decision *or their representatives* are allowed to participate.<sup>219</sup>

As to the expertise objection, making decisions over an urban redevelopment project or the terms of a lease of water utilities infrastructure does often involve complex technical know-how. Participants in the decision-making process will likely not have the competence and 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 ways that participants can understand, and as long as the expert opinion is pluralistic and subject to scrutiny, reliance on expert knowledge does not

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216. *Id.* at 60.

217. DRYZEK, *supra* note 191, at 58.

218. See COHEN, *supra* note 182, at 10 (arguing that the irrelevance objection starts from the assumption that a direct democracy with citizens gathering in legislative assemblies is the only way to institutionalize a deliberative procedure. Premising that, and recognizing that direct democracy is impossible under modern conditions, the objection concludes that we ought to be led to reject the ideal because it is not relevant to our circumstances. But Cohen notes that, while the claim about the impossibility of direct democracy is plainly correct, there is no merit in the claim that direct democracy is the uniquely suitable way to institutionalize the ideal procedure. For Cohen, there is no reason to be confident that a direct democracy would subject political questions to deliberative resolution, even if a direct democracy were a genuine institutional possibility. In other words, we cannot simply assume that large gatherings with open-ended agendas will yield any deliberation at all, or that they will encourage participants to regard one another as equals in a free deliberative procedure.

219. Elster, *supra* note 183, at 8.

detract from the deliberative nature of the decision-making process.<sup>220</sup>

A more radical practical objection suggests that deliberative democratic property forms rest on unrealistic assumptions about participants' "rationality."<sup>221</sup> The ideal deliberative democratic process assumes a "communicative rationality." It assumes that participants in the decision-making process enter into communication with open minds, a willingness to listen to the arguments of others, and a readiness to be rationally swayed by the strongest argument.<sup>222</sup> But this is an unrealistic assumption.<sup>223</sup> In fact, humans tend to be strategic and instrumental when they approach communication, usually having set objectives in mind and viewing communication with others as a way of achieving these objectives. For example, how likely is it that the parties negotiating the terms of an *emphyteutical* lease for a redevelopment project will adopt a purely communicative rationality? The developer, the municipality, the representatives of the community all have very different objectives and will approach the deliberation table strategically, resolved to achieve their particular ends.

Deliberative democrats acknowledge that participants enter communication with varying degrees of willingness to listen to arguments.<sup>224</sup> However, they have two responses. First, the very participation in deliberation may increase participants' deliberative ethos. Cognitive scientists show that, if people enter communication with some willingness to consider arguments, "communicative rationality" can increase over time as a result of communication with others. In other words, a decision-making process that starts as instrumental and strategic may drift toward a deliberative practice.<sup>225</sup> Such drifting can be furthered by thoughtful institutional design; a well-designed deliberative setting can foster deliberation, independently of the motives of participants.<sup>226</sup> The second response is that not only can the acquisition of new information, but the mere practice of deliberation can also change participants' preferences. This may occur in part because when participants realize that certain preferences cannot be expressed in the form of acceptable or powerful reasons, they may reevaluate those preferences.<sup>227</sup>

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220. GUTMANN & THOMPSON, *supra* note 182, at 5.

221. The term "rationality" is central to Jürgen Habermas' theory of deliberative democracy. Habermas's theory separates differing rationalities informing decision-making; see JÜRGEN HABERMAS, 1 THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 50-54 (Thomas McCarthy, trans. 1984).

222. Peter McLaverty & Darren Halpin, *Deliberative Drift: The Emergence of Deliberation in the Policy Process*, 29 INT. POL. SC. REV. 197, 202 (2008).

223. *Id.*

224. *Id.*

225. *Id.*

226. Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY, *supra* note 182, at 101-05.

227. Cohen, *supra* note 182, at 200-01.

c. Deliberative property forms mirror the existing distribution of power

The most radical objection to deliberative property forms is that they may simply mirror the existing distribution of power. Democratic deliberative property forms may fail to involve, and may actually exclude, potential participants, such as those least able to participate on account of resources or education, those marginalized on account of race, gender or sexuality, or those with ideologically radical views. This objection is voiced with particular force by “difference democrats.” Difference democrats stress the need for democratic politics to concern itself with “the recognition of the legitimacy and validity of the particular perspectives of historically oppressed segments of the population.”<sup>228</sup> Deliberative democracy, these critics argue, is a revolutionary political idea. It calls for a radical change in the bases of decision making as well as in the scope of those included in decision making. To deliver its promises, deliberative democracy requires dramatically more egalitarian political social and economic conditions than exist in any contemporary society.<sup>229</sup>

In the obviously non-ideal circumstances of the real world, the emancipatory potential of deliberative democracy may never be realized. In the real world, decisions are always contingent and grounded in power and it is delusional to present them as “reasoned argument free from power.”<sup>230</sup> For example, both the community land trust and *emphyteusis* seek to facilitate a mode of urban planning that takes the plurality and diversity of urban society as a point of departure.<sup>231</sup> But the promise of community involvement, and especially minority involvement, in deliberating over the terms of the *emphyteutical* deed or the future of the land trust property may not materialize. The poor and minority residents who live right next the proposed development are less likely to be recruited to the deliberative table. Further, they are likely to lack the ability to present their arguments in an effective

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228. Dryzek, *supra* note 191, at 57. Among “difference democrats,” see WILLIAM CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 211 (1991) (envisioning an ideal situation where material inequalities have been remedied and participants in democratic politics are prepared to question the complexities and ambiguities of their own identities as well as those of others), Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL*, 120 (Seyla Benhabib ed., 1996) (generally, critiquing deliberative democracy’s universalizing tendencies that repress group difference and mask exclusion); Chantal Mouffe, *Democracy, Power and the Political*, in *DEMOCRACY AND DIFFERENCE, supra*, at 248-250 (arguing for a politics of difference that rejects any attempt to impose universal identities and rationalities).

229. Archon Fung, *Deliberation Before the Revolution. Toward an Ethics of Deliberative Democracy in an Unjust World*, 33 *POLITICAL THEORY* 397, 397-398 (2005).

230. Andrew Knoop, *Delivering Deliberation’s Emancipatory Potential*, 34 *POLITICAL THEORY* 594, 596 (2006).

231. Wigmans, *supra* note 111, at 217.

manner and the power to push their views through to deliberative process. The terms of the deed may end up reflecting the consensus reached among the most powerful actors, the developer and the municipality.

Difference democrats note that, not only is it delusional to present the outcomes of deliberative democratic processes as inclusive and free from power, it is also oppressive because it precludes more radical and effective strategies for change. In other words, there is a tension between activism and deliberative democracy. The activist is suspicious of exhortations to deliberate. She recommends that those who care about inclusion should engage primarily in “critical oppositional activity,” rather than in reasoned arguments with those who benefit from existing power structures.<sup>232</sup>

Can anything be done to enable deliberative property forms to approximate the deliberative ideal? Deliberative democrats recognize the force of these objections but argue that they do not justify abandoning deliberative democracy altogether. They suggest that deliberative democracy has the capacity to question the background conditions.<sup>233</sup> When the process excludes particular groups or benefits the most powerful, deliberation can bring this deficiency to public attention. Thus, even under unjust conditions, deliberation can make a more positive contribution to the elimination of injustice than other alternative processes or strategies. Additionally, conditions for deliberation may be improved by incremental, non-revolutionary steps. These include: affirmative action recruitment that targets disadvantaged groups, guarantees of consultation and veto power over decisions that affect those groups.<sup>234</sup> They may also include neutral facilitators who provide information and training to the least able so that they may voice their arguments effectively.<sup>235</sup> Finally, deliberation and activism are not mutually exclusive. Archon Fung has proposed a convincing theory of “deliberative activism.”<sup>236</sup> Fung argues that, under highly adverse conditions of extreme inequality, the deliberative democrat should resort to non-deliberative, activist methods. In Fung’s account, the deliberative democrat should be faithful to the deliberative ideal until reasonable efforts to institute fair and inclusive deliberation fail.<sup>237</sup> The logic of Fung’s argument parallels the justification for civil disobedience: the extent of the deviation from deliberation increases according to the adversity of

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232. Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 *POLITICAL THEORY* 670, 671 (2001).

233. GUTMANN & THOMPSON, *supra* note 182, at 42.

234. Fung, *supra* note 229, at 408; Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *ETHICS* 250, 261-62 (1989).

235. Fung, *supra* note 229, at 413-14.

236. *Id.* (generally).

237. *Id.* at 402-03.

circumstances. In other words, “just as it is morally incumbent upon the civilly disobedient to make their cases through legal means before violating the law, so those committed to deliberation should exhaust deliberative means before resorting to non-communicative forms of power.”<sup>238</sup>

#### CONCLUSION

In this Article, I have provided an account of the *numerus clausus* principle, how it works, why it exists, and the quality of the forms on the list, that emphasizes democratic experimentalism. I have expanded existing democratic accounts of the principle by focusing on the role citizens and social movements play in generating new property forms that are later ratified by the legislature. Further, I have argued that a significant number of property forms created in recent times share an important quality. They reflect an aspiration, imperfectly realized, to deliberative democratic governance of resources that involve public interests. I have examined sympathetically, but critically, this new aspiration. This new theme of deliberative democracy in property also raises further critical questions that are beyond the scope of this Article, most importantly, the question of institutional design. To deliver their promises, deliberative democratic property forms require making inclusive and participatory governance a pragmatic reality, rather than an ideal, and one that works. The promise of inclusion calls for processes that identify all legitimate stakeholding interests and are effective at recruiting diffuse, inarticulate and hard-to-represent groups. The promise of reasoned deliberation requires mediation and facilitation mechanisms able to trigger the “drift” toward a deliberative ethos in unwilling participants and to remedy information asymmetries. The promise of a continuing dialogue invites flexible procedures for regular reconsideration of decisions.

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238. *Id.* at 403.