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The Cost of Unstable Property: Oil, Gas, and Other Confusing Mineral Interests

Chad J. Pomeroy
St. Mary's University School of Law, cpomeroy@stmarytx.edu

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THE COST OF UNSTABLE PROPERTY: OIL, GAS, AND OTHER CONFUSING MINERAL INTERESTS

Chad J. Pomeroy[*]

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* Turcotte R.C. Professor of Law, St. Mary's University School of Law.

I. INTRODUCTION

Most people think of property as a thing: a chunk of land or a piece of personal property. Most lawyers, hopefully, have a more sophisticated view and think of property as a set of rights that exists with respect to a thing and governs how one interacts with that thing *vis-à-vis* other people. But even that nuance is not refined enough for an oil and gas lawyer. Such a practitioner does, of course, view ownership as a set of rights, but the thing at hand is not just a piece of real property or the part of the land that you can see—the really interesting thing to these folks is the minerals that lie underneath the property.

A "mineral estate," as opposed to a "surface estate," is just what it sounds like: the rights to minerals.[1] Out of this subterranean "bundle of sticks" spring many issues and complications.[2] The issue this Article discusses is the unusual—and unusually expensive—issue of just how fractured these underground ownership rights become.[3]

In relevant part, this fracturing starts with understanding the difference between mineral rights and royalty interests—a right to payment contingent on mineral (mostly oil) production that constitutes one facet of mineral ownership.[4] Part II delves into these definitional issues, laying the foundation for a basic understanding of mineral rights both as an independent concept and as applied in the modern economy.[5] From there, Part II examines the nature of the rights that come from minerals by describing the distinct elements of mineral ownership.[6] Unlike normal property, where the bundle of sticks is more of a metaphor, the concept of fractured rights is more

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1. *See* PATRICK H. MARTIN & BRUCE M. KRAMER, 1 WILLIAMS & MEYERS, OIL AND GAS LAW, § 219 (LexisNexis Matthew Bender, 2022) [hereinafter WILLIAMS & MEYERS]. Oil and gas, certainly, but anything that lies underneath the surface may essentially be part of the mineral estate. *Id.* This includes gold, uranium, aluminum, etc. *See, e.g.*, Moser v. U.S. Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (holding "that title to uranium is held by the owner of the mineral estate as a matter of law"). In truth, this is a slight exaggeration because there can be uncertainty surrounding the terms "mineral" and "other minerals." *See, e.g.*, Paul D. Newton, *Texas Reexamines the Meaning of 'Minerals':* Moser v. United States Steel Corp., 19 TULSA L.J. 448, 448 (1984) (noting judicial attempts to classify what substances are included in the term "minerals"). But for purposes of this Article, we shall generally refer to anything that lies beneath as a mineral and, concomitantly, as part of the mineral estate.

2. *See* WILLIAMS & MEYERS, *supra* note 1, § 301.

3. *See infra* Sections IV.A–B (discussing and providing case examples of the costly confusion created when mineral interests are severed and separately conveyed).

4. Richard C. Maxwell, *Mineral or Royalty—The French Percentage*, 49 SMU L. REV. 543, 544 (1996).

5. *See infra* Part II (discussing mineral estates and interests). That is, understanding royalty rights in the context of the broader ownership interest introduces the concept of mineral leasing as the most economically important aspect of mineral ownership and cements the relationship between owning a fee interest in the minerals and having a derivative right to revenue arising from those same minerals. *See infra* Part II (discussing the nature and scope of mineral and royalty interests).

6. *See infra* Section II.C (discussing how these five facets of mineral ownership operate differently than property owners' traditional rights or bundle of sticks).

concrete for mineral rights.[7] That is, there is a clear and defined list of five rights that inhere to all fee mineral interest owners.[8] Defining and explaining these rights in some detail sets the stage for this Article's primary thesis—that these fractured rights are suboptimal.[9]

More specifically, the law's express condonation of these independent rights creates a situation in which the owner of the mineral rights might have all, one, or some combination of these rights—meaning that the owner of the mineral rights does not necessarily own what you think they own.[10] And that is a problem, as is initially laid out in Part III.[11] Therein, I return to a topic that I have written about a number of times over the years, which draws extensively from three prior articles of mine.[12] In particular, I have repeatedly written about the "numerus clausus," a term and principle meaning "the number is closed."[13] As Part III explains, the numerus clausus has become a positive description of, and an explanation for, the fact that property generally exists only in certain standardized forms under the common law.[14] It first sets forth the numerus clausus in the level of detail necessary for this sort of examination.[15]

Part IV then delves into the numerus clausus as a normative tool, applying it to the mineral interests discussed above and analyzing how the law should view these fractured rights.[16] As Part IV explains, the variegated nature of mineral rights violates the numerus clausus by permitting property

7. *See infra* note 91 and accompanying text (discussing how the bundle of sticks metaphor is suboptimal in the context of mineral estates).

8. *See* French v. Chevron U.S.A. Inc., 896 S.W.2d 795, 797 (Tex. 1995). Again, this is as opposed to the rights that exist as to ownership of the surface estate. *See* Moser v. U.S. Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984); *Surface Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a "surface interest" as "[e]very right in real property other than the mineral interest").

9. *See infra* Part III (explaining how permitting property owners to customize their mineral rights creates costly confusion that is avoidable with the application of the numerus clausus doctrine).

10. *See* WILLIAMS & MEYERS, *supra* note 1, §§ 501, 511.

11. *See infra* Part III (discussing the importance of the numerus clausus doctrine within property law).

12. *See generally* Chad J. Pomeroy, *The Shape of Property*, 44 SETON HALL L. REV. 797 *passim* (2014) [hereinafter Pomeroy, *SP*]; Chad J. Pomeroy, *Why Is Property So Hard?*, 65 RUTGERS L. REV. 505 *passim* (2013) [hereinafter Pomeroy, *WPH*]; Chad J. Pomeroy, *A Theoretical Case for Standardized Vesting Documents*, 38 OHIO N.U. L. REV. 957 *passim* (2012) [hereinafter Pomeroy, *SVD*].

13. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000) [hereinafter *Optimal Standardization*]; *see* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 385 (2001) [hereinafter *What Happened to Property*].

14. *See infra* Part III (discussing property law and the numerus clausus); *Optimal Standardization*, *supra* note 13, at 4. Merrill and Smith argue that the pressure creating the numerus clausus effect comes from a self-imposed, informational cost–benefit analysis wherein courts habitually focus on whether a new property type provides informational benefits that exceed the marginal informational costs thereof. *Id.* at 68–70.

15. *See infra* Part III (explaining the numerus clausus).

16. *See infra* Part IV (applying numerus clausus to mineral interests).

owners to widely—and inconsistently—customize their rights.[17] This customization comes with a significant cost.[18] Part IV sets forth an abbreviated example of the kind of cases that inevitably arise from the confusion incumbent in creational creativity, but the point extends beyond any historical case or list of cases.[19] The theoretical solution, then, is to weigh the benefits of the different facets available to mineral right owners and entrepreneurs against these costs. Of course, such an exercise is fraught with theory and uncertainty, but playing out such an analysis provides a concluding framework for ascertaining the extent to which ownership of mineral rights should qualitatively differ from ownership of surface rights.

II. THE CURIOUS CASE OF MINERAL INTERESTS

Mineral interests are a strange breed.[20] Most obviously, they are underneath the ground and go largely unnoticed and unthought of by most people.[21] Understanding what they are, how they differ from the related concept of royalty interests, and just how multifaceted they can be is important to understanding the central thesis of this Article.

A. The Nature and Scope of Mineral Interests

In its most basic form, a mineral interest is "[t]he right to search for, develop, and remove minerals from land or to receive a royalty based on the production of minerals."[22] Courts interpret the use of the word "minerals," absent any qualifying terminology, to mean *all* minerals under the land (including, importantly, oil and gas—two of the most economically vital minerals in the world).[23]

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17. *See infra* Section IV.A (discussing how the variegated nature of mineral rights is a clear violation of the numerus clausus doctrine).

18. *See infra* Section IV.B (discussing the costs of violating the numerus clausus).

19. *See infra* Section IV.B (illustrating cases exemplifying issues with the variegated nature of mineral rights).

20. *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK: UNIQUE AND HARD-TO-VALUE ASSETS, at 3 (Aug. 2012), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/unique-hard-to-value-assets/pub-ch-unique.pdf.

21. *See* Steve Doane, *Mineral Rights: Do You Own What's Under Your Home?*, NEWS-PRESS (Jan. 17, 2014, 4:30 PM), https://www.news-press.com/story/news/2014/01/12/mineral-rights-do-you-own-whats-under-your-home/4434699/.

22. *Mineral Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

23. Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 298–99 (Tex. 1923) (explaining the breadth of the term "minerals"); Rio Bravo Oil Co. v. McEntire, 95 S.W.2d 381, 382–83 (Tex. [Comm'n Op.] 1936) (holding that a reservation of "coal, mineral, stone, or any other valuable deposits" included the oil and gas as well, despite not being specifically mentioned); *cf.* Myher v. Myher, 123 S.W. 806, 807 (Mo. 1909) (holding a will that specifically qualified the conveyance as to coal as only a conveyance of coal); Ramage v. South Penn Oil Co., 118 S.E. 162, 163 (W. Va. 1923) (holding that the granting of the surface conveyed all of the land and minerals because only oil and gas were specifically reserved).

Of course, it is not terribly helpful to define a word with that same word, so the law turns to the concept of value: "all minerals" refers to "all substances within the ordinary and natural meaning of [the] word,"[24] and a conveyance of minerals most importantly grants "all valuable substances to the mineral owner regardless of whether their presence or value was known at the time of conveyance."[25]

Mineral owners have "[t]he right to search for, develop, and remove [their] minerals from [the] land" in any reasonably necessary manner.[26] This means that fee simple mineral estate owners can use whatever means are necessary for them to locate and pursue the minerals in and under their land.[27] This even includes the right to use the surface estate regardless of whether the mineral owner also owns the surface.[28]

In a severed estate, the mineral estate is dominant and the surface estate is servient.[29] The mineral estate still has the right to use the severed surface estate in *any reasonable* manner necessary to access the minerals.[30] Finally, in terms of geographic scope, a mineral estate's breadth is determined by the boundaries of the surface estate.[31] "[T]he location as made on the surface by the locator determines the extent of rights below the surface. . . ."[32] This is, in a way, a manifestation of the "*ad coelum* doctrine," which states that "a landowner [owns] everything above and below the land, up to the sky and

24. Moser v. U.S. Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984).

25. *Id.*

26. *Mineral Interest*, *supra* note 22.

27. Humble Oil & Refin. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967); Warren Petroleum Corp. v. Martin, 271 S.W.2d 410, 412 (Tex. 1954) ("Neither can such fact be used as a basis for a presumed finding that the petitioner used more land than was reasonably necessary to its oil operations. . . . Therefore, respondent cannot recover on such theory."); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (holding that despite water being expressly severed in this case and being a part of the surface estate, the mineral estate holder was still allowed to use whatever water was reasonably necessary to pursue the minerals).

28. *See Warren Petroleum Corp.*, 271 S.W.2d at 413.

29. *Williams*, 420 S.W.2d at 134.

30. Christman v. Emineth, 212 N.W.2d 543, 550 (N.D. 1973). The primary limitation a mineral owner may face here is when a surface estate holder is already using the surface. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971). In such a situation, the mineral estate must grant deference to the use of the surface by the surface estate only if there is another reasonable alternative available. *Id.* ("[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.").

31. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 89 (1898).

32. *Id.* "But it is also true that, until there has been a severance, ownership of the surface carries with it ownership of the minerals beneath the surface. . . . [U]nder the common law[,] minerals were the property of the owner of the land, the property in the surface carrying with it the ownership of everything beneath and above it; and this prima facie ownership continued until rebutted by showing that ownership of the mines and minerals had become in fact several and distinct from the ownership of the soil or surface." Bogart v. Amanda Consol. Gold Mining Co., 74 P. 882, 883 (Colo. 1903).

down to the earth's core, including all minerals,"[33] tying subsurface ownership to the geographic confines of the land.

In summary, a mineral interest is simply the right of a mineral estate holder to pursue the minerals beneath their land in whatever manner is reasonably necessary within the metes and bounds of the surface estate.[34]

B. The Nature and Scope of Royalty Interests

A mineral royalty interest (typically referred to as a royalty interest), on the other hand, is something different, something less.[35] One can conceive the two as related, with the mineral estate being the whole right and the royalty interest being a lesser component (albeit a very important one).[36] The holder of a mineral interest has the right to go onto the property, explore, and produce minerals.[37] Instead, a royalty interest holder, however, does not have any of these rights.[38] A royalty interest is entitled to a share of the profit from production and nothing else.[39]

Interestingly, while a mineral interest has greater property rights, a royalty interest may be more valuable because—while it is true that a royalty interest does not carry with it any real property rights—a royalty interest conveyed as a share of gross production carries with it a larger percentage of production than a similar conveyance of the underlying mineral interest itself.[40] And it is also important to distinguish between mineral royalty

33. *Ad Coelum Doctrine*, BLACK'S LAW DICTIONARY (11 ed. 2019); *see also* Chad J. Pomeroy, *All Your Air Right Are Belong to Us*, 13 NW. J. TECH. & INTELL. PROP. 277, 284–85 (2015) (discussing the *ad coelum* doctrine in the context of drone technology).

34. *Christman*, 212 N.W.2d at 550; *Del Monte*, 171 U.S. at 89.

35. Maxwell, *supra* note 4, at 544–45.

36. *Id.*

37. Rist v. Toole Cnty., 159 P.2d 340, 342–44 (Mont. 1945).

38. *Id.*

39. *Id.* "As we have had frequent occasion to observe, terms relating to conveyances of oil and gas interests have often been loosely and inaccurately used. This is particularly true with reference to the term royalty. A mineral deed is one which involves a severance, from the fee, of a present title to minerals in place. It either effects such severance of title in the first instance or conveys a part of such mineral ownership previously carved from the fee. It is a realty conveyance. Royalty is that part of oil and gas payable to the lessor by the lessee out of oil and gas produced. It is sometimes referred to as part of the compensation to the title owner for the privilege of exploring, developing, and producing oil and gas from the tract." Hickey v. Dirks, 133 P.2d 107, 109 (Kan. 1943) (internal citations and quotations omitted).

40. Maxwell, *supra* note 4, at 544–45. "A royalty . . . is less than a full mineral interest in conceptual terms [because] it encompasses only one attribute of such an interest; but it can be more than a mineral interest in economic terms when its share is stated as a share of gross production rather than as a percentage of [lease] royalty." *Id.* Assume, for example, that your rich uncle conveys to you a 1/10th interest in the mineral estate of Blackacre. If an oil and gas well is later drilled pursuant to a lease offering the mineral estate holder a royalty equal to 1/8th of production, then you get 1/18th of that production (because you own 1/10th of the mineral estate, which is entitled to 1/8th of production). *See, e.g.*, French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 798 (Tex. 1995) (emphasizing why a royalty interest conveying an outright fraction is larger than a mineral interest conveying a fraction of a fraction in economic terms). On the other hand, if your uncle conveyed to you a 1/10th royalty interest, then you get 1/10th of the production, period. *See id.*

interests, lease royalty interests, and overriding royalty interests.[41] "[A] mineral royalty [interest] is a passive interest in production" that can be created through a lease but is not tied to a lease and does not require the creation of a lease.[42] A lease royalty interest is an interest in production retained by the mineral interest holder when it grants a mineral lease, with the lessee holding the remaining interest, called a working interest.[43] Any interest created by the working interest is known as an overriding royalty.[44]

Plainly put, a royalty interest is simply a right to production that does not entitle the owner to access the property or minerals or play any role in production.[45] The key to distinguishing a mineral from a royalty interest is the intent articulated in the granting document.[46] This distinction is important because of the economic importance of royalty interests and because the right to receive a royalty is itself one of the facets of mineral ownership, as discussed below.[47]

C. The Five Facets of Mineral Interests

What is so interesting about mineral interests—and what generates the issue identified and discussed in this Article—is the fact that a mineral interest has five distinct rights associated with it.[48] These rights include the right to (1) develop, (2) lease, (3) receive bonus payments, (4) receive delay rentals, and (5) receive royalty payments.[49] And again, what is so unique here is that these rights are true, immutable aspects of mineral ownership.[50] They are not part of the generally evolving bundle of sticks inherent in every kind of property; they are, instead, a distinct right of ownership, each of which

41. William Shelby McKenzie, *Classifying Mineral Interests—Mineral Servitude v. Mineral Royalty*, 23 LA. L. REV. 106, 107 n.5 (1962).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* "The owner of the mineral right has the right of ingress to, and egress from, the land, the right to produce the minerals, the right to participate in the bonuses and delay rentals paid under the terms of any lease. On the other hand, the owner of a royalty right has none of these rights, nor is his consent even necessary for the execution of a lease by the mineral owner, his right being to share in production if and when it is had." Continental Oil Co. v. Landry, 41 So. 2d 73, 75 (La. 1949).

46. The following phrases have been determined to create a mineral interest. A 1/16th "royalty of all the oil, gas[,] and other minerals produced and saved from said premises." Vincent v. Bullock, 187 So. 35, 37 (La. 1939). "[A] royalty interest of 1/256th out of all of the oil, gas, Sulphur[,] and other minerals, that may be produced." Union Sulphur Co. v. Lognion, 33 So. 2d 178, 179 (La. 1947).

47. *See* Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) (citing RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS §§ 2.1–.5 (1st ed. 1971)).

48. French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 797 (Tex. 1995); *see Altman*, 712 S.W.2d at 118.

49. *French*, 896 S.W.2d at 797 (citing *Altman*, 712 S.W.2d at 118).

50. *See id.*

exists independently of the other and each of which can be severed and conveyed separately.[51]

1. The Right to Develop

The mineral interest holder has the right to search for, develop, and remove minerals from the land.[52] This right is absolute regarding the fee simple owner and is only hindered if the mineral estate and surface estate are severed.[53] In a severed estate, the mineral estate is dominant and the surface estate is servient.[54] This means that the mineral estate has the right to use a severed surface estate in a reasonable manner to access the minerals.[55]

2. The Right to Lease

The right to lease is another separate right.[56] If mineral estate owners convey this "executive right," they may not enter any leases on the property even if they are still entitled to other incidents of a mineral interest.[57] The benefits that executive right owners can receive for granting a lease include bonus and delay rental payments.[58]

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51. "A conveyance of a mineral estate need not dispose of all interests; individual interests can be held back, or reserved, in the grantor. However, '[w]hen an undivided mineral interest is conveyed, reserved, or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed.'" *Id.* (quoting Day & Co., Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990)).

52. Humble Oil & Refin. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967); Warren Petroleum Corp. v. Martin, 271 S.W.2d 410, 412 (Tex. 1954) ("Neither can such fact be used as a basis for a presumed finding that the petitioner used more land than was reasonably necessary to its oil operations. . . . Therefore, respondent cannot recover on such theory."); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (holding that despite water being expressly severed in this case and being a part of the surface estate, the mineral estate holder was still allowed to use whatever water was reasonably necessary to pursue the minerals).

53. *See Sun Oil Co.*, 483 S.W.2d at 811.

54. *Williams*, 420 S.W.2d at 134.

55. Christman v. Emineth, 212 N.W.2d 543, 550 (N.D. 1973). The only time a mineral owner is limited when attempting to use the surface is if a surface estate holder is *already* using the surface. Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971). If this occurs, then the mineral estate must grant deference to the use of the surface by the surface estate only if there is another reasonable alternative available. *Id.* ("[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee."). Other than this exception, mineral estate owners have free reign to access the minerals within their estate. *Id.*

56. *French*, 896 S.W.2d at 797 (quoting Day & Co., Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990)).

57. *Id.* What happens if mineral interest owners convey the right to lease the minerals? Can they still develop the property themselves? I was unable to find answers to these questions.

58. *See supra* text accompanying notes 26–30 (discussing the rights of mineral owners).

3. *The Right to Receive Bonus Payments*

A bonus is "the cash consideration paid or agreed to be paid for the execution of the lease."[59] This payment is made in addition to any lease royalties or delay rental payments.[60] Bonus payments are typically an "incentive for a lessor to sign an [oil and gas] lease."[61]

4. *The Right to Receive Delay Rental Payments*

A delay rental payment is a provision within a lease that allows a lessee to make payments extending the life of the lease during the primary term without commencing operations.[62] "The defining characteristic of a delay rental [payment] . . . is that it is an *alternative* to drilling."[63]

5. *The Right to Receive Royalty Payments*

As set forth above, the right to receive royalty payments is solely dependent upon the production of the minerals[64] and is a passive interest to a share of the production.[65] Royalty holders may not develop the land nor may they pursue the minerals—their only right lies in a share of the production of the minerals.[66]

III. PROPERTY LAW AND THE NUMERUS CLAUSUS

To understand the shape of property law, it is helpful to understand the numerus clausus and the confusion that it helps to forestall and push back against.[67] As I have previously discussed, property law is heterogeneous in

59. EnerQuest Oil & Gas, LLC v. Plains Expl. & Prod. Co., 981 F. Supp. 2d 575, 602 (W.D. Tex. 2013) (quoting Griffith v. Taylor, 291 S.W.2d 673, 676 (Tex. 1956)).

60. *Id.*

61. *Bonus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

62. *EnerQuest Oil & Gas, LLC*, 981 F. Supp. 2d at 602.

63. *Id.* at 603.

64. *Mineral Interest*, *supra* note 22.

65. Vincent v. Bullock, 187 So. 35, 40 (La. 1939). "A mineral royalty should be distinguished, as a matter of definition, from a lease royalty and an overriding royalty. A lease royalty is that interest in a share of the production retained by the landowner and/or mineral owners [and that] forms part of the consideration for granting the mineral lease. The remaining interest in production granted to the lessee under a mineral lease is called the working interest. Any royalty right carved out of the working interest is termed an overriding royalty. Neither the lease royalty nor the overriding royalty exists independently of the lease, and both are governed by the law of leases. On the other hand, a mineral royalty is a passive interest in production [that] may be granted subject to a mineral lease, but is a real obligation existing independently of such lease, and can be created without reference to any lease." McKenzie, *supra* note 41, at 107 n.5 (internal quotations omitted).

66. *Vincent*, 187 So. at 40; McKenzie, *supra* note 41, at 107 n.5.

67. *See* Pomeroy, *WPH*, *supra* note 12, at 525.

most respects,[68] though not so when it comes to the system of estates (i.e., the permissible types of property).[69] This is different from other areas of law (such as contract law, for example), making it more difficult to study.

Importantly, it also makes it more difficult to *use* property law because it undercuts certainty and predictability.[70] One cannot know the rights that inhere in a particular "suite of rights" that constitutes a property interest if there are no consistent rules dictating as much.[71] For example, I have previously written about the difficulties regarding vesting document heterogeneity and third-party creditor rights, both of which undercut efficiency and market agency.[72] This heterogeneity is inefficient and expensive.

There is an exception to this confused state—the system of estates. Here, the law of property forms—that is, the kinds of estates that one can create and utilize—is much more consistent, even across different jurisdictions.[73] Often discussed in the context of the numerus clausus, this exception seems to straitjacket parties when it comes to creating new or different kinds of property interests or estates.[74] Of course, the thesis of this Article rests upon the fact that this statement does not apply to subterranean mineral rights, but it does generally apply to surface rights, and the numerus clausus is an important tool in thinking through why this is so (even if I have previously discounted it as an ultimately persuasive explanation, as discussed below).

Merrill and Smith claim that the numerus clausus is a "stealth doctrine"[75] that explains why the system of estates is uniform. Their perception of this theory is based largely on the case of *Johnson v. Whiton* (or, at least, explicated largely in terms of that case),[76] and they claim to derive from that case and their analysis of it a systemic aversion to the informational costs that new property interests create.[77] New forms are too hard to interpret, they say, because it is too hard to tell what rights attach to

68. *See id.* at 525 (creating a taxonomy to describe the high degree of variation in property law among jurisdictions); *e.g.*, John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 1–5 (1986).

69. *See Optimal Standardization*, *supra* note 13, at 23.

70. *See, e.g.*, Cass R. Sunstein, *The Autonomy of Law and Economics*, 21 HARV. J.L. & PUB. POL'Y 89, 89 (1997) ("[T]he enormous contribution of the economic analysis of the law is that it orders debates about law by simply asking how we can minimize the costs of decision and the costs of error."). In a very real sense, the heterogeneity of property law makes the costs of decision very high because each property interaction is potentially new or different. *See* Pomeroy, *SP*, *supra* note 12, at 803–04; Pomeroy, *SVD*, *supra* note 12, at 973–75.

71. *What Happened to Property*, *supra* note 13, at 359.

72. *See generally* Pomeroy, *SP*, *supra* note 12; Pomeroy, *WPH*, *supra* note 12; Pomeroy, *SVD*, *supra* note 12.

73. *See* Pomeroy, *WPH*, *supra* note 12, at 526–27.

74. *See id.*; *see also* Keppell v. Bailey, [1834] 39 Eng. Rep. 1042, 1049 (Ch.); Pomeroy, *WPH*, *supra* note 12, at 526 (citing *Optimal Standardization*, *supra* note 13, at 11–12).

75. *See Optimal Standardization*, *supra* note 13, at 20–23.

76. *See* Pomeroy, *WPH*, *supra* note 12, at 542.

77. *See Optimal Standardization*, *supra* note 13, at 3–5, 9.

different kinds of property interests.[78] I know, for example, what rights you have if I see that you have a fee simple absolute in Blackacre, but I have no idea at all what rights you have if I instead see that you have a "fee Sunday attachis" (a made-up term).[79] Opening the floodgates to this kind of inventiveness would also open the floodgates to cost and expense and would, eventually, cripple one's ability to efficiently assess, acquire, and use real property.[80]

So the numerus clausus is the name given to the courts' organic response to this threat, which is to simply not permit new, inventive property forms. This limitation has a cost—people cannot create the property forms that perfectly suit their needs and desires, but the system balances these competing concerns (informational cost and frustration cost) to reach an "optimal" number of permissible estates.[81]

Now, I have previously argued that this theory—while interesting and elegant enough—is not necessarily persuasive. Though I initially reacted positively to the numerus clausus doctrine,[82] I ultimately rethought my wholesale endorsement of the numerus clausus as a prism through which to see property law, at least insofar as it could serve as a validated concept. Concluding that such a theoretically overbroad but practically under-demonstrated idea was not, in fact, a true driver of the nature of property law, I turned to historic England and the circumstances that influenced the English monarchy and nobility as they shaped modern property law, particularly as it relates to permissible and usable estate forms.[83] The lesson I took from this historic review was that property form

78. *See* Pomeroy, *WPH*, *supra* note 12, at 529.

79. *See id.*; *Optimal Standardization*, *supra* note 13, at 26–27, 27 n.109 (citing Henry Hansmann & Reinier Kraakman, Unity of Property Rights 5–6 (Nov. 17, 1999) (unpublished manuscript) (on file with the *Yale Law Journal*)).

80. *See Optimal Standardization*, *supra* note 13, at 25–26 (relying on Keppell v. Bailey, [1834] 39 Eng. Rep. 1042, 1049 (Ch.)).

81. In some of my prior writing, I have primarily attributed this numerus clausus analysis to Merrill and Smith, but theirs is not the only justification for the systemically closed number of property forms in the common law system. *See* Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, *in* THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 214–15 (Nicholas Mercuro & Warren J. Samuels eds., 1999); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1176–78 (1999).

82. *See generally* Pomeroy, *WPH*, *supra* note 12; Pomeroy, *SVD*, *supra* note 12.

83. *See* Pomeroy, *SP*, *supra* note 12, at 810–11. In brief, because that argument is not directly relevant here, I concluded that historical contests for money and power led to an evolving set of statutes in early English common law that ultimately explained the variable level of homogeneity found in property common law. Historically, this went back to king's ownership of all land and his grant thereof to lords in exchange for "feudal incidents." *See* Roy T. Black, *The Historical Background of Some Modern Real Estate Principles*, 34 REAL EST. L.J. 327, 334 (2005). These lords were subject to the king but could themselves transfer the land to those further down the chain in exchange for their own feudal incidents. *See* Pomeroy, *SP*, *supra* note 12, at 820. The nature of these incidents varied, but they all ultimately benefited the transferring party and so can be viewed as a tax to the suzerain. *See* James M. McElfish, Jr., *Property Rights and Wetlands Regulation*, SA83 ALI-ABA 439, 447 n.54 (1996); David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1015 (2011). This led to a series of contests between the king and the nobility, wherein the king continually tried to limit ownership and rights,

has been shaped by historical economic struggles and battles more than an ephemeral economic doctrine.[84]

But, critical to this Article, that does not eliminate the analytical heft behind the numerus clausus as a normative exercise. Merrill and Smith's informational burden analysis is still useful in thinking through whether property rules are efficient—that is, *whether they are what they should be*.[85]

Information efficiencies may not lead to the simplified suite of estates permitted by common law, but they can aid us in thinking through a parallel issue—the issue of what kinds of mineral estates should be permitted.

IV. THE NUMERUS CLAUSUS AS APPLIED TO MINERAL INTERESTS

To begin this thought exercise, let us remember that the core purpose of property is to convey to others the rights of the owner that inhere in a "thing."[86] In this sense, property law taken as a whole combines to define what we own and what that means. Does this happen (or does it happen efficiently), though, when it comes to mineral interests? The numerus clausus serves as a clarifying prism for answering this in the negative, highlights the costs thereof, and suggests a relatively straightforward (if ultimately impractical) solution.

A. A Clear Violation

Recall that the primary thrust of the numerus clausus argument is that permitting new property types by allowing people to create new property types via customization creates costs that outweigh the benefits of such customization and that courts have thusly and rightly refused to permit this

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and thus ensure a stable taxpayer base, and the nobility responded by just as continually trying to expand their rights and, as such, their base of power and wealth. *See* Meggie Orgain, *Death Comes to Us All, but Through Inheritance, the Rich Can Get Richer: Inheritance and the Federal Estate Tax*, 4 EST. PLAN. & CMTY. PROP. L.J. 173, 175 (2011); Marianne M. Jennings, *Real Property Could Use Some Updating*, 24 REAL EST. L.J. 103, 106 (1995). This contest acted to shape the nature of permissible property interests, and the concept of an "estate" can largely be traced to the *De Donis Conditionalibus*, an early, responsive statutory attempt to legitimize landowners' rights to customize their property rights. *See* Pomeroy, *SP*, *supra* note 12, at 822. "As a result of *De Donis* . . . the medieval lawyers recognized that an entailed fee was somewhat less than a fee simple and that the quantum of an estate had to be measured by its possible duration in time. . . . This recognition led to the conclusion that a fee simple could be comprised of several interests or estates." Mark A. Senn, *English Life and Law in the Time of the Black Death*, 33 REAL PROP. PROB. & TR. J. 507, 519 (2003). The story did not stop there, with a variety of other statutes contesting the issue, including the *Statute Quia Emptores*, passed in 1290, which prohibited subinfeudation. *See* David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1856 (2013). Ultimately, this contest between taxpayers and tax recipients—and the statutes they deployed to aid them in that fight—restricted the nature and number of acceptable property forms, thus creating our concept of ownership as a fixed system of estates. *See* Pomeroy, *SP*, *supra* note 12, at 825, 825 n.138.

84. *See* Pomeroy, *SP*, *supra* note 12, at 826–27.

85. *Id.* at 799.

86. *See id.* at 817.

kind of activity.[87] These costs are informational ones in that property rights are in rem, meaning that owned property must communicate an owner's rights and obligations to everyone else, leading to the core problem with new types of property: they drive up the costs associated with this communication to others.[88]

Another way to understand the cost of communication is to think of it in terms of confusion. Trying to understand new or unusual things—i.e., property forms—is confusing. It is difficult and likely to result in misunderstanding, which takes a lot of energy to avoid. And in this context, the cost is external to the creator in the sense that property owners do not directly bear the costs of misunderstanding their rights given that the obligation to understand and honor others' rights is incumbent on everyone else.[89] So customizable property ends up permitting people who do not bear the costs of confusion to sew confusion whenever it benefits them to do so.[90] This is problematic in any given situation but is particularly problematic when echoed broadly across the property system because it means that misunderstanding is baked into the system. Put differently, confusion *always* reigns because you know that the person you are buying from (or anyone up the chain of title) could have altered the nature of the property you are interested in.

And that is precisely what happens in the mineral estate arena. Owning a fee simple absolute in a surface estate means that you own it outright.[91] You

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87. *Id.* at 807.

88. *Id.* at 808.

89. *See What Happened to Property*, *supra* note 13, at 359; *Optimal Standardization*, *supra* note 13, at 26–28 (citing Henry Hansmann & Reinier Kraakman, Unity of Property Rights 5–6 (Nov. 17, 1999) (unpublished manuscript) (on file with the *Yale Law Journal*)). This is probably true, though I do wonder just how costless confusion is to a property owner. It is certainly costless (or low-cost) to customize your property in the way you want it while you own it without any intention to sell or leverage it. *See What Happened to Property*, *supra* note 13, at 359. However, an owner who has a confusing piece of property will bear a cost once they take it to market because the market will price into the value thereof the lack of clarity about what that thing is (and the concomitant lack of clarity about its value). *See id.* That said, there is an element of mismatch—a flavor of externality, perhaps—associated with permitting present owners to customize their presently owned property to the unavoidable detriment of the market (i.e., present nonowners). *See id.* A potential analogue is the idea of "waste" in that a present possessory owner can extract the value of property through using it, though at the ultimate expense of the future interest holder. *See* Marsha Baumgarner, *What a Waste! What's a Prudent Lender to Do?*, 5 BUS. L. BRIEF (AM. V.) 10, 11 (2008). Similarly, the present possessory owner does, in fact, reduce the value of the property, but they still have an incentive to do so because they recognize the current present value. *See id.*

90. *See What Happened to Property*, *supra* note 13, at 387. And there is, of course, a benefit in having the freedom to do so because you can craft a property right in whatever way suits your needs, similar to the ability to create contracts in whatever way you need. *See* Pomeroy, *SVD*, *supra* note 12, at 975.

91. *See generally Optimal Standardization*, *supra* note 13 (describing the different property interests). There is, of course, a bundle of sticks that exist with respect to all property interests—including even a fee simple absolute. *See* Pomeroy, *SVD*, *supra* note 12, at 987. And the composition of this bundle of sticks can change depending on the situation. *Compare* Jacque v. Steenberg Homes, 563 N.W.2d 154 (Wis. 1997) (protecting the right to exclude), *with* State v. Shack, 277 A.2d 369 (N.J. 1971) (limiting the right to exclude). But these rights—or sticks—are not optional or situational at the instigation of the owner. *See* Pomeroy, *SVD*, *supra* note 12, at 981. That is, an owner of a fee simple absolute interest in a surface

have, then, as close to a complete set of rights in the property as possible, in terms of both duration and qualitative right to control and treat it as your own.[92] Of course, it is possible to curtail these rights. You can agree to restrict your use via contract.[93] Or you can permit servitudes to encumber the land.[94] But either of these routes, though involving the customization of land rights, are relatively non-confusing because they are perceivable and understandable—contracts are only binding on parties to the contract and so are, almost by definition, understood, and servitudes are only binding upon third parties who are on notice of them[95] (meaning those who have an opportunity to read and understand the relevant interests).

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estate (as opposed to an oil and gas interest) has whatever bundle of sticks the law ultimately acknowledges (barring a conflicting interest, such as a servitude). *See generally id.* at 982 (describing the process of ascertaining property rights). That means that to know what they are getting, any third party interested in a surface estate owned by another (i.e., a potential purchaser, a potential lender, any kind of recipient of an interest therein, etc.) simply has to ascertain that the owner has a fee simple absolute. *Id.* at 968. Again, this is not monolithic with respect to any conceivable right in the sense that the law can affect the bundle of sticks that exists as to a given piece of property at a given point in time, but that possibility is simply the inherent power of the law to affect private property rights. *See id.* at 980 n.134. That exists with respect to every right in every legal system. And that is different than the rights of individuals to eccentrically define, redefine, and alter the very nature of what they own. And that ability is what is available to the owner of a mineral estate, who can slice and dice those rights, as it were, in terms of the five facets discussed above. *See supra* Section II.C (describing the five facets of mineral interests). This systemization of an optional set of rights creates a customizable, changeable interest that creates confusion. *See supra* Section II.C (describing the five facets of mineral interests).

92. "The estate in fee simple absolute is the present interest in land that is unlimited in duration." RESTATEMENT (THIRD) OF PROPERTY § 24.2 (AM. L. INST. 2010) (internal quotation marks omitted). Conceive, then, of the qualitative nature of property as being defined in terms of time—so owning for an unlimited amount of time is the most or most extensive interest you can have in land. The analogue for personal property is "absolute ownership." *See id.*; *e.g.*, Robin M. Wolpert, *Preserving and Promoting Minnesota's Recreational Trails:* State v. Hess, 31 WM. MITCHELL L. REV. 1133, 1140 (2005) (quoting Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wines, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 377 (2000)) (indicating the meaning of the fee absolute concept in the context of railroad rights of way by noting that "the railroad acquired fee simple absolute title, allowing it to do virtually anything it wanted with its land").

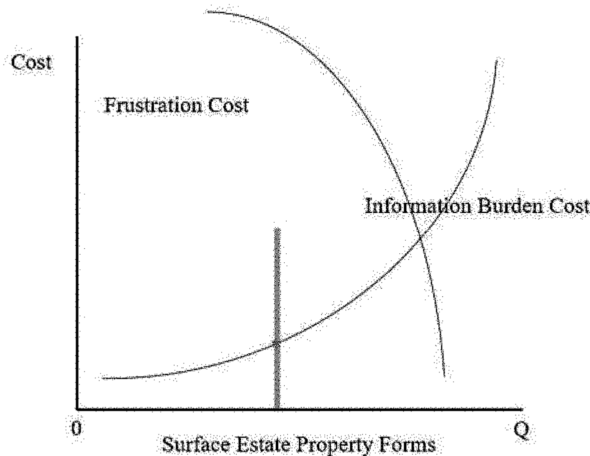
93. *See* Pomeroy, *WPH*, *supra* note 12, at 518 (describing contract modifications).

94. "A servitude is a legal device that creates a right or obligation that runs with the land, and can be, among other things, an easement." 28A C.J.S. *Easements* § 2 (2021) (internal quotations and citations omitted). A classic example is a Covenant, Condition, and Restriction (CC&R). *Id.* If you, as a property owner, suffer a CC&R that encumbers your property (typically by way of recording, thereby putting others on notice and, hence, binding them), then you have, in effect, agreed to honor the terms therein. *See* Pomeroy, *SVD*, *supra* note 12, at 988. Typically, these terms are negative in character and act to restrict one's right in the property. *See* 28A C.J.S. *Easements* § 2 (2021). So a mineral right owner could permit a CC&R prohibiting oil and gas development to be recorded against their property, and that would (unsurprisingly) have the effect of prohibiting oil and gas development. *Id.* The mechanism for this customization of rights, though, is a right that inheres in another via a separate interest (and document) rather than an actual change to the underlying mineral right itself. *See id.* ("Servitude, as used in connection with property, has been defined as a right in the owner of one parcel of land, by reason of [their] ownership, to use the land of another for a special purpose of [their] own, not inconsistent with the general property in such other.").

95. This is because bona fide purchasers are not subject to conflicting interests in land. *See* Hawley v. Diller, 178 U.S. 476, 487 (1900). In more detail, this means that anyone who is not on notice of such an interest—for example, an easement or a covenant—is not bound by it. *Id.* Via the recording acts, this

Owning a fee simple absolute in a mineral estate means something else.[96] It is customizable within the context of the rights to develop, lease, and receive bonus payments, delay rentals, and royalty payments.[97] This means that a fee simple absolute can be any of these things or any potential combination of them. Of course, this is positive for the owner (or immediately preceding grantor, perhaps) thereof; as indicated above, it is nice to have the availability to create an interest that gives you precisely the kind of ownership interest you would like.[98] But, as also indicated above, this is not nice for everyone else—anyone attempting to understand what the owner of the mineral estate owns is obligated to figure it out. In a word, there is confusion.

The difficulty inherent in this condonement can be represented by comparing the state of surface estate property format, in graphic terms of the numerus clausus, as traditionally conceived:



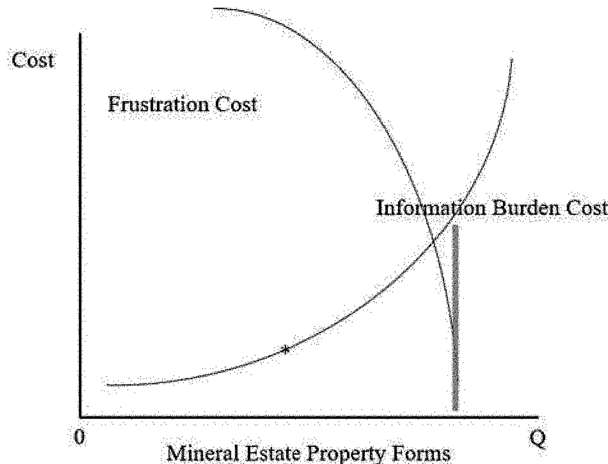
incentivizes parties with these kinds of encumbering interests to record so that everyone else will be on notice and will be bound thereto—leading, ineluctably, to a situation in which everyone who might be bound will examine title at the relevant recorder's office and see precisely what adverse interests effectively encumber the interest at issue. *See generally* Pomeroy, *WPH*, *supra* note 12, at 514 (detailing the recording process).

96. *See supra* Section II.C (describing estates in mineral interests).

97. *See supra* Section II.C (describing estates in mineral interests).

98. This is a simplification. The fracturing of a fee simple absolute mineral interest along five planes is not the same thing as permitting endless variation in any number of different ways. *See supra* Section II.C (describing the five facets of mineral interests). It is, however, vastly more complicated than a plain old fee simple absolute given the many different combinations that are possible when these qualitative choices are introduced as possibilities. *See supra* Section II.C (describing the five facets of mineral interests).

And the same can be accomplished by comparing it to the same graph, altered to reflect the state of mineral estate property format:



The vertical line in both graphs represents the actual number of permissible property forms. The first graph shows the theoretical optimum (purportedly enforced via the numerus clausus) number of property forms, reached by properly balancing the information-burden cost to third parties with the frustration cost to owners (and so minimizing overall cost). The second graph, however, is unbound by the optimum and instead permits many more forms, benefiting owners by permitting them freedom but doing so at the expense of increased information cost (i.e., confusion), which outweighs the increased benefit to owners.

The owners' right to craft mineral estates that fit their needs violates the numerus clausus. We can certainly understand why these owners would want this freedom, but we can also see the negative social impact associated with this unbalanced right. And those costs are not just theoretical.

B. The Costs of Violation

The costs one would expect to see—given the manner in which the numerus clausus has been conceptualized here—are informational in nature. That is, the systematized manner in which a mineral estate owner can change and select the substantive rights associated with their estate (in terms of the five facets discussed above) makes it difficult for third parties to gather information on that property, which burdens the entirety of the relevant property-based economic system.

Let us consider an example. Assume that Rancher *A* owns a fee simple absolute in a large ranch in West Texas, known as Blackacre Ranch. Fortunately for Rancher *A*, oil is discovered thereunder in producing

quantities. Prior to discovery, the ranch was valued at $1,000,000, but thereafter, the value rose to $10,000,000.[99] Given this windfall, Rancher *A* desires to retire to Hawaii, though Rancher *A* would like to keep the ranch for his children given that it has been in the family for nearly one hundred years. Based on what we know about surface and mineral estates, an obvious solution presents itself: Rancher *A* should sell the mineral estate to Oil Production Company, Inc. (Oil Production) for $9,000,000, retain the surface estate, let his kids take over ranching, and move to Oahu. This seems easy and straightforward.

The difficulty comes in, however, when you consider the situation from Oil Production's perspective. If it were buying the surface estate, it would know with certainty what it was getting: an unqualified, unlimited interest in the surface of Blackacre. As the buyer, it could do anything it wanted to the property for an unlimited duration of time.[100] *That* is clarity. *That* is something one can understand, value, bargain for, and utilize.

On the other hand, if Oil Production were buying the mineral estate, there could be substantial uncertainty because a mineral estate is not just a mineral estate. Presumably, the entire mineral estate associated with Blackacre is worth $9,000,000. But we know that, as a matter of course, mineral estates are divisible and customizable, so we cannot be sure that every mineral interest includes all five facets of ownership. What if the mineral estate on sale by Rancher *A* does not include the right to develop? That would obviously affect value in a massive way: the company could find itself the owner of a mineral interest that it cannot mine. Or what if the mineral interest did not include the right to lease (the aforementioned executive right)? If Oil Production were intent on developing the property itself, that might not affect the value as significantly as a lack of the right to develop, but it would still make it worth less for a host of reasons. The problem that I think this example illustrates is that the interest does not communicate the rights it conveys, so society at large (that is, the whole universe of potentially interested third parties) does not know how to value it.[101]

Now, the first and best riposte to this concern as a problem is to point out that the different facets of a mineral interest do not simply come and go on a whim. A mineral interest starts whole at some point up the chain of title,

99. In this example, it is easy to see that the value of the oil and gas interest is $9,000,000.

100. Assuming, as always in this context, no conflicting interests. *See, e.g.*, *Real Property Ownership: The Estate System*, L. SHELF EDUC. MEDIA, https://lawshelf.com/shortvideoscontentview/the-estate-system (last visited Sept. 13, 2022).

101. This is a more fundamental problem than it initially seems given that an inability to value effectively means that economic exchange may not occur and that, more importantly, there are times when it should occur but will not. *See, e.g.*, Thomas Helbling, *Externalities: Prices Do Not Capture All Costs*, INT'L MONETARY FUND (Feb. 24, 2020), https://www.imf.org/external/pubs/ft/fandd/basics/external.htm. If, for instance, Oil Production can make money developing Blackacre if it is worth at least $9,000,000 but the company cannot decide if it is worth that or not, then there will be no development that would have served society were the situation more clear and concrete.

and the owners peel away different aspects of ownership and add on over time, typically via a deed.[102] And these interests are, by definition, discoverable and readable.[103] So, the response would be that there is no real confusion—Oil Production may not be able to get the full mineral interest from Rancher *A*, but it would know that whatever historical conveyance or document that acted to carve that off from Blackacre is recorded and can be studied and assessed.

This is not an apt response for a couple of reasons. First, it does not take into account the ambiguity and vagueness inherent in human communication. Assume that Rancher *A*'s father left to him, in the father's will, "the surface estate of Blackacre and the mineral interest as well, except that Rancher *A* must get the advice of his brother, Rancher *B*, before entering into an oil and gas lease on Blackacre." What is that? Is this a weird, unenforceable restraint on alienation? Is it precatory language that means nothing? Or is it the slicing off of the executive right from Rancher *A* and giving it to Rancher *B*? Does this mean that Oil Production needs to purchase the mineral estate from both fellows? And if so, how does one allocate the $9,000,000 purchase price? There is confusion.[104]

Second, at a more basic level, the argument that third parties like Oil Production can see other claims and thus do not suffer from confusion essentially misses the point. The very fact that one has to think through what a mineral interest is when considering buying it is enough friction to materially harm the information-conveying function that is so theoretically important to the numerus clausus. If you buy a fee simple absolute, you know what you are buying—it is a coherent, singular thing. But you cannot say that when you buy a mineral interest. That means that there is always added cost in the context of this particular kind of mineral interest.

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102. Assume, for example, that *X* owns Blackacre in 1800. The utility of mineral interests is not known until 1910, so nobody contemplates carving the Blackacre mineral interest from the Blackacre surface interest until that time, and at that time *X*'s great-grandson (also named *X*) owns the property. *X* (the great-grandson) deeds the mineral interest in 1910 to *E*, a local entrepreneur who specializes in combining mineral parcels and selling them to individuals with production expertise. So, in 1920, *E* combines the mineral interest with associated adjoining parcels and deeds out all of these interests to *B*, a regional developer with significant ties to larger national companies. However, because *E* does not completely trust *B* when *B* deeds the mineral interest, *B* reserves the right to execute oil and gas leases (i.e., retaining the executive right) and the right to mine gold or silver. So *B*, who now has the Blackacre mineral interest shorn of some of its rights, combines it with other interests and then deeds these mineral interests to Standard Oil but reserves a 1/8 royalty interest, all in exchange for a one-time payout from Standard Oil.

103. Meaning that the deeds referenced in the foregoing footnote are recorded, putting everyone on notice. *See* 28A C.J.S. *Easements* § 2 (2021). Roughly put, under modern recording acts, a claim to property does not affect bona fide purchasers, which means people who are not on notice are not bound by an adverse claim. U.C.C. § 8-105 (LEGAL INFO. INST. 1994). As such, claims are typically recorded and so discoverable—or else they do not affect the third party. *See id.* This means that some third party that claimed the executive right with respect to the mineral interests under Blackacre would lose unless the document that serves as the foundation for that claim was publicly known. *See generally id.*

104. In both this example and in that set forth in *supra* note 102.

And this is what comes through in the case law. For example, in *Anadarko Petroleum Corp. v. BNW Property Co.*,[105] Will Edwards, the owner of the entire mineral estate at issue, conveyed 1/4th of the estate to a fellow named J.A. Haley.[106] Edwards expressly reserved 3/4ths of the estate to himself, along with the executive right.[107] Thereafter, Edwards died, and his interests were portioned out to three parties.[108] One of these parties was the Beckhams, who inherited 4/9ths of Edwards's remaining 3/4ths mineral interest (i.e., a 1/3rd interest in the total mineral estate) plus 4/9ths of the executive right (3/9ths of which was attributable to the 3/4ths interest reserved by Edwards and 1/9th of which was attributable to the 1/4th interest previously conveyed to Haley).[109] After the Beckhams' deaths, their successors executed two deeds conveying their 1/3rd mineral interest to Earl Vest.[110] These "deeds, however, were silent as to the 4/9ths executive right" owned by the Beckhams.[111] Ultimately, the companies Anadarko Petroleum Corp. (Anadarko) and BNW Property Co. (BNW) found themselves in a dispute about whether the deeds conveyed the executive rights reserved by Edwards (and ultimately passed to the Beckhams).[112] The trial court held in BNW's favor, holding that the deeds from the Beckhams' successors, when properly interpreted, were not intended to convey the executive right.[113] The appellate court overturned that holding, stating that "executive rights not expressly reserved or excepted in a deed pass under the deed."[114]

That ruling, while interesting (and dispositive), is a little beside the point here. And that point is that two sophisticated companies found themselves arguing, on appeal, about who owned what in the context of a mineral interest.[115] Once Edwards was able to customize his right—by reserving only part of the mineral interest but all of the executive rights—it became unclear what interests existed and who owned them.[116] That became spectacularly apparent when those fractured rights began to pass down to subsequent generations of successors, which likely led to the conflict at issue.[117] But the core difficulty, really, is that this kind of customization is possible, which means that anyone interested in any mineral estate needs to be concerned about this issue (whether or not there was confusing customization and

105. Anadarko Petroleum Corp. v. BNW Prop. Co., 393 S.W.3d 846, 846 (Tex. App.—El Paso 2012, pet. denied).

106. *Id.* at 848.

107. *Id.*

108. *Id.*

109. *Id.* I would suggest that hardly more need be said about the confusion inherent in how these interests can be carved up. *See id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 850.

115. *See id.* at 848.

116. *Id.*

117. *Id.*

subsequent division among heirs). Because this is possible, a cautious third party must always be concerned about it and approach every mineral interest with an appropriate level of due diligence. Put differently, everyone must always guard against this sort of confusion anytime they interact with a mineral interest.[118]

Another illustrative example is the case of *Lesley v. Veteran's Land Board of the State of Texas.*[119] In this case, Hedrick conveyed approximately 4,100 acres to the Lesleys, reserving to himself a one-half mineral interest.[120] Later on, the Lesleys transferred the surface estate, reserving the other one-half mineral interest.[121] Ultimately, Bluegreen Southwest One, L.P. acquired the entirety of the surface estate.[122] Importantly, the executive right followed the surface estate, meaning that by the time of the last transfer, Hedrick owned half the mineral estate, Lesley owned the other half, and Bluegreen owned the surface and the executive right.[123] Bluegreen developed the land into housing and had no interest in any sort of oil and gas development, going so far as to record covenants, conditions, and restrictions that forbade any such development.[124] After those homes were built (and after the relevant restrictions were recorded), the Barnett Shale was discovered, and the parties discovered that there was as much as $600 million in oil and gas under the property.[125]

But, as discussed, the systematic and intentional fracturing of mineral interests along the fault lines set forth above meant that the owner of that right did not actually have the right to that ownership.[126] This ambiguous arrangement led to disagreement and further confusion when the owners of mineral rights predictably decided that they would like to get their share of that $600 million, and the court responded to the inevitable lawsuit by trying to figure out what rights each party had.[127] Deepening the confusion surrounding the parties' fractured ownership rights, the court held that the executive right might be separated from the mineral interest but that there

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118. "Interacting with a mineral interest" is intentionally broad—it includes, of course, purchasing an interest. *See generally Mineral Interest Types Explained*, U.S. MIN. EXCH. (July 27, 2020), https://www.usmineralexchange.com/blog/industry-news/mineral-interest-types-explained/. But it also includes acquiring any other kind of interest therein—i.e., a leasehold interest, a security interest, a royalty, etc. *Id.* It would also even include tangential actors such as developers of adjacent properties wondering who to interact with regarding development or land use officials wondering about the right party to regulate or punish. *See generally Mineral Rights Buyers in 2022*, U.S. MIN. EXCH. (Dec. 29, 2021), https://www.usmineralexchange.com/blog/sell-mineral-rights/mineral-rights-buyers/. Broadly put, it includes anyone who might need to know who owns a particular mineral interest.

119. Lesley v. Veterans Land Bd. of Tex., 352 S.W.3d 479 (Tex. 2011).

120. *Id.* at 481.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 481–82.

125. *Id.* at 482.

126. *See supra* notes 116–17 and accompanying text (explaining through example that fractured mineral interests create confusion as to true ownership).

127. *Lesley*, 352 S.W.3d at 483.

nevertheless continues to exist a duty between executive right holders and non-executive right holders.[128] Unfortunately, the nature of that duty was never made entirely clear. Different courts have used different terms, and even this court itself used the terms "utmost fair dealing," "prudence and good faith," and "ordinary care and diligence" to describe the duty.[129] Whatever the duty actually is, the relevant point is that by imposing a duty of some kind, the court more or less made the point that the ability to customize and carve up property leads to structural uncertainty.[130] After this case, for instance, it is genuinely not possible to say with a high degree of certainty what rights you have if you have an executive right separated from the mineral rights. Do you owe a fiduciary obligation to the mineral rights owner? Can you enter into a lease (or not) based on what is in your own best interest? Or can you do so only if your best interest aligns with that of the mineral rights owner? Or is it some other formulation?

Again, it is not so much the answer to those questions that we are interested in but the fact that there are such questions. The fact that those are outstanding means that we do not really know what these given rights entail, which means that we cannot properly assess and value them. That is the informational breakdown outlined above, and it is precisely what the numerus clausus intends to avoid.

C. The Solution, Divorced from Reality

The solution is rather banal: simply apply the numerus clausus—or, at least, the numerus clausus principles—to mineral interests by stripping away the five facets inherent therein (the right to develop, the right to lease, the right to receive bonus payments, the right to receive delay rental payments, and the right to receive royalty payments). Make a mineral interest a simple mineral interest in the way that a surface estate is a simple surface estate. When you buy a fee simple absolute in the surface estate of Blackacre, you know what you are buying: the right to use, possess, exclude, etc.—the whole bundle of sticks.[131] Make it the same for a fee simple absolute in the mineral estate of Blackacre. If everyone knew every time that the mineral estate of Blackacre involved the same suite of rights as the surface estate—and not some customizable mix that may or may not involve the right to develop or the right to profit—then there would be more clarity and, almost by definition, more profitable economic exchange.

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128. *Id.* at 488–90.

129. *Id.*

130. *See id.* at 491.

131. Whatever that bundle of sticks is. *See supra* note 91 (explaining that what is included in the bundle of sticks can change from situation to situation).

As stated, the solution itself is rather banal,[132] but that is only because the suggestion seems so ineluctable and pragmatic after the discussion above. That said, it is worth noting what this does not mean. Stripping away the five facets of mineral ownership does *not* mean that it would be impossible to allocate development, royalty, or other rights to others.[133] Just as is the case with surface rights, it is eminently possible to grant others these rights in economically advantageous ways. Doing so (via servitudes or other contractual arrangements), recorded or not, allows owners to customize the rights that are accessible with respect to a particular piece of property. But it does so in a way that is accessible and that fits within the extant structure of property and contractual rights. That is, these kinds of arrangements are only binding (i.e., permissible) against the parties of that property or when they are understandable (non-ambiguous) and recorded.[134] This means that there is no confusion: nobody has to worry about what they are buying or what the very essence of the property interest they are acquiring is because there is only one kind of property interest[135] that is possible (and because any of the kinds of contractual restrictions discussed herein are accomplished in regular and known ways).

So what we end up with is a property interest that is both (1) simplistic in the sense that everyone understands what it is and (2) economically malleable in the sense that the underlying right can be adequately altered to suit the needs of owners and potential owners. To wit: we end up with property interests that are just like surface estates.

V. CONCLUSION

Property and contract law are probably the two most economically important areas of American law. Indeed, it probably does not make sense to even distinguish between the two given how intimately intertwined they are in the economic realm; we make contracts to buy, sell, develop, and create

132. *See* discussion *supra* Section IV.C (explaining that the solution is banal). The precise logistics of this change—i.e., whether this can be done via common law or legislative edict—and the best way to effect such a change are topics for another day.

133. Here, "allocate" includes both a positive and negative allocation of the right in the sense that it is possible to convey to another either the right to develop the surface of Blackacre or the right to restrict the right to develop Blackacre. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972). For instance, the owner of Blackacre can enter into a binding development agreement, granting someone else the right to develop, and even record the agreement, thus putting the public on notice (and, in such a way, virtually "running with the land"). *See id.* Similarly, the owner could grant to another, via a CC&R (or some other kind of servitude), the right to block development of Blackacre and, again, record such agreement, putting the public on notice. *See* 28A C.J.S. *Easements* § 2 (2021).

134. Or, if not recorded, known to the public in the sense that third parties are on notice (either through actual or inquiry notice). 28A C.J.S. *Easements* § 2 (2021).

135. Using fee simple absolute as the estate at issue. *Id.* Of course, you could also have a life estate, defeasible fee, or future interest in a mineral estate, but here we are talking about the inherent nature of the tangible thing that can itself be owned via the kinds of estates recognized under our English-derived common law. *See id.*

property, and our property rights are alienable and ultimately appreciable because of the contracts we can enter into with respect to them. However one views it, though, these two areas of the law more or less drive the American capitalist system because they create and define value, and they do that, in no small part, because they are vehicles for certainty and predictability.[136] The numerus clausus is an attempt to encapsulate and explain this certainty as it exists with respect to the systemic predictability that arises due to the limited types of property that our system will countenance. The closed list, the argument goes, exists because of the economic pressure for clarity.

Whatever one ultimately thinks of this model, it certainly has normative value, as can be seen by applying it as an evaluative tool with respect to mineral estates. These estates, as distinguished from surface rights, are *highly* customizable given the different inherent rights that exist therein, which leads to precisely the sort of costs that the numerus clausus would predict. It is difficult to know what you are acquiring (or alienating) exactly when it comes to this area of the law, which leads to unpredictability, confusion, litigation, etc.—all the things that collectively represent a cost and drag upon our property-driven economy. The solution, then, is to consider the lessons of the numerus clausus, strip away these rights as independently applicable facets of the mineral estate, and treat ownership the exact same as ownership of a surface estate. In that way, everyone would know what they are getting (or have gotten), and everyone could return to focusing on creating utility: the real goal of property law.

136. Or maybe they do that entirely because they create predictability. *See* Pomeroy, *SP*, *supra* note 12, at 802 (discussing property laws in different jurisdictions); Pomeroy, *WPH*, *supra* note 12, at 509 (discussing the same).