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Plural Ownership, Funds, and the Aggregation of Wills

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This Article suggests that common ownership — better described as "plural ownership" to distinguish the phenomenon from semicommons — may usefully be analyzed from a dual perspective. Plural ownership may simultaneously be seen on the one hand as an aggregation of individualized rights, duties and intentions, and on the other as giving rise to a real entity with a group mind and corporate rights and duties distinct from those of the individual owners. For the purposes of understanding this dualism, the most developed and interesting form of plural ownership is the trust fund with multiple controllers and beneficiaries, an ancient device that now serves as the bedrock of modern capitalism. The fund is here subjected to legal, historical and philosophical scrutiny to uncover how group personality is generated by plural ownership in the absence of formal legal incorporation.

INTRODUCTION

Plural ownerships, like all plural social activity, raise the question — what is the quality of intention of persons acting as a group? Does the group simply aggregate the several wills of the participants? Or is some overarching intention, distinct from that of the individual actors, to be discerned in the common activity? One could look into the empirical solutions developed

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in the law, discovering how group ownerships generate powers, rights and duties that can be common, joint or several. The nature of the plural wills can then be traced back from the legal results. There may be no unifying theory to be found; lawyers will typically evolve piecemeal solutions, with tenants in common differing from beneficiaries under a discretionary trust or partners in marriage, and with the law of criminal conspiracy yielding different solutions than the law of company directors. But the pragmatic, lawyer's answer can be supplemented by new perspectives. One can view the problem through the lens of philosophy, analyzing the logical possibilities of aggregate and group intentions. And one can also scrutinize the historical evolution of aggregate bodies and the theories used to describe them. This Article offers some new leads in this theoretical project.

A prescient analysis of the group mind/group ownership problem was offered by Frederic William Maitland in his great work *The History of English Law Before the Time of Edward I*, published in 1895:

The student of the middle ages will at first sight see communalism everywhere. It seems to be an all pervading principle. Communities rather than individual men appear as the chief units in the governmental system. A little experience will make him distrust this communalism; he will begin to regard it as the thin cloak of a rough and rude individualism . . . communal liability . . . is merely a joint and several liability. . . . A right of common . . . may be an individual's several right . . . [R]ights given by the manorial custom . . . are several rights given to individuals . . . This is not communalism; it is individualism *in excelsis*.¹

Maitland seems here to be affirming the basic individualistic structure of the legal-social world he found in medieval England,² yet he was by no means a conventional liberal in his worldview, nor was he entirely a methodological individualist in his scholarship.³ His intellectual career began in ethics and

1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 616-23 (2d ed. 1898) (1895).

2 An interpretation pursued in ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY, PROPERTY AND SOCIAL TRANSITION* (1978).

3 Joshua Getzler, *Law, History and the Social Sciences: Intellectual Traditions of Late Nineteenth- and Early Twentieth-Century Europe*, 6 *CURRENT LEGAL ISSUES* 215, 242-48 (2003).

philosophy rather than in history and law, and in later life he accepted the German metaphysical theory that group minds could emerge through owners or other actors merging their actions for a common purpose, a theory explored at length earlier in that same *History*:

Every system of law that has attained a certain degree of maturity seems compelled by the ever-increasing complexity of human affairs to create persons who are not men, *or rather (for this may be a truer statement) to recognize that such persons have come and are coming into existence*, and to regulate their rights and duties.

...

The core of the matter seems to be that for more or less numerous purposes some organized group of men is treated as a unit which has rights and duties other than the rights and duties of all or any of its members. What is true of this whole need not be true of the sum of its parts, and what is true of the sum of the parts need not be true of the whole.⁴

Maitland thus set out a conundrum: that communal institutions represent an aggregation of the rights, interests, powers and liabilities of individuals, but also that group action can generate persons prior to positive law that demand legal recognition. I will explore the conundrum here mainly by discussing the legal conception of the fund, which may be denoted as a pool of assets subject to multiple ownership powers and claims. The fund of multiple assets provides a useful focus not because the simpler plural ownership of single assets is unimportant, but because legal and social activity has congregated more thickly about multiple ownership of multiple assets, and so has generated the more complex and interesting results. Moreover, many singular objects of ownership such as land and chattels begin to exhibit fund-like qualities once the law begins partitioning use and exclusion rights between owners, whether concurrent or successive.

I will derive from the legal phenomenon of the fund three linked arguments:

4 POLLOCK & MAITLAND, *supra* note 1, at 486-97 (especially at 486-88) (emphasis added) (passages notably expanded in the second 1898 edition); *see also* 3 FREDERIC WILLIAM MAITLAND, *Moral Personality and Legal Personality*, in COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 304 (Herbert Albert Laurens Fisher ed., 1910); FREDERIC WILLIAM MAITLAND, *THE CORPORATION AGGREGATE: THE HISTORY OF A LEGAL IDEA* (1893), *discussed in* David J. Seipp, *Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural* (2007) (unpublished manuscript, on file with author).

- that a network of *ex lege* powers, rights and obligations are generated by plural fund ownership;
- that the aggregation of individual wills within plural ownerships can be seen to yield a separate *persona* or group mind shaped by the network of legal powers, rights and obligations, whether this *persona* is formally recognized by positive law or not;
- that the *persona* generated by plural ownership focuses collective decision-making into a coherent will addressed to the outside world, and so creates a balance between committing co-owning individuals so as to help them achieve their collective goals, and ensuring distributive fairness between those individuals as they interact within the group.

The personality theory of plural and fund ownership that I evoke may seem alien and counterintuitive in our modern liberal world. Yet even in the 21st century we might find a revival of *fin-de-siècle* collectivist concepts useful. To make space for these concepts, it will be helpful next to historicize the dominant concept of liberal property, and show how this compelling conceptual and ideological artifact⁵ is connected to the legal phenomena of plural and communal property. Plural ownerships have had a pervasive role in legal and social practice, and the conventional opposition of liberal property and commons begins to appear as a modern superimposition, distracting from a more deeply communitarian property reality. It is the legal structure of that communitarian practice that I wish to uncover.

I. LIBERAL PROPERTY, COMMONS, AND PLURAL PROPERTY

John Locke constructed his naturalist theory of property in 1679 or thereabouts as a foil against Hobbesian and patriarchalist theories of the state in the run-up to the Glorious Revolution. Locke's dual theory of appropriation and labor, as the bases of property anterior to the existence of the state, drew some of its normative vocabulary from extant Civilian and common-law reasoning. Political theorists before 1700 commonly pressed into service ideas found in the work of the Italian and French commentators (notably *occupatio* and *specificatio* as original modes of property acquisition, being a medieval restatement of Roman classical law). It is evident that Locke's near-contemporaries Grotius and Pufendorf drew from the same legal stock for their own theories of property, though Locke's account of the

⁵ See David Schorr, *How Blackstone Became A Blackstonian*, 10 THEORETICAL INQUIRIES L. 103 (2009).

entrustment of natural rights to a positive and accountable state resonated with the history of English feudalism and monarchy.⁶

Locke's argument in the *Second Treatise of Government* launched a long-breathed debate over the justification of liberal property, which may be specified as a single will dominating assets to the exclusion of others and wielding a full spectrum of control powers, immune to communal regulation save by contractarian consent.⁷ Liberal property comprised much more than simply a convenient resistance theory for the late seventeenth-century English gentry; it lay at the heart of a new theory of human psychology and personality, labeled by C.B. Macpherson as possessive individualism.⁸ Liberal property could serve a multitude of tasks: in Europe it was a device to dissolve feudalism and localism and so build market societies overseen by nation-states;⁹ whilst in the colonized world beyond Europe it could justify expropriation of native titles by white settlers.¹⁰

In a modern age, concerned more with the balance of economic freedom within the regulatory state, liberal property has been defended as promoting autonomy,¹¹ efficiency¹² and justice.¹³ Critics point easily enough to the alienation, coercion and disutilities that liberal property can bring; they

6 Buttressed by a strong theological dimension underpinning Locke's egalitarian political thought: JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT* (2002). The links between Lockean social contract theory and the "classical" republicanism of the 1640s are more tenuous.

7 ALAN RYAN, *PROPERTY AND POLITICAL THEORY* (1984); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); STEPHEN R. MUNZER, *A THEORY OF PROPERTY* (1990); JAMES E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); and JAMES W. HARRIS, *PROPERTY AND JUSTICE* (2002). For law-and-economics perspectives, see *ECONOMICS OF PROPERTY LAW* (Richard E. Epstein ed., 2007).

8 CRAWFORD B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962). The theory continues to inform the work of some analytical Marxists. See GERALD A. COHEN, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* (1995).

9 A key text in this argument is JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* (1990), stressing the republican content of German legal thought before 1848. See also Peter B.H. Birks, *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, 1985 *ACTA JURIDICA* 1.

10 STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005); and STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* (2007).

11 HARRIS, *supra* note 7.

12 Harold Demsetz, *Towards a Theory of Property Rights*, 57 *AM. ECON. REV.* 347 (1967).

13 ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 149-231 (1974).

see property not simply as a natural right fully formed prior to the state, but as a positive institution that may be subjected to endless reformation for utilitarian or other goals.¹⁴ Defenders of private property have riposted that the alternatives to a liberal property regime would be a grossly inferior no-property system — either a brutish state of nature,¹⁵ or a collectivist world where individual access to resources was constantly subjected to intrusive group politics, or where distributions were effected by unstable coalitions of rent-seekers. Garrett Hardin injected a still harsher note into the modern debate, arguing that the most likely escape route from a tragic unregulated commons was the command-economy techniques of coercive state power. His main concern was to constrain fertility and population growth,¹⁶ but he also argued that material resources generally could be regulated by privatization and extension of property rights,¹⁷ and it is this privatization message on the margin of Hardin's argument that has wielded the greater influence.

Property theory today has largely escaped from Hardin's intellectual trap — the stark triadic opposition of property/individualism *versus* no-property/anarchy *versus* collectivism/state control. The game has shifted: theorists now give serious attention to holdings in Western law that permit a blend of open and stinted access within more or less integrated and bounded groups. These holdings have been denoted variously as common pool resources,¹⁸ limited commons,¹⁹ semicommons,²⁰ liberal commons,²¹

14 A.V. Dicey correctly identified Benthamism as ultimately opening the door to collectivism and socialism. ALBERT VENN DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 303-10 (2d ed. 1914). On utilitarian skepticism concerning natural property, see Joshua Getzler, *Theories of Property and Economic Development*, 26 J. INTERDISC. HIST. 639 (1996).

15 Though the state of nature may meet the formal efficiency measures of a liberal economy: Michele Piccione & Ariel Rubinstein, *Equilibrium in the Jungle*, 117 ECON. J. 883 (2007).

16 Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) [hereinafter Hardin, *Tragedy*]; GARRETT HARDIN, THE OSTRICH FACTOR: OUR POPULATION MYOPIA (1999).

17 Hardin, *Tragedy*, *supra* note 16.

18 ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Elinor Ostrom, *Private and Common Property Rights*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS § 2000, at 332-79 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

19 Carol M. Rose, *The Several Futures of Property*, 83 MINN. L. REV. 129 (1998); CAROL M. ROSE, PROPERTY AND PERSUASION (1994).

20 Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000).

21 Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001).

and so on.²² They are celebrated as the intermediate institutions between state and market, showing how property can present a social face. A more austere definition might align these forms of property with the economists' category of club goods,²³ that is, excludable but partially non-rivalrous goods, allowing concurrent enjoyment from within the ownership group. The extra contribution of the "limited commons school" is to go beyond economic calculation as the motor of institutions and to explain how a mix of legal and social norms, and behind that a blend of individualistic and solidaristic motivations, can successfully sustain a "comedy of the commons."²⁴ This provides a more psychologically nuanced view of how people in communities experience and exercise property rights; they do not spend their time defending and trading individual entitlements.

We can isolate a formal subset of limited commons, encompassing common and joint ownerships, which may be described as "plural ownerships."²⁵ Roger Smith uses the phrase to denote concurrent and successive rights to enjoyment of land, but here it will be used in the Civilian sense of *condominium*, where each owner within the group has access within defined limits to use and control of the asset, and where the owners either jointly or severally have rights to exclude third parties by vindicatory actions. For third parties on the outside looking in, plural ownerships are a special type of private exclusory property where the excluding owners form a group. From the inside, plural property accords each class of owner within the group a defined scope of control powers over, or stinted access to, the assets.²⁶ Common-pool resources, semicommons, and limited commons overlap with,

Their argument was presaged in Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

22 If any single contributor is to be singled out for effecting this shift in focus, at least in U.S. legal discourse, Carol M. Rose would spring to mind; see the handsome tribute by Michael Heller, *The Rose Theorem*, 18 YALE J.L. & HUMAN. 29 (2006). My own historical work on water rights, whilst disagreeing with Rose's empirical interpretations, has been deeply influenced by her blend of historical, legal and economic analysis. JOSHUA GETZLER, *A HISTORY OF WATER RIGHTS AT COMMON LAW* 336-42 (2004).

23 James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965).

24 Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). For a perceptive study of how extra-legal stinting of the commons might work in practice, see Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384 (1996).

25 ROGER SMITH, PLURAL OWNERSHIP 3-8 (2005).

26 Rose, *supra* note 19.

but are not coterminous with plural ownerships, as persons with access to common pools or limited commons may not have exigible rights against outsiders and hence are not properly to be described as owners of property, in strict legal terms. Indeed this denial of the property label is axiomatic since much of the point of identifying common pools and limited commons is to show how these mechanisms are maintained by non-legal norms and not only by legal sanctions. There are always borderline cases; to take an old example, commoners enjoying appendant or appurtenant rights to pasture, piscary, turbary or estovers in the medieval economy could not readily use proprietary claims against interlopers; they might have damage-driven tort claims or public nuisance claims or feudal or police actions, but not full-blooded property rights.²⁷ To take a modern instance, fishery license-holders may ask their state to complain to another state or to an international agency where outsiders intrude on common pools, but they may not themselves impound interloping fishing boats unless specially armed with a franchise of public power to do so. It would confuse matters to describe plural ownerships as identical to closed or limited commons, since too many of the indicia of property are missing; access to and control over the assets may be so constrained as to deny some owners use-rights yet accord them exclusory rights,²⁸ which inverts the position usually found in common pool resources. Plural ownerships and limited commons may resemble each other, but the differences are important.²⁹

The rediscovery of non-individual property has excited much recent scholarly discourse, but practical lawyers have never lost sight of the ubiquitous phenomena of commons institutions and plural ownerships, whatever the nature of official or elite legal ideology. Indeed, plural ownership institutions represent a large bulk of lawyers' conceptual stock-in-trade. One can adapt Blackstone's rhetoric³⁰ to claim that nothing comes more naturally to mankind (or to lawyers) than that shared and mutual dominion

27 GETZLER, *supra* note 22, at 167-69; the right of gleaning was a key case. See Peter King, *Legal Change, Customary Right, and Social Conflict in Late Eighteenth Century England: The Origins of the Great Gleaning Case of 1788*, 10 LAW & HIST. REV. 1 (1992).

28 HARRIS, *supra* note 7, at 23 *passim*, distinguishes interests protected by trespassory rules from "half property" and "mere property" with limited exclusory rights, and these from "full blooded ownership."

29 As the Roman lawyers recognized. See Joshua Getzler, *Roman Ideas of Landownership*, in LAND LAW: THEMES AND PERSPECTIVES 81 (Susan Bright & John Dewar eds., 1998).

30 Cf. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1 (1765-69).

which a group claims and exercises together over assets.³¹ One of the important tasks of property theory, then, is to analyze the legal as well as the social techniques of mutual governance found within plural ownerships.³²

II. SINGLE AND MULTIPARTITE FUNDS AS MODES OF AGGREGATING OWNERSHIP

Funds are a type of (generally) plural ownership that provide the legal framework for vast agglomerations of intangible capital in the modern economy, encompassing banks, mutual funds, hedge funds, private equity, unit trusts and pension pools. The assets of partnerships and corporations may also be described as funds in their operation. The fund may be hypermodern in function, but it has distant roots in a simpler legal and economic culture. It is a piquant point that capitalism past a certain rudimentary level of development depends on antique forms of collective ownership for its legal and institutional bedrock, a theme that exercised Weber, amongst others.³³ Here we must attend more closely to legal detail.

A. Single-Owner Funds

The simplest instance of the fund (from the Latin *fundus*, or bottom, base, ground, basis, foundation, and also denoting a farm or estate) is not a common property institution but a singular *dominium* over a collection of assets. It has come to develop further connotations in lawyers' parlance: a *shifting* set of assets, often monetary or intangible, where the fund-owner owns all those assets falling within or contained by the fund from time to time.³⁴ As James Penner has pointed out, so simple a concept of fund is really synonymous with a patrimony, meaning those things an individual owns and that are available to his creditors or heirs.³⁵ But the terminology of property

31 GETZLER, *supra* note 22, at 193 *passim*.

32 Hanoch Dagan & Michael Heller, *Conflicts in Property*, 6 THEORETICAL INQUIRIES L. 37 (2005).

33 See Getzler, *supra* note 14; Joshua Getzler & Michael Macnair, *The Firm as an Entity Before the Companies Acts*, in ADVENTURES OF THE LAW 267 (Paul Brand, Kevin Costello & W. Nial Osborough eds., 2005) (also published as Oxford Legal Studies Research Paper No. 47/2006, 2006, available at <http://ssrn.com/abstract=941231>).

34 BERNARD RUDDEN & F.H. LAWSON, THE LAW OF PROPERTY 45-56 (3d ed. 2002); Bernard Rudden, *Things as Thing and Things as Wealth*, 14 O.J.L.S. 81 (1994) [hereinafter Rudden, *Things*].

35 James E. Penner, *Duty and Liability in Respect of Funds*, in COMMERCIAL LAW:

shifts according to which aspect of the institution is being described — the Romans spoke of things *in patrimonio* regarding transmissible rights; claims *in rem* when looking at exigibility; *res* or things *in bonis* when denoting assets of value; things *in commercium* regarding assignable assets in the hands of a person of full legal capacity and standing in the civil law; *possessio* when regarding legally-protected control; and so on.³⁶ By contrast, the common law never developed a precise vocabulary to discriminate between these aspects of property. The patrimonial idea does usefully identify one proprietary facet of the fund, but the description does not capture other significant features.

The fund can further be specified as an envelope for those shifting assets owned by an individual and partitioned for a particular purpose or for a particular beneficiary interest. The owner by dedicating the assets to a particular use is typically a trustee in common-law systems. The fund-as-envelope dedicated to a particular use under a trust can be seen as a convenient legal shorthand for the collection of assets owned separately within the fund. Substitutions can then be explained as the exercise of a power to buy, sell, or otherwise exchange assets, where the claim to the value of assets leaving the fund is engrafted onto assets coming into the fund; in the manner of a real subrogation the incoming items are applied to the purpose or use that formerly encumbered the outgoing assets.³⁷ Instead of substitution it is also possible to regard outgoing assets as remaining within the fund partition even though they are controlled by a new owner-trustee; he or she must respect the prior claims and treat the assets as if they still belonged to the fund, possibly in a new parallel fund dedicated to the same use or purpose.

On this model, ownership inheres in the items of the primary trust fund one by one and the fund itself has no legal status.³⁸ However this is not the only possibility. A fund is sometimes "reified," that is, "treated as a thing," as

PERSPECTIVES AND PRACTICE 207, 210-12 (John Lowry & Loukas Mistelis eds., 2006).

36 WILLIAM WARWICK BUCKLAND, A TEXT-BOOK OF ROMAN LAW 96, 180-232 (Peter G. Stein rev., 3d ed. 1963).

37 Rudden, *Things*, *supra* note 34, at 86-91.

38 SARAH WORTHINGTON, PROPRIETARY INTERESTS IN COMMERCIAL TRANSACTIONS 79-86 (1996); compare Richard C. Nolan, *Property in a Fund*, 120 LAW Q. REV. 108, 130-36 (2004), who describes the fund as assets subject to a power of sale coupled with overreaching. The overreaching doctrine itself is a modern construct based on the equitable doctrine of conversion which was an accounting device applied to administration of estates and legacies; it does not provide a conceptual explanation of the substitution phenomenon, only a historical label. J. DYSON HEYDON & MARK J. LEEMING, JACOB'S LAW OF TRUSTS 653-65 (7th ed. 2006); RODERICK P. MEAGHER,

an object of ownership in itself.³⁹ Thus one "owns" a share portfolio without knowing or caring what the components of the portfolio are; one chiefly cares that the custody of circulating assets is secure, the management prudent, and the capital risk balanced. Where the fund is "ring-fenced," "asset partitioned," or treated as a separate "patrimony" available only to designated claimants, then the law formalizes the lay sense that the fund stands as an object of ownership in itself, separate from its components and moreover separate from other assets in the hands of the fund owner, and also immune from liabilities attracted in some sphere of activity outside that of the fund's purpose.

The debate over whether the fund is properly to be regarded as an object of property separate from its contents has recently exercised English lawyers analyzing whether a fixed charge can be placed over a collection of rights to future property, thus inventing a new form of functionally floating security exercised over circulating corporate assets and immune to statutory redistribution on insolvency.⁴⁰ The conceptual issue of reification of the fund appears in many other guises; it is worth recalling that in past centuries the debate took place in a political rather than a business or financial context. Medieval lawyers struggled to explain why a *dominus* being the overlord of territory could allow titles to be vested in lower lords and tenants of the property in a Romanistic conceptual world where relativity of title was impossible.⁴¹ One solution was to resolve the lower interests as *iure in re aliena*, as adjacent intangible property rights that did not detract from the overall sovereignty of the ultimate *dominus*.⁴² Another was to postulate that sovereignty as a corporate control of a fund. Bartolus (1314-1357), the leading

J. DYSON HEYDON & MARK J. LEEMING, EQUITY: DOCTRINES & REMEDIES 1079-90 (4th ed. 2002).

39 I have relied here on the discussion in Penner, *supra* note 35.

40 COMPANY CHARGES: SPECTRUM AND BEYOND (Joshua Getzler & Jennifer Payne eds., 2006).

41 The debate can be carried back into classical law — see the discussion of the "Kaser thesis" in HERBERT FELIX JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 146-55 (3d ed. 1972). Another key source is Baldus's late fourteenth-century commentary on the twelfth-century *Libri Feudorum*. Henry de Bracton's convoluted account of the relativity of feudal titles within the common-law system is examined in GETZLER, *supra* note 22, at 49 *passim*.

42 Robert Feenstra, *Dominium and ius in re aliena: The Origins of a Civil Law Distinction*, in NEW PERSPECTIVES IN THE ROMAN LAW OF PROPERTY 111 (Peter B.H. Birks ed., 1989); PETER G. STEIN, ROMAN LAW IN EUROPEAN HISTORY 61-67, 119-20 (1999).

jurist and commentator of his time, resolved the sovereignty of the emperor and the republican self-rule of Italian city-states thus:

I say that the emperor is the lord of the entire world in a true sense. Nor does it conflict with this that others are lords in a particular sense, for the world is a sort of *universitas*. Hence someone can possess the said *universitas* without owning the particular things within it.⁴³

"*Universitas*" is usually translated as corporation, but "fund" is a possibly superior reading. Magnus Ryan puts the point:

Contrary to what is occasionally implied in more general studies, there was no readily available theory of human corporations in Roman law. Roman law is, in fact, obstinately unresponsive to the attractions of treating groups of people as corporate individuals. The expression *universitas* more often denotes a collectivity of things, rights, and obligations in Roman law, than people.⁴⁴

It may be that Roman law, with its mature concepts of plural ownership, simply did not need a more developed theory of the corporate person holding on behalf of its membership; we shall broach some of the details of this shortly. But we can also invert the argument and state that reification of a fund as a collection of assets, a *universitas*, especially one with plural ownership, creates a legal *persona*, whether or not a higher legal authority made a grant of legal personality, and whether or not the law consciously describes it as such.

43 Bartolus, *Commentary on D.6.1.pr*, in BARTOLUS SUPER PRIMA PARTE DIGESTIS VETERIS fol. 172rb (Lyon, 1505), cited in Magnus Ryan, *Bartolus of Sassoferrato and Free Cities*, 10 TRANSACTIONS ROYAL HIST. SOC'Y (6th Ser.) 65, 71 (2000); see also Joseph P. Canning, *Ideas of the State in Thirteenth and Fourteenth-Century Commentators on the Roman Law*, 33 TRANSACTIONS ROYAL HIST. SOC'Y (5th Ser.) 1 (1983).

44 Ryan, *supra* note 43, at 84; see ALAN WATSON, *THE LAW OF PERSONS IN THE LATER ROMAN REPUBLIC* (1967). Evidence of some limited classical recognition of artificial legal personality is adduced in WILLIAM H. RATTIGAN, *DE JURE PERSONARUM; OR, A TREATISE ON THE ROMAN LAW OF PERSONS* 197-217 (London, Wildy & Sons 1873); and PATRICK W. DUFF, *PERSONALITY IN ROMAN PRIVATE LAW* (1938); by contrast, medieval Romanistic law was more favorable; for an English echo, see 3 HENRY DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIA* fols. 207-08, at 128-30 (Samuel E. Thorne ed., 1968-77).

B. Multiple-Owner Funds

A fund, which begins as the singular ownership of a group of assets ("I keep all my jewelry and precious *objets* that I own from time to time in a bank vault, as a fund for my children's education") will often have the added features of plural ownership. One could pursue the conventional Hohfeldian path of disaggregating the strands of obligation that are held to construct multital claims, or follow Honoré and speak of the divided incidents of ownership.⁴⁵

I will move in the opposite direction and show how aggregation of claims to things can generate new legal forms of combinative ownership.

In the first step away from an undivided patrimony, a fund can involve a single manager or managing owner with title and control powers, holding as trustee for a single beneficiary or beneficial owner to whom the manager is accountable. Or there can be multiple managers such as trustees with shared title and control powers, holding for multiple beneficial owners who in turn share fixed or variable beneficial claims. The fullest analysis of the fund would therefore require descriptions of the relationships of the managers or control-owners *inter se*, of the beneficial owners' relationships *inter se*, and of the relationships between the control-owners and the beneficial owners. A further dimension is added where parties inhabit two distinct roles: a controller can simultaneously be a beneficiary. Dual controllers and beneficiaries can substitute for any of the parties within privity of the fund. Thus a partner can simultaneously be a controller and a beneficiary of the partnership stock, and will owe her loyalty and duties of account and of performance to the partnership group of which she is a member.

In order to make sense of how changing assets can be subject to defeasible but overlapping real claims, it will be necessary to specify how control owners and beneficial owners each can vindicate against third

45 Hohfeldian analysis of property rights is set out and critiqued by HARRIS, *supra* note 7, at 120-25. A.M. (Tony) Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (Anthony G. Guest ed., 1961), provides an alternative account based on indicia of ownership as control; unlike Hohfeld, Honoré defends the distinction of *in rem* as generally applicable to obligees regardless of status or position as against *in personam* rights with narrow exigibility: A.M. Honoré, *Rights of Exclusion and Immunities Against Divesting*, 34 TUL. L. REV. 453 (1960). Penner describes both Hohfeld and Honoré as founders of the "bundle of rights" thesis of property, despite their radical differences: James E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996). For a stout defense of the Hohfeldian view, see Pavlos Eleftheriadis, *The Analysis of Property Rights*, 16 O.J.L.S. 31 (1996).

parties who interfere with rights to assets, where the interference is either through straight-out trespass or by the taking of an inconsistent derivative title. Finally, owners of the fund can be the obligors or obligees of third parties in contract, tort or other personal claims. The procedural quality of claims is not logically specified by the nature of the primary rights, and indeed is unstable within individual legal systems and varies between legal systems. The proprietary nature of shareholder claims within a corporation is a case in point.⁴⁶ Thus the fund swiftly generates complex privities of estate and obligation, which may be posited across an almost infinite extent of relationships. These complexities demonstrate the intrinsic difficulties of specifying property simply as a set of Hohfeldian correlative rights and duties; Hohfeld's multital claims can logically be seen as a secondary level of intangible proprietary rights and claims ultimately deriving from person-thing ownership relations, and are not identical to and do not comprise the primary rights themselves. Indeed legal rights including ownership can have a definite existence before duties are imposed on any identifiable person.⁴⁷

C. The Model of Ownership Subject to Obligation

The net of relationships between control owners and beneficiaries may or may not involve any shared or split property or title, in the sense that control can exist without a direct right to vindicate, and likewise benefit can exist without a direct right to vindicate. Instead of assigning real claims to both controller and beneficiary, powers and obligations may be joined to proprietary rights in order to distribute claims to the assets. Thus a contractual bailor (a party transferring assets under the civilian contracts *re* or the common-law contract of bailment) does not have real title or protected possession; the contract and delivery vests ownership in the bailee, leaving the bailor with only an obligational claim to the asset that cannot be proved against a third party.⁴⁸ By contrast, the agent can sue to recover possession from trespassers and has power to change title regarding successors, yet does

46 ARIANNA PRETTO-SAKMANN, BOUNDARIES OF PERSONAL PROPERTY: SHARES AND SUB-SHARES (2005).

47 PENNER, *supra* note 7.

48 A bailor may have a tort claim if he has an immediate right to possession as a base; but this is not vindication; *see* *Transcontainer Express v. Custodian Security*, [1988] 1 L.L. Rep. 128; *East West Corp. v. DKBS 1912*, [2003] EWCA (Civ) 83, [2003] 2 All E.R. 700. In *OBG Ltd v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1 (appeal taken from Eng.), Lord Nicholls and Baroness Hale suggest that interference with contractual or economic value alone can open the gate to a tort claim in conversion, but the majority affirmed the orthodox rule that there must be a chattel in possession

not have an ownership claim outside possession, cannot claim benefits, and must account to the principal who is the owner.⁴⁹

Trusts raise difficult questions as to whether we view the control-owners or the beneficiaries as the "owners" of the assets, in the sense of identifying who ultimately wields the powers of vindication against third parties. One could plausibly describe the trustee-controller, or the trust beneficiary, or both, as owners having exclusory powers widely exigible against third-party takers; in that sense they are concurrent or parallel owners, though the beneficiary may need to exercise the trustee's title in order to act against simple trespassers rather than derivative takers.⁵⁰ One resolution of the split-title trust is to state that neither party in isolation is really an owner; one party may have a title but cannot wield it as a full owner in the sense of having a unilateral power to exclude and being able to exercise those exclusory powers independently of the will of another;⁵¹ whilst the other party may have only personal rights to direct the exercise of real rights in the hands of another and benefit from that exercise.⁵² The picture is further blurred by the power of trust beneficiaries severally or collectively to assign their interests, and to act in concert so as to collapse a delegate trustee's title and destroy successive interests; Gregory Alexander's studies of nineteenth-century trust law have shown how courts wavered in permitting beneficiaries such strong powers to achieve ownership by unilateral action.⁵³

(including a negotiable instrument embodying contractual value) for a conversion to operate.

49 Leigh v. Aliakmon, [1986] 1 A.C. 785 (H.L.) (appeal taken from Eng.) and MCC Proceeds v. Lehman Brothers International, [1998] 4 All E.R. 675 (C.A.), holding that an equitable owner cannot sue in negligence, conversion or other common-law tort claim founded on his own right to seek possession; nor can an equitable owner bring a tort claim operating through the higher legal title of the trustee against a successive legal owner who took title in good faith. Cf. Morlea Professional Services Pty Ltd v. Richard Walter Pty Ltd (in liq), [1999] F.C.A. 1820 (Fed. Ct. Austl.), where the court seemed to envisage the beneficiary's constructive trust claim in equity against a third-party recipient as a "direct right" and not a "derivative right" through the trustee's title; hence bars to the trustee title did not affect the beneficiary's claim.

50 Cf. Richard C. Nolan, *Equitable Property*, 122 LAW Q. REV. 240 (2006).

51 James E. Penner, *Ownership, Co-ownership, and the Justification of Property Rights*, in PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS 166 (Timothy Endicott, Joshua Getzler & Edwin Peel eds., 2006).

52 A.M. (Tony) Honoré, *Trusts: The Inessentials*, in RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 7 (Joshua Getzler ed., 2003); Lionel D. Smith, *Trust and Patrimony* (Mar. 4, 2008) (unpublished manuscript, on file with author); BEN MCFARLANE, *THE STRUCTURE OF PROPERTY LAW* 16-41, 66-79, 206-56 (2008).

53 Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*,

Legal ambivalence in the face of split titles is nothing new; it is intrinsic to sophisticated legal systems. A good lesson may be derived from the early Roman development of personal servitudes such as usufruct, and from bonitary ownership; originally a claimant might only be able to make claims against third parties through the legal person and powers of the *dominus* who had granted the claimant use rights without granting ownership; the *dominus* was restrained by obligational law not to exercise his real rights as a true untrammelled owner but to exercise them in the interests of the obligor. Only later were the fractional use and income rights in the usufructary or the bonitary owner protected as property rights that are independently exigible against third parties and separated from the estate of the *dominus* as a parallel ownership. Inheritances, leases and restrictive covenants exhibit similar evolutions in the common-law systems. Other forms of personal or customary rights to real rights did not make the full journey to property interests — copyhold leases and the rights of cohabittees to a share in home equity are examples of assets stuck halfway between personal and real assets, and in need of discretionary and ad hoc curial intervention to harden them into widely exigible and persistent property rights. Intellectual property rights and company shares are more regularly given full proprietary protection. The progression of personal rights from value exercised via claims passed through a higher owner, to independent proprietary claims, and the existence of discretionary halfway stages, sums up the dynamic nature of property rights in Western legal systems.

III. THE PROBLEM OF CONDOMINIUM AND SEVERANCE

A. Roman Models

The Roman jurists evolved a rich vocabulary of singular and plural ownership that was crucial for later lawyers, whether common-law or civilian. The Roman-law property framework⁵⁴ began with original acquisition through *occupatio*, which created a new singular ownership over a *res nullius* (an unowned asset, such as a wild animal or land in the wilderness, with

37 STAN. L. REV. 1189 (1985); Gregory Alexander, *The Transformation of Trusts as a Legal Category 1800-1914*, 5 LAW & HIST. REV. 303 (1987). See generally GREGORY ALEXANDER, *COMMODITY AND PROPRIETY: THE COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* (1997).

54 G. INST. 2.66-79 (Francis de Zulueta ed. & trans., 1946); J. INST. 2.1.11-39 (Paul Krueger ed., J.B. Moyle trans., 5th ed. 1913).

abandoned and captured assets as adjacent categories), through the unilateral will and action of the appropriator taking possession. An extension of original acquisition involved modes that destroyed the identity or the extant ownership of a thing in order to allow annexation of the whole into the patrimony of another owner, such as *accessio* (annexation), *specificatio* (creation of a new substance), and (arguably) *usucapio* (acquisition through *bona fide* use). Finally there were *confusio* (irrevocable blending) and *commixtio* (reversible blending), creating shared ownerships where the specific identity of two masses is lost through combination, such that no new species emerges and no one party could be said to take a new thing; the shared ownerships that ensued may have had an unjust enrichment or consent-based justification.⁵⁵ The Romans also carved out sophisticated concepts of split property beneath or alongside the singular ownership concept of *dominium* — notably the derivative titles of praedial servitudes, usufructs, and bonitary ownership based on valid possession,⁵⁶ and there were also many legal forms embodying public or collective value — the *res communes*, *res publicae*, and *res religiosae*. To complete the doctrinal matrix, the *res universitatis* of corporate property was recognized as the representation of a group of conjoined single owners.⁵⁷

Let us next take Justinian's sixth-century restatement of the classical rules for the original titles of *confusio* and *commixtio*:

If materials belonging to two persons are mixed by consent — for instance, if they mix their wines, or melt together their gold or their silver — the result of the mixture belongs to them in common. And the law is the same if the materials are of different kinds, and their mixture consequently results in a new object, as where mead is made by mixing wine and honey, or electrum by mixing gold and silver; for even here it is not doubted that the new object belongs in common to the owners of the materials. And if it is by accident, and not by the intention of the owners, that materials have become mixed, the law is the same, whether they were of the same or of different kinds.

But if the corn of Titius has become mixed with yours, and this by

55 J. INST. 2.1.27-28; DIG. 41.1.7.7-9 (Alan Watson, Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 1985); Tessa Leesen, *Produced and Bottled in Rome — Who Owned the Wine? The Controversy About Specificatio*, 53 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITE (3rd Ser.) 265 (2006).

56 GYÖRGY DIÓSDI, OWNERSHIP IN ANCIENT AND PRECLASSICAL ROMAN LAW 107-85 (1970); ALAN RODGER, OWNERS AND NEIGHBOURS IN ROMAN LAW 1-38 (1972).

57 See also Getzler, *supra* note 29, at 86-92.

mutual consent, the whole will belong to you in common, because the separate bodies or grains, which before belonged to one or the other of you in severalty, have by consent on both sides been made your joint property. If, however, the mixture was accidental, or if Titius mixed the two parcels of corn without your consent, they do not belong to you in common, because the separate grains remain distinct, and their substance is unaltered; and in such cases the corn no more becomes common property than does a flock formed by the accidental mixture of Titius's sheep with yours. But if either of you keeps the whole of the mixed corn, the other can bring a real action for the recovery of such part of it as belongs to him, it being part of the province of the judge to determine the quality of the wheat which belonged to each.⁵⁸

The distinction between joint owners who each own the whole mass and who must bring an action to divide the mass, and common owners who own severable and specific percentages of a mass, is a crucial first step in the creation of workable plural-property institutions. Jurists disagreed over the boundary; for example, Pomponius and Ulpian⁵⁹ believed that common ownership of a new blended substance only eventuated where the fusion was consensual, in the sense that the action to divide was only mandated where the preceding fusion was consensual; they thus applied the same rule to fused as to mixed substances. Gaius and Justinian by contrast maintained that the action to divide applied to all cases of fusion without exception, whether consensual or not.⁶⁰ The Gaian solution concentrates on the physical, irreversible nature of the blend; the Ulpianic solution looks at the intent of the parties.⁶¹

That the correct mode for ending relationships between owners of shared substances raises juristic choices should occasion no surprise. But rules for termination and exit lead to more intrinsic questions — how should the law govern the inception, the governance, and the termination of these mini-commons? How to stop one party unjustly claiming the whole, and so usurping, consuming, wasting or degrading his co-owner's share? The Roman answer regarding co-ownerships was similar to the answer given by

58 J. INST. 2.1.27-28.

59 DIG. 6.1.5pr.-1.

60 DIG. 41.1.7.8-9.

61 Peter B.H. Birks, *Mixtures*, in INTERESTS IN GOODS 227, 232-34 (Norman Palmer & Ewan McKendrick eds., 2d ed. 1998). Birks here contrasts the "common" or "co-ownership" of *confusio* and the several "continuing ownerships" of *commixtio*, and also points out that the commonsense physics and chemistry of the Roman jurists did not discriminate between evidential and physical separability of mixtures.

the jurists for partnership and marriage. The internal workings of a lived relationship are governed by the good or bad sense of the parties. One who marries badly, or chooses a poor business partner, or a derelict co-owner, can only blame himself.⁶² The decision of the positive law *not* to regulate but to leave intimate relationships to extralegal sanctions was itself a choice of regulatory technique. Thus Roman law did not see fit to create elaborate rules for the stunting and control of current relationships; it did not have a doctrine of majority rule or of minority oppression or of fiduciary law *inter vivos*. Instead parties knew that they were operating in the shadow of elaborate rules as to how to start a relationship and what to do if the relationship died. These commencing and terminating rules reflected back on how they might regulate their behavior whilst the relationship was on foot.⁶³

The terminating rules enforced just dissolution of the plural ownership, involving a parceling out of rights and duties, severance of shared property, and compensation to a party whose value was absorbed into the other's patrimony.⁶⁴ Thus if Roman joint owners fell out, one or both could bring an action to dissolve the relationship and sever the mass of property owned. There were other conceivable solutions: the relationship could be converted into either a partnership with one party owning outright as a singular *dominus* and the other being owed certain rights and owing certain duties under regular contractual rules, or an egalitarian partnership with fully shared ownership and contractual governance combined with elaborate rules for dissolution and severance. The various *condominium* solutions are exceedingly interesting on a structural plane because of the collision with the Roman dogma that *dominium* is properly a singular and absolute ownership, an ultimate right to vindicate and possess to the exclusion of all others. On one model, the joint owners under *confusio* have merged their legal persons in one narrow part of their legal space of rights and duties and that co-person is the singular *dominus*. Joint ownership thus unites persons as much as it unites properties. The common ownership model of *commixtio* is easier to understand. The fungibles are admixed and it is convenient to treat the mixers as owning

62 See, e.g., J. INST. 3.25.9: "if a man chooses as his partner a careless person, he has no one to blame but himself." Query if revealed bad character in a marriage or business partner nullified a relationship retrospectively since initial consent had been won by fraud.

63 REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 460-72 (1996).

64 DIG. 10.3 (*communi dividundo* — the action for dividing common property); DIG. 17.2 (*pro socio* — partnership).

their nominally separate shares in a promiscuous mass, and two separate *domini* control two legally separate but physically joined patrimonies.

B. English Models

English law constructed two forms of plural ownership suggesting Roman models. There were joint tenancies requiring formal severance of a fused estate, and common tenancies involving arithmetically shared ownership that did not require staged severance but permitted dissolution and exit at will. For long it was unclear whether the default rule for partnership was joint or common ownership, and on the liability side the courts could not choose between joint and joint-several partnership duties; this made the insolvency and dissolution rules extremely difficult from the late seventeenth to the early nineteenth centuries. It also made partnerships frail, for the default rule was that any dispute between partners, and any reorganization of personnel, could be resolved only by dissolution of the partnership and severance of its assets.⁶⁵ Nathaniel Lindley noted in his treatise on partnership and companies⁶⁶ that the common-law duty to account for profits during the currency of a partnership and to give fair shares on dissolution was based on express or implied contract, but that common owners outside partnership had no intrinsic duty to account to each other for misappropriation of the *spes* or its income; earlier statutory intervention gave a right of account for unequal taking of land values, but did not extend this accounting to the common owners of a chattel or other personal and intangible property. If a co-owner of personalty could not usefully take out his share then he was left with the right to sue other co-owners for destruction, or else attempt to win back possession for himself by self-help. Only in the later nineteenth century was an accounting mechanism for co-owners created short of dissolution of the relationship. This lack helps explain the rise of formal corporate form with prescribed rules for minority oppression, income and capital distribution, liquidation and the rest.

65 Getzler & Macnair, *supra* note 33; William Hamilton Cowles, *The Firm as a Legal Person*, 57 CENT. L.J. 343 (1903).

66 NATHANIEL LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP, INCLUDING ITS APPLICATION TO COMPANIES 68 *passim* (2d ed. 1867).

IV. PLURAL OWNERSHIPS AS ENTITIES

Can non-incorporate plural ownerships, for example funds held under trusts or through trust devices in unincorporated associations, be resolved as some kind of real legal entity? Once the trust fund is conceived of as a separate patrimony, it is often convenient to locate the ownership of the fund in the trust itself as legal person. Procedural practice increasingly encourages such thinking,⁶⁷ but in substance too the trust can be re-described as a privately-formed entity, with management and distribution powers, duties of account, loyalty and care, appointment and dismissal of trustees and real and personal remedies serving as a governance mechanism of the "corporation." Lionel Smith has argued forcefully that the entity model should be resisted and that a trust is better described as a complex of obligational rights encumbering the real rights of the trustee; civilian models of the trust as a divided patrimony with possibly a separate personality are therefore otiose.⁶⁸ This is a valid counter to civilian attempts to theorize the trust without equitable enforcement. But even if obligations and property can do much of the work of entity law,⁶⁹ the entity metaphor can provide insights not just for trusts but for all plural ownerships. In other words, the real entity insight may apply beyond funds or assets under management or trust to any form of shared ownership; legal persons emerge from a nexus of property relations that becomes an entity, thus surpassing the contractarianism that comes so naturally to lawyers and economists. There is a plausible sense, not just a fictive label or a metaphysical whimsy, that whenever two persons jointly own a simple chattel, say a motorbike, they have formed a two-person-one-motorbike enterprise devoted to motorcycling, and they have thus generated a governance structure and group mind to run the enterprise. The two owners may have separate wills regarding use of the bike (each will have opinions as to who will ride, and when; who will fuel, clean and repair; who can sell, hire or charge; who will have to pay debts and liabilities); but the two must form some kind of consensus of purpose lest their enterprise quickly fracture, and this is achieved by practising some kind of group-think about how the two shall share the enjoyment and care of their jointly-owned bike.

The evolution of a working consensus over time typically cannot be

⁶⁷ See *Strother v. 3464920 Canada Inc.*, [2007] 2 S.C.R. 177 (Can.), where the "Strother Family Trust (Trust No. 1)" was named as appellant rather than the trustees.

⁶⁸ Smith, *supra* note 52.

⁶⁹ As is argued in *Getzler & Macnair*, *supra* note 33.

achieved by contract alone, because the partners to the enterprise are locked into the relationship with high exit costs, and so are forced to cooperate without being able to settle their rights in a once-off bargain. Such lock-in is particularly useful where easy exit can too easily damage the worth of the enterprise, and thus arm each side with a destructive holdout or ransom power against the other.⁷⁰ To take our motorbike example — if a new \$10,000 bike will depreciate on purchase by 30%, and then decline a further 2% per month, then two co-owners may wish to make exit difficult by taking joint tenancies rather than common shares in the item, and committing to a longer-term biking relationship. Married couples taking joint ownership of the family home and merging their assets express the same instinct; joint asset-holding is a more powerful binding of the relationship than the contractarian marriage deal itself. Where cohabiting parties keep their assets entirely separate, or in common tenancy (legally separate but physically mingled) and do not take a joint ownership, it is regarded by law as a strong indicium that full partnership and mutuality has not been accepted and so exit at will with severance of shares is more readily allowed.⁷¹ Even in such cases of ready exit the plural ownership generates binding mutual obligations, as can be seen in Lord Nottingham's claim that: "The Common Law raises a trust between tenants in common of a personal chattel."⁷²

A. Historical Examples

Frederic William Maitland propounded a real entity theory of co-ownership in 1897 in the third part of *Domesday Book and Beyond*,⁷³ arguing that plural ownerships of land in the medieval farming economy operated in effect as farming corporations. He also fitted the plethora of corporations operating in medieval land, church and governmental law into a real entity mold. Maitland finally extended the real entity idea to trust funds in his late essay *Trust and*

70 Timothy Guinnane et al., *Putting the Corporation in Its Place*, 8 ENTERPRISE & SOC'Y 687 (2007); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

71 See, e.g., *Stack v. Dowden*, [2007] UKHL 17, [2007] 2 A.C. 432 (appeal taken from Eng.).

72 Cited in LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA TO CHANCERY AND EQUITY" 244 (David E.C. Yale ed., 1965) (c. 1672).

73 FREDERIC WILLIAM MAITLAND, *DOMESDAY BOOK AND BEYOND: THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND* 341-56 (Cambridge Univ. Press 1987) (1897).

Corporation,⁷⁴ borrowing from Gierke's model of the non-trading corporation in German law as an extra-statist locus of communal action. Like Gierke, Maitland saw the most fertile role for such entities as foundations supporting religious, governmental, educational and other local communities.⁷⁵ Medieval English lawyers tended to personify the local corporation in its human head for purposes of litigation; and when the group sued or was sued in its own name the lawyers may have seen this as a type of class action of individuals; but the habit of allowing group litigation helped develop corporate theory.⁷⁶ Ron Harris has recently charted the extraordinary afterlife of Maitland's Gierkean real corporation theory in England and America, where a substantial sub-literature emerged from the 1890s on the nature of corporate legal personality. Harris suggests that interest-group conflict drove the juristic debate over the nature of entities, particularly as labor and capital fought over the rights and liabilities of trade unions and corporations, and that the debate shifted with political and economic change.⁷⁷ Certainly in the United Kingdom entity shielding was prized in order to facilitate banking finance and also to insulate directors and secured creditors from other classes of claimant including shareholders.⁷⁸ There is similar evidence of the malleability of legal institutions in different contexts. John Habbakuk observed that the English landed gentry ran their family life as property-holding corporations with overlapping generations of partners based on kinship; this safeguard of aristocratic dynasticism then yielded the family firm as the original closely-held corporation of early mercantile, financial and industrial enterprise.⁷⁹

The patriarchal family of pre-modern Europe suggests another legal

74 3 FREDERIC WILLIAM MAITLAND, *Trust and Corporation*, in COLLECTED PAPERS, *supra* note 4, at 321; *see also* Getzler, *supra* note 3, at 242-48.

75 3 FREDERIC WILLIAM MAITLAND, *The Crown as Corporation*, in COLLECTED PAPERS, *supra* note 4, at 244; FREDERIC WILLIAM MAITLAND, *TOWNSHIP AND BOROUGH* (Routledge 1997) (1898).

76 *See* JOHN H. BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: VOLUME VI, 1483-1558*, at 622-27 (2003); SUSAN REYNOLDS, *The History of the Idea of Incorporation or Legal Personality*, in IDEAS AND SOLIDARITIES OF THE MEDIEVAL LAITY: ENGLAND AND WESTERN EUROPE 1 (1995).

77 Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories*, 63 WASH. & LEE L. REV. 1421 (2006).

78 *See*, for example, the key case of *Percival v. Wright*, [1902] 2 Ch. 421 (Swinfen Eady, J.); on the interest of bank creditors in the English business corporation, *see* Joshua Getzler, *The Role of Security over Future and Circulating Capital: Evidence from the British Economy Circa 1850-1920*, in COMPANY CHARGES: SPECTRUM AND BEYOND, *supra* note 40, at 227.

79 H. JOHN HABBAKUK, *MARRIAGE, DEBT, AND THE ESTATES SYSTEM: ENGLISH LANDOWNERSHIP, 1650-1950* (1994); FRANCIS MICHAEL L. THOMPSON,

technique to solve the problem of group coherence, namely concentrating legal personality in a head who forms a kind of corporation sole representing the entire family. Historically, the patriarchal family may be seen as a compulsory collective unit, permitting not only a sexual division of labor but also insurance and long-term welfare provision for the vulnerable young and old, in a time of weak markets and pervasive dearth.⁸⁰ Within the patriarchal family, corporate authority could be focused by absorbing the legal and economic capacities of wives and children into that of the father. In England and America until the end of the nineteenth century, the doctrine of coverture meant that the act of marriage collapsed the wife's legal capacities into the personality and powers of her husband, including her powers to control and assign property. In return, a husband was automatically liable for his wife's debts and, up to a point, her other liabilities. A wife could recover some of her legal capacity by agreeing with her husband to cancel her coverture during marriage, as when the marriage was strained by infidelity or the wife wished to trade independently. Upon divorce or death of a husband, the surviving wife's capacity revived and she could in certain circumstances recover her real property and claim dower or jointure; and if she died first her heirs could recover her real property from the husband's estate following his death — various complex forms of post-relational severance.⁸¹

Much of this historical status law can be explained as a result of patriarchal culture and an entrenched subordination of woman, but it may also be seen as a functional device in a more fragile economy to enhance the coherence and longevity of family units by concentrating legal authority in one representative. The patriarchal model provided the basis of claims to monarchical authority under the old regimes of Europe, and was modernized

GENTRIFICATION AND THE ENTERPRISE CULTURE: BRITAIN, 1780-1980, at 1-44 (2001).

80 Dynastic objectives are stressed by LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800* (1977) and by HABAKKUK, *supra* note 79, at 144-240 (concentrating on landed elites); for a more nuanced view looking at the wider population and integrating emotional, procreative and material needs, see ALAN MACFARLANE, *MARRIAGE AND LOVE IN ENGLAND, 1300-1800* (1986). A companionate basis for modern marriage is assumed in Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

81 Getzler & Macnair, *supra* note 33; JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 269-71, 483-89 (4th ed. 2002). At common law it was also presumed that consent to sex at the entry into marriage gave the husband immunity from rape for the currency of the marriage — another example of the wife's status of subordination, which only ended with *R v. R*, [1992] 1 A.C. 599 (H.L.) (appeal taken from Eng.).

and secularized in the 1650s by Thomas Hobbes, who stripped it of biblical sanction and instead traced a logic of concentrated power as the only provider of order. These were the ideologies that Locke and the liberal tradition had to displace — with liberal property.⁸² However, to maintain the coherence of group decision-making through private ordering, liberal property too must be constrained.

B. Asset Partitioning and Residual Claim Models

In an important contribution, Henry Hansmann and Reinier Kraakman have proposed an efficiency model of the historical rise of corporate form out of joint ownership, whereby the progressive insulation of the collectively-held fund from the personal liabilities of individual owners of the fund is by itself a sufficient explanation of the application of artificial legal personality promoting perpetual succession, asset partitioning and limitation of liability.⁸³ Oliver Hart⁸⁴ and Hansmann⁸⁵ have further argued that the varieties of legal form for collective action are then resolved by examination of the costs of aligning the interests of those who pool their financial and human capital. Residual claimants to the pooled assets — those whose control remains when all delegated powers and contracted obligations are subtracted — are seen as the owners forming the basis of the entity. The key to organizational form is the comparative cost of governing ownership powers as opposed to the costs of market transactions outside the entity.⁸⁶ Proprietary models of the business entity, using a framework of interaction between plural owners encompassing power holders, obligors and residual claimants, are now rapidly colonizing modern corporate theory, and may soon displace the regnant nexus

⁸² See *supra* Part I.

⁸³ Henry Hansmann & Reinier H. Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000); Henry Hansmann, Reinier H. Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006). Getzler & Macnair, *supra* note 33, argue that no state grant of corporate personality was necessary to create effective limited liability whether through forward or reverse asset partitioning.

⁸⁴ OLIVER HART, *FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE* (1995).

⁸⁵ HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 11-23 (1996); see also Edward B. Rock & Michael Wachter, *Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in the Close Corporation*, 24 J. CORP. L. 913 (1999).

⁸⁶ John Armour & Michael J. Whincop, *An Economic Analysis of Shared Property in Partnership and Close Corporations Law*, 26 J. CORP. L. 101 (2001); John Armour & Michael J. Whincop, *The Proprietary Foundations of Corporate Law*, 27 O.J.L.S. 429 (2007).

of contracts model.⁸⁷ Without departing from a basic hypothesis of calculative individualism, the new model suggests that complexes of property rights create a workable law of entities that contract alone cannot achieve. In a sense, this model applies to the business corporation the more basic idea that plural ownerships intrinsically generate entity structures; it is not necessary to add in the requirement of asset partitioning between claimants to generate entity functions.

To sum up the argument so far: proprietary accounts of collective action assume that property institutions form an irreducible content in our juristic constructs. Conceptually, property is not reducible to other categories; and functionally, property achieves coordination of collective action that other legal institutions cannot achieve. The reason why it is useful to see collective action as constitutive of new legal persons, whether in the setting of trust funds, trading corporations, families or simpler plural ownerships, is because the individual actors participating in these groups must commit over time to membership and therefore must constrain their capacity to act against group interests. Usually parties will create a governance mechanism ordering its internal and external relations, and this may require the group to develop a coherent will capable of decision and adjudication.⁸⁸ That pooling of powers and capacity in a collective and the corresponding reduction of individually-wielded powers and capacity including curbs on the right to sever is a good working definition for how legal persons are formed, whether looking at a two-person partnership, the European Community or the United States of America. In the public law arena, we can substitute secession for severance and see like factors in play.

87 Though it is fair to note that the new wave of proprietary theories of the firm shares much ground with earlier institutionalist analysis, *e.g.*, OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975); Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

88 Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. LEGAL STUD.* S453 (2002), noting that property may have higher value with group access subject to stinting, rather than disintegrating the property into exclusory parcels. The role of custom in providing a decentralized governance mechanism is explored in Henry E. Smith, *Community and Custom in Property*, 10 *THEORETICAL INQUIRIES L.* 5 (2009).

V. GOVERNANCE METHODS FOR PLURAL OWNERSHIPS

Let us conclude by isolating two techniques whereby the pooling of resources under plural ownership can succeed in organizing collective action.

A. The Stinting of Access over Time Yields Fiduciary Law

Plural ownership must generate a system of stinted access to assets by the owners, and this requires long-term or "relational" transacting. Such transactions cannot take the form of complete contracts since the objectives of participants in the group as well as external conditions will vary over time; indeed one of the functions of plural ownership is as a pre-commitment device for individuals to manage their own internal decision-making over time. Since claims and duties regarding the common resource cannot easily be priced and bargained *ex ante*, fiduciary law emerges as a particularly appropriate governance mechanism. Fiduciary law also achieves results that social norms mandating gift exchange cannot always reach, through its powerful hortatory and remedial qualities; there remains a taint of fraud or exploitation for breach of a duty to guard assets that other persons have entrusted to your care.⁸⁹

Fiduciary regulation may be divided into two ideal types: vertical fiduciary law where one party manages the assets of the other; and mutual fiduciary law where parties locked into long-term relationships have to run their affairs mindful of group interests. Fiduciary law can help explain the control of minority oppression at the hands of majority owners; good faith requires that ownership powers not be exercised without taking due account of the interests of co-owners. Hansmann and Kraakman put aside fiduciary law as a second-order phenomenon of entity law, that can be achieved contractually and which can be dissociated from the need for separate legal personality. This is conceptually, empirically, and historically questionable.

B. Severance Rules and Plural Ownership as a "Social Integrate"

However rational the participants, groups pursuing joint objectives may fail through decisional fragmentation and incoherence. The aggregation of the

⁸⁹ TAMAR FRANKEL, TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD 119-35 (2006); Joshua Getzler, *Duty of Care*, in BREACH OF TRUST 41 (Peter B.H. Birks & Arianna Pretto eds., 2002).

atomic wills of individual members of the group may simply fail to yield an authoritative result, even if there is some consensus as to overall goals. The problem of aggregating preferences and creating determinate social choice has generated an enormous literature, with the Condorcet/Arrow paradoxes at its head.⁹⁰ A less familiar aggregation problem emerges from governance through committee voting where decisions are broken up into component premises and voted on sequentially, individually, and cumulatively, which is the typical governance mechanism of partnerships and corporations. Each premise may command the support of a different majority, and voters may find that the final decision commands little or no support from each individual participating in the progressive voting. The group may therefore fissure. But if veto rights over the concluding decision are permitted by means of a further majority vote, the group enterprise then courts failure as the group cannot pursue a consistent policy or indeed any policy over time, and cannot act coherently in relation to outside parties. Philip Pettit has labeled this infirmity in group decision-making the "discursive dilemma."⁹¹

A number of solutions to the discursive dilemma can be identified.

90 For entry into a vast literature: Kenneth J. Arrow, *Arrow's Theorem*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 124 (John Eatwell, Murray Milgate & Peter Newman eds., 1987); DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (Iain McLean, Alistair McMillan & Burt L. Monroe eds., Kluwer 1998) (1958); AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970).

91 Philip Pettit, *Groups with Minds of their Own*, in SOCIALIZING METAPHYSICS 167 (Frederick Schmitt ed., 2003); Philip Pettit, *Deliberative Democracy, the Discursive Dilemma, and Republican Theory*, 7 PHIL. POL. & SOC'Y 138 (2003); Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41 (1994); Bruce Chapman, *Law, Incommensurability, and Conceptually Sequenced Argument*, 146 U. PA. L. REV. 1487 (1998); JEREMY WALDRON, *Legislators' Intentions and Unintentional Legislation*, in LAW AND DISAGREEMENT 119 (1999). The modern debate was fueled by Lewis Kornhauser & Lawrence Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986); Lewis Kornhauser & Lawrence Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993). More generally the status of group intentionality and the nature of rights and obligations generated within groups has given rise to a large philosophical literature ripe for use by lawyers; see, e.g., JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995); MICHAEL E. BRATMAN, FACES OF INTENTION (1999); Michael E. Bratman, *Shared Valuing and Frameworks for Practical Reasoning*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 1 (R. Jay Wallace, Philip Pettit, Samuel Scheffler & Michael Smith eds., 2004); MARGARET GILBERT, SOCIALITY AND RESPONSIBILITY (2000). For a warning against taking the corporate person seriously as a moral agent in the context of criminal law, see G. Robert Sullivan, *The Attribution of Culpability to Limited Companies*, 55 CUMB. L.J. 515 (1996).

The group can permit exit by disgruntled members — severance of capital through alienation of particular interests or total severance through dissolution. In such a case the group cannot easily present itself to outsiders as an entity capable of speaking with one steady voice. Another solution is to allow weighting and trade of preferences through coalitions and strategic voting. A third solution is for the members of the group to accept the discipline of premise-based reasoning and suppress individual preferences in order to allow a coherent result to emerge. Pettit calls such a coherently rational group a "social integrate." Edward Rock has extended the model into entity law, noting that premise-based reasoning is promoted by corporate form.⁹² The public corporation more or less disfranchises shareholders, who cannot easily form coalitions and who cannot express dissatisfaction by liquidating corporate assets; their investments are locked-in unless they can find an assignee who replaces old capital with new. Another factor is that boards of directors are small, cohesive, can build internal coalitions, and face punishment for indulging in incoherent conclusion-based reasoning that wrecks the collective.

We can engraft this model onto all cases of plural ownership. Collectives that must speak in one voice will seek to act as social integrates, force premise-based reasoning on their memberships, and suppress dissent, severance and exit. Property and dissolution rules can structure this suppression of exit and dissent rights. By contrast, collectives that can survive severance and therefore tolerate dissent and exit do not have to speak in one voice to the outside world — here partners may readily dissolve the firm and take out their human or financial capital. The public corporation is a halfway house — a shareholder cannot collapse the corporate capital and sever his share, but he or she can assign it for value; and majority shareholders can only demand distributions of capital in constrained circumstances, in order to protect creditors, employees and minority shareholders. The trust is another fascinating hybrid of exit powers and lock-in rules. In English law, for example, trust beneficiaries can dissolve and sever at will, but only as a unanimous collective moving assets from managers' hands into those of all the beneficiaries, and in such a case there is no discursive dilemma; settlors' intentions are overridden at the behest of a strong and unified majority. There are other paths to severance or distribution such as the exercise of appointment powers vested in trustees, but these powers are heavily constrained in order to prevent opportunistic

⁹² Edward B. Rock, *The Corporate Form as a Solution to a Discursive Dilemma*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 57 (2006).

reduction of the plurally-owned capital. By contrast, U.S. trust law has come to reject severance and has instead enhanced the power of settlors to deny distributions to beneficiaries outside strictly stipulated agreement. Perhaps this explains why trusts outside corporate form are less used as vehicles for collective action in the United States. Another important case is the closely-held corporation which readily constrains severance, and in addition often builds in blocking shares and constrains exit or assignment of capital. This type of organization represses decisional incoherence, and allows lock-in of investment and the prevention of holdouts, but also raises the risk of expropriation of minority interests. The lesson is that by creating a range of plural-ownership entities with different rules of decision-making, severance, and exit, the law allows market actors to select the best vehicle for their particular needs.⁹³

CONCLUSION

This exploration of the nature of plural ownership began with the conundrum identified by Maitland, that plural ownerships can be resolved as an aggregation of individualized rights and duties, or seen alternatively as constitutive of fresh entities. It turns out that Maitland's individualistic viewpoint does not trump his collectivist viewpoint. Plural ownerships generate group personality; but the reason is that persons may accept on rational grounds that they ought to behave as if their individualism should be exercised within the constraint of functioning groups, if certain goals are to be achieved. So the individualistic and communitarian theories of plural ownership can simultaneously be true, and Maitland's conundrum dissolves.

⁹³ Guinnane et al., *supra* note 70; HANSMANN, *supra* note 85.