6-1-2012

Governance Property

Gregory S. Alexander
Cornell Law School, gsa9@cornell.edu

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 160 | JUNE 2012 | NO. 7

ARTICLE

GOVERNANCE PROPERTY

GREGORY S. ALEXANDER[†]

[†] A. Robert Noll Professor of Law, Cornell University.

This Article was presented at the Symposium on New Directions in Property Theory, jointly sponsored by the *University of Pennsylvania Law Review* and the University of Pennsylvania Law School on November 6, 2011. I am enormously grateful to the co-organizers, Professors Shyam Balganesh and Gideon Parchomovsky, for inviting me and to the School for its hospitality. I am indebted to Hanoch Dagan, Eduardo Peñalver, Laura Underkuffler, and the conference participants for their valuable comments on a previous draft. Remaining errors and infelicities (and doubtless they are legion) are mine, of course.

INTRODUCTION

Is property a black box? Is it best understood in terms of the relationship between owners and nonowners, without regard to the internal dynamics of property stakeholders? Exclusion theorists of property think that the concept of property properly concerns only the relations between owners and nonowners—that is, the external relationships of owners, or what we might call the "external life" of property.[1] From this perspective, the *internal* relationships among prop-

[1] *See, e.g.*, J.E. PENNER, THE IDEA OF PROPERTY IN LAW 68 (1997) (stating that property rights can be "fully explained by using the concepts of exclusion and use" and that such concepts are "intertwined"); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 279-80 (2008) (describing the emphasis on exclusion in both rights-based and utilitarian accounts of property); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1853 (2007) (positing that "some version of morality" communicates respect for property rights to the world at large).

erty stakeholders—the "internal life" of property[2]—are irrelevant from a conceptual point of view, even though these relationships are often very significant to property as a doctrinal matter. To exclusion theorists, all that matters conceptually is the owner's right to exclude nonowners from using, possessing, or interfering with the owner's asset. Therefore, what happens within the box—between or among the persons having a property interest in the asset—is of no concern to property law.[3] The law of property, built around the right to exclude, concerns itself primarily with the owner's relationship with the rest of the world.

This is a distorted and misleading view of property, however. To reveal this misconception, I will distinguish between two types of property, which I call exclusion property (EP) and governance property (GP). Exclusion property, according to exclusion theorists, consists of one owner with virtually all control over the asset; therefore, a defining characteristic is that the owner's rights are in rem in nature.[4] Elsewhere, I have argued that ownership is more complex than this

---

[2] *See, e.g.*, Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT L., no. 1, 2011 at 1, 19 (arguing that rules of exclusion are "silent as to the internal life of property").

[3] A qualification is in order here. The internal dimension of ownership is sometimes considered under what Henry Smith calls the "governance strategy." For example, Smith points out that water law regimes may have both internal and external aspects, even under seemingly exclusion-based doctrines such as prior appropriation. *See* Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445, 466-72 (2008) (asserting that "prior appropriation is in fact more of a governance regime . . . than the conventional picture recognizes"). However, Smith's conception of the governance strategy does not focus primarily on the internal dimension of ownership. In this respect, Smith and I use the term "governance" in different ways. Smith considers governance as an alternative strategy to exclusion used to signal and specify the range of an owner's use and control rights over resources. Unlike exclusion, which essentially delegates all such control rights to the owner, governance methods are more finely grained and detailed. *See* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S455 n.5 (2002) [hereinafter Smith, *Exclusion Versus Governance*] ("'Governance' here just refers to a high degree of delineation of rights to resources in terms of use . . . ."). Smith's conceptions of exclusion and governance both involve managing ownership's external dimension: the relationship between owners and nonowners. I interpret governance to refer solely to the relationship between individuals who have a property interest in an asset.

[4] *See* Katz, *supra* note 1, at 279-81 ("Ownership, on an exclusion-based or boundary approach, is the product of a norm that protects the boundaries around an object so as to exclude the whole world but the owner."); Smith, *Exclusion Versus Governance*, *supra* note 3, at S475 (arguing that in rem rights are more characteristic of an exclusion-based—rather than governance-based—strategy).

concept of property would suggest.[5] However, for present purposes, I assume for the sake of argument that a category of property, here called exclusion property, exists that fits the exclusion theorists' characterization. Governance property, by contrast, is multiple-ownership property. Because of the relationship between an owner's rights and interests, GP requires governance norms—the devices regulating ownership's internal relations. Those rights may be as robust as full ownership rights, including coterminous rights to use, possess, manage, and transfer the asset; the rights could also be more limited, such as use rights with respect to assets owned by others. The fragmentation of various sorts of coincident rights with respect to some asset is what distinguishes GP from EP and creates the need for norms that govern the exercise of those rights.

Governance property and exclusion property are theoretical concepts. No actual property institution or ownership arrangement is purely one or the other. Rather, actual property institutions occupy various positions along a spectrum between GP and EP. It is useful, nevertheless, to discuss GP and EP as ideal types, for they illuminate the conceptual and normative differences between two prominent property theories in recent legal scholarship: the exclusion theory[6] and the human flourishing theory.[7]

Governance property appears in a wide variety of forms. The multiple owners may be concurrent, sequential, or combined. They may concurrently own certain portions of the total property while individually owning other portions, thereby combining GP with EP. In other multiple owner arrangements, some of the owners may have only nonbeneficial rights, privileges, and powers, while the remaining owners have beneficial interests. Examples of GP include concurrent estates; marital and domestic partnership property; common interest communities, including condominiums and housing cooperatives; certain

---

[5] *See* Gregory S. Alexander, Reply, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1070 (2009) ("The core of ownership is more complex than the right to exclude standing alone."); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 747 (2009) [hereinafter Alexander, *Social-Obligation Norm*] (characterizing "[t]he core image of property rights . . . that the owner has a right to exclude others and owes no further obligation to them" as "highly misleading").

[6] For major exemplars of exclusion theory, see generally PENNER, *supra* note 1, Katz, *supra* note 1, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998), and Smith, *Exclusion Versus Governance*, *supra* note 3.

[7] For a discussion of the human flourishing theory, see generally Alexander, *Social-Obligation Norm*, *supra* note 5; Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

forms of business organizations, including partnerships and close corporations; leaseholds; and trusts, including statutory trusts (e.g., pensions).

Although the concepts of governance property and the commons overlap to a considerable degree, they are not identical.[8] Governance property does not include open-access resources, which constitute a kind of nonownership regime. Therefore, GP and commons would only potentially overlap in limited-access regimes. There are differences between the two concepts even within the limited-access context, however. Notably, some limited-access regimes are characterized by two features that are sometimes absent in GP: first, a horizontal relationship among the co-owners, implying relative equality of legal rights, privileges, and powers among them; and second, concurrency of the privileges of possession, use, and enjoyment of the asset.[9] These two distinctions between GP and commons create conflicts of interest that differ from the familiar problems facing commons co-owners.[10] I discuss norms that respond to these problems in Part II. Governance property also differs from commons within the context of agency.[11] Agency does not seem to occur in the context of commons, but it does occur in many GP institutions, particularly those with vertical relationships of power.[12] Agency requires trust on the side of the principal,

[8] The two primary differences between governance property and the commons are that governance property does not include open-access resources and involves some degree of agency.

[9] Although some GP institutions share either or both of these characteristics, others do not. In some GP institutions, such as trusts and close corporations, co-ownership combines horizontality with verticality in the owners' relations, although the vertical and horizontal relationships result from ownership of different types (i.e., legal and equitable). Relative equality, particularly in areas concerning management powers, does not always exist among GP co-owners. Nor do co-owners always enjoy concurrent rights and privileges of use, possession, or enjoyment. Landlords and tenants as well as trust beneficiaries, for example, have successive possession and enjoyment interests.

[10] For an illuminating analysis of the conflict-of-interest problems in commons, see Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 582-90 (2001).

[11] I owe this point to Eduardo Peñalver.

[12] By vertical relationships of power, I mean relationships in which one party has legal power to make decisions to control the management, use, or enjoyment of property interests affecting another party. Commonly, but not invariably, these relationships are fiduciary in nature. Relationships such as those between trustees and beneficiaries, and corporate managers and shareholders are examples.

and responsibility or loyalty on the side of the agent.[13] I consider this aspect of GP further in Section III.B and Part IV.

This Article has two main theses: one is positive, the other normative. The positive thesis is that governance property, not exclusion property, is the dominant mode of ownership today. The rise of governance property reverses what Charles Donahue calls "the agglomerative tendency,"[14] defined as the "tendency to agglomerate in a single legal person, preferably the one currently possessed of the thing that is the object of inquiry, the exclusive right to possess, privilege to use, and power to convey the thing."[15] I argue that the emergence of GP as the predominant form of property means that the right to exclude can no longer be considered the core of private ownership. The right to exclude, although important, is not central to GP; rather, internal governance mechanisms are essential. The exclusion theory of property cannot account for GP; at best, it can only account for EP. EP is Blackstonian property,[16] man-in-his-castle property, owner-versus-the-world property. Therefore, EP involves only external relationships with third parties and raises no internal governance issues because all rights and privileges are consolidated in one person. By contrast, GP involves both types of issues—internal governance and external relations. The internal governance issues may be quite complex as compared to issues involving the multiple owners' relations with third parties. Because dealing with third parties is less complicated, the right to exclude is less central to GP than it is to EP.[17]

---

[13] For an explanation of the duty of loyalty in the trust context, see generally UNIF. TRUST CODE § 802 (amended 2006), 7C U.L.A. 192 (Supp. 2011) and RESTATEMENT (THIRD) OF TRUSTS § 78 (2007).

[14] Charles Donahue, Jr., *The Future of the Concept of Property Predicted from Its Past*, *in* PROPERTY: NOMOS XXII 28, 34 (J. Roland Pennock & John W. Chapman eds., 1980).

[15] *Id.* at 32.

[16] Or, rather, the image of Blackstone according to popular myth. The reality of Blackstone's understanding of ownership is more complex. *See* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603 (1998) (stating that Blackstone "was thoroughly aware of . . . pervasive and serious qualifications on exclusive dominion"); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 105 (2009) (characterizing the association of Blackstone with the "exclusive-dominion view" as "perverse").

[17] In characterizing exclusion property as "Blackstonian property," I do not wish to suggest that there exists a category of property as to which the right to exclude is absolute or without a social dimension. In earlier work, I have argued that all property is potentially subject to an implicit social obligation norm and that the effect of this norm at times may be to dilute or restrict a private owner's right to exclude. In this sense, then, even EP may be considered governance property. The critical difference between EP and GP, however, is *structure*: the formal structure of GP, unlike EP, is plural and joint

The normative claim of this Article is that ownership of governance property, as opposed to exclusion property, contributes to the development of certain virtues that promote human flourishing.[18] These virtues include community, cooperation, trust, and honesty.[19] Virtue development is a distinctive characteristic of governance property, and GP inculcates these important virtues more effectively than EP. It is difficult to understand the prevalence of GP institutions in a wide variety of social and economic spheres except in relation to those institutions' role in facilitating the development of certain virtues that are necessary for human flourishing. As I discuss in Part IV, human flourishing is the moral foundation of governance property.

Peering inside the box of property, I analyze GP in all of its rich variety. Governance property institutions can be very diverse and are therefore measured along two spectra. One spectrum measures the relative complexity of GP institutions. Some GP institutions are quite simple and pose few governance problems. Others are very complex and require comparably complex norms and devices for their smooth governance. I will examine these norms and devices in Part III of this Article. The second spectrum concerns the functions of particular GP institutions. The purposes of GP institutions are varied, including financial, commercial, personal, familial, charitable, civic, and religious organizations. Putting these two spectra together, what emerges is a picture of GP as a remarkably diverse mode of ownership that affects every aspect of human activity. It is no exaggeration to say that gov-

---

rather than singular or unilateral. Governance property owners formally hold rights, privileges, and powers over GP assets jointly, or at least along with others who have formal interests in those assets. *Cf.* Alexander, *Social-Obligation Norm*, *supra* note 5, at 774 (contending that owners are obligated to provide certain benefits to society regarded as necessary for human flourishing).

[18] The conception of human flourishing that I discuss here is value pluralist. That is, it denies that human flourishing is a genuinely unitary value in itself. Indeed, the theory here denies that there are any genuinely unitary values at all. There are many ways for a person's life to flourish, and there are many values that are constitutive of human flourishing or the well-lived life. However, unlike the concept of welfare, as that concept is commonly used in law-and-economics scholarship, human flourishing is not solely a matter of satisfying personal preference nor solely a matter of agency sovereignty. From the neo-Aristotelian view that I adopt here, what is good or valuable for a person is not determined entirely by that person's own evaluation of the matter. Some things are intrinsically valuable, while others are not.

[19] Another important contribution of GP as an analytical concept is that it provides an additional unit of normative analysis of property—the group, or community. Exclusion property's sole unit of normative analysis of property is the individual.

ernance property is the form of ownership that matters most in modern society.

The Article proceeds in the following order. Part I surveys some of the major governance property institutions to illustrate the diversity and ubiquity of these institutions in American society. Part II describes the analytical structure of GP institutions. Despite the wide diversity in form among GP institutions, they all share certain core features. I identify those core features shared by these institutions and further identify what GP institutions share with common property and what distinguishes GP from commons. In Part III, I discuss the economic and social advantages and disadvantages of GP institutions, and I then identify norms by which participants in GP institutions govern themselves and resolve internal conflicts. Much of this discussion is familiar because some of the costs of GP are ones that it shares with commons. Part IV looks beyond costs and benefits to identify the normative foundations of GP institutions. I discuss the main values supported by governance property, including certain moral values that contribute to human flourishing and that exclusion property cannot realize.

I. GOVERNANCE PROPERTY INSTITUTIONS

Governance property institutions have proliferated in virtually every area of social life. This Part provides only a brief look at, rather than a comprehensive survey of, some of the major GP institutions in modern society. I have classified the institutions according to the primary context in which they are situated, but this classification is crude and somewhat misleading. Indeed, there is considerable overlap between the contexts in which the specific GP institutions exist.

A. *The Domestic Sphere*

1. Marriage/Domestic Partnership

Perhaps the most obvious examples of a governance property institution are marriage and domestic partnerships. Neither marriage nor domestic partnership automatically triggers GP. The legal rules governing marital and domestic partnership property are largely default rules.[20] While theoretically spouses and domestic partners

[20] For a brief introduction to the United States' approach to marital property regimes, see J. Thomas Oldham, *What If the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses When They Divorce in the United States*, 42 FAM. L.Q. 263, 265-67 (2008).

could choose to hold all of their assets individually, this choice is uncommon. Most marital and domestic partners hold at least some of their assets in a joint arrangement. If the parties live in a community property state, the presumption is that assets acquired by either marital partner (or domestic partner in a few community property states) through means other than gift or inheritance are community assets.[21] This system is a quintessential form of GP, as there is equal division of ownership between the spouses.[22] In so-called "separate" states, most marital partners and many domestic partners own various assets in one or another GP form. Many own their homes as joint tenants or as tenants by the entirety where that form is recognized.[23] Probably just as many, if not more, place money or financial assets in multiple-party accounts, such as joint bank accounts. All of these various forms of joint ownership constitute GP institutions.

2. The Home or Household

Many families, including various functional substitutes for so-called "traditional families," hold title to their residences in one of the common law cotenancy forms. Some register title in the name of one person; however, individual ownership of the family residence is rare today, largely because of the disadvantages of probate that result from having title held solely in the decedent's name.[24] Most families seek to take advantage of the benefits of the right of survivorship, notably avoidance of probate, that are characteristic of joint tenancies and tenancies by the entirety.[25] These two types of cotenancy are GP forms, fragmenting ownership rights of possession, use, and transfer among multiple persons. In community property states, some married couples (and domestic partners in states such as California)[26] hold title to the primary residence as an asset of the community, meaning that

---

[21] *See* JESSE DUKEMINIER ET AL., PROPERTY 387-90 (7th ed. 2010) (providing an overview of community property).

[22] Here I am simplifying community property law, which is more diverse and complex than the text acknowledges.

[23] *See* LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, FAMILY LAW 46 (4th ed. 2010) (noting that "[j]oint ownership with a right of survivorship is an extremely popular form of home ownership among married couples" and highlighting that a "tenancy by the entirety" was a "distinct [common law] form of ownership reserved for married couples").

[24] DUKEMINIER ET AL., *supra* note 21, at 323.

[25] *Id.* at 387-90.

[26] *Id.* at 417.

each party is a fifty-percent owner of the title.[27] Community property is a clear example of GP, as are the various forms of co-ownership of real property in separate property states.

3. Neighborhoods and Communities

a. *Common Interest Communities*

Common interest communities (CICs) constitute the most important development in residential life in the United States in the past several decades and serve as clear examples of a governance property institution. As of 2008, over fifty-nine million Americans resided in CICs.[28] Roughly sixty percent of all CICs are homeowner associations, and the rest are condominiums and cooperatives.[29] Ownership is divided among multiple individuals, all of whom have simultaneously existing use interests in certain resources. In homeowner associations, for example, usually all owners of individual units have easements with respect to common areas, which may include walks, parking lots, and recreational facilities.[30] Moreover, CICs are based on a complex of restrictive and affirmative covenants, which the CIC board, representing all owners in the community, has the power to enforce.[31] In a very real sense, every property owner has some kind of property interest in everyone else's property, which is precisely the character of a GP institution.

b. *Leaseholds*

Modern leaseholds are also a governance property arrangement because title is divided between tenant and landlord.[32] Each party has a legally protectable property interest in the same resource. The landlord and the tenant have conflicting interests,[33] making it necessary to

---

[27] *Id.* at 387-90

[28] *Id.* at 896.

[29] *Id.*

[30] *See* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 19-20 (1994) (classifying "share[d] ownership of the 'common area' of the development" as one of the "distinct legal characteristics" of a CIC).

[31] On the distinction between restrictive and affirmative covenants, see DUKEMINIER ET AL., *supra* note 21, at 873-74.

[32] *Id.* at 428-31 (noting the significance of a lease in creating "certain rights and duties and liabilities and remedies" that inhere in the landlord-tenant relationship).

[33] *Id.* at 482 (identifying a central problem in leaseholds as the dueling incentives of tenants to "neglect maintenance" and landlords to "neglect everyday repairs.")

develop some mechanism that both coordinates and maximizes the values of their respective interests.

4. The Commercial Sphere

Governance property institutions are also common in the business world. Although the public corporation remains the dominant organizational form, partnerships and close corporations are also widely used. These business organizations fit the description of GP perfectly. Ownership of the firm's assets is divided among multiple individuals whose property interests are deeply entangled with each other. This phenomenon is especially apparent in partnerships and corporations—within those contexts, the separation between ownership and control of firm assets is either partial or nonexistent, thereby intensifying the entanglement of interests.

Another form of business organization that fits within the GP model is the commercial trust. As John Langbein notes in an influential article, the vast majority of wealth held in trusts in the United States is in commercial trusts.[34] These trusts range from pension trusts to real estate investment trusts to asset securitization trusts and they represent an enormous amount of wealth as well as a significant form of business organization. Commercial trusts conform to the definition of GP for the same basic reason as do personal trusts: their common features include divided and multiple ownership, potentially conflicting interests, and fluid portfolios requiring sophisticated management.

II. The Analytical Structure of Governance Property

Analytically, governance property is not all the same. There are two basic types of GP institutions: (1) those that share the same structure as commons and (2) those whose structure is unique to GP. This Part briefly describes the analytical features of each.

---

[34] *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 178 (1997) (stating that well over ninety percent of the wealth in U.S. trusts is held in commercial trusts).

A. *Commons and Governance Property Shared Features*

1. Equality

Commons, both in the open-access and limited-access forms,[35] is a regime comprised of privileges and no rights.[36] All commoners have equal possession and use interests and have no right to exclude other commoners. The relationship among co-owners is one of relative equality concerning power or control over the asset.[37] All commoners exercise, at least formally, equal control and management. Some governance property institutions also exhibit equality of control, such as cotenancies. Formally, no cotenant unilaterally controls the asset. Stated differently, *both* tenants control the asset—at least in the sense that either cotenant may transfer his share to another party or invest it as he will. The same can be said for other GP institutions, including partnerships.

2. Concurrent Privileges

Closely related to equality of control is the second characteristic of the commons' and GP's analytical structure—concurrent privileges of possession, use, and enjoyment. As we have already seen, all persons within a commons are entitled to use and enjoy as much of the asset as they wish. Some GP institutions share this feature. Once again, partnerships and cotenancies are examples. In these systems, no one has the right to exclude a cotenant or partner from using or enjoying the property, unless a mutual agreement binds the parties from exercising this privilege. Concurrency of privileges predictably creates problems in their exercise, requiring development of coordination norms or mechanisms.[38] In the open-access type of commons, concurrency of

---

[35] *See generally* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322-62 (1993) (comparing the utility of private and public land use rights in different contexts).

[36] *See* Frank I. Michelman, *Ethics, Economics, and the Law of Property* (describing a "state-of-nature" in which "[a]ll is privilege" and no one has exclusionary rights), *in* ETHICS, ECONOMICS & THE LAW: NOMOS XXIV 3, 5 (J. Roland Pennock & John W. Chapman eds., 1982).

[37] *See* DUKEMINIER ET AL., *supra* note 21, at 319-22 (emphasizing the concurrent ownership interest typical of cotenancies).

[38] In the case of cotenancies, this dilemma was memorably captured in the following pithy statement: "Two men cannot plow the same furrow." Mastbaum v. Mastbaum, 9 A.2d 51, 55 (N.J. Ch. 1939).

privileges leads to the familiar problem known as the "tragedy of the commons," at least according to critics of the commons.[39]

B. *Features Unique to GP*

Not all governance property institutions share the same analytical structure as the commons. Some forms of GP exhibit unique analytical characteristics. Two such characteristics are especially prominent—verticality of relationships and nonconcurrency of use and enjoyment privileges.

1. Verticality of Relationships

In some governance property institutions, the relationship among interest holders regarding control over the asset is formally vertical, meaning that some interest holders hold exclusive or greater control than others over the asset. This hierarchy of power is distinct from the commons, which is characterized by a horizontal relationship among interest holders. A trust is a clear example of a vertical GP institution. The trustee is an interest holder of one kind (the legal titleholder), while the beneficiaries are interest holders of quite a different kind (beneficial, or "equitable," rights holders).[40] However, their interests are not equal with respect to control over the trust assets. Only the trustee has the power to control the trustee property, although he must exercise that power in the exclusive interest of the beneficiaries.[41]

Other GP institutions exhibit similarly hierarchical relationships with respect to control of GP assets. Leaseholds, for example, consist of a vertical relationship between landlord and tenant. In one sense, the tenant immediately controls the leased premises, but in a more fundamental sense the landlord does. The landlord's reversion interest permits him to control the tenant's use of the premises in a variety of

---

[39] The classic account of this phenomenon is, of course, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). The "tragedy of the commons" is essentially a coordination problem in the sense that the multiple users of the common resource are unable to agree to a plan that would coordinate their individual consumption of the resource in such a way that would maximize its value to them over time. Governance property arrangements in which multiple users and interest holders have concurrent use privileges face the same coordination problem.

[40] *See* THOMAS P. GALLANIS, FAMILY PROPERTY LAW: WILLS, TRUSTS, AND FUTURE INTERESTS 393 (5th ed. 2011).

[41] *See* DUKEMINIER ET AL., *supra* note 21, at 275.

ways that the property doctrines, ranging from the law of waste to the law of fixtures, formally recognize.[42]

2. Nonconcurrency of Enjoyment

In addition to the potential for vertical relationships, some GP institutions also differ from commons through the timing of the interest holders' rights of possession and enjoyment. Rather than possessing the asset concurrently, as commoners may, the beneficiaries of these GP institutions have successive rights of enjoyment. Once again, trusts provide an example. In nearly all personal trusts, the right to possess and use the trust property is divided sequentially between life beneficiaries and remainder beneficiaries. During the term of the life estate remainder, beneficiaries are not entitled to possess, use, or otherwise enjoy the trust assets unless the trustee has been given a power to invade the trust principal for their benefit.[43] The beneficiaries' right of possession is triggered only upon termination of the preceding life estate. This temporal division of interest itself creates an inherent conflict of interest among the beneficiaries that requires the creation of some sort of coordination norm and a mechanism to enforce it.

III. CONFLICTS AND COORDINATION IN GOVERNANCE PROPERTY INSTITUTIONS

Extensive literature on the commons has identified multiple problems that inhibit effective internal governance of commons property regimes.[44] This literature tends to focus on high negotiation costs due to holdouts and high monitoring and policing costs. The same problems beset some governance property institutions. This Part discusses such problems and various conflicts of interest that threaten the smooth functioning of GP institutions that are structurally similar to limited-access commons. It then examines some of the

---

[42] *See id.* at 505-08.

[43] *Id.* at 275.

[44] *See* Demsetz, *supra* note 39, at 348 (arguing that property rights help to internalize externalities that otherwise incentivize inefficient use of the commons); H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124, 134 (1954) (arguing that "the plight of fishermen and the inefficiencies of fisheries production stems from the common-property nature of the resources of the sea"). *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (suggesting that some common-pool resources are preserved through voluntary action by individuals and organizations).

means by which GP institutions respond to these potential conflicts in order to achieve effective and efficient coordination of interests.

As I have already discussed, not all governance property institutions are commons, as conventionally defined. Governance property institutions that include vertical control relationships avoid the familiar problems associated with commons by assigning authority over management of the property to a designated third party. Nevertheless, these institutions also face serious potential conflicts of interest, both within vertical and horizontal relationships. Like the commons-type GP institutions, property law and cognate fields have developed norms and mechanisms to deal with these conflicts and to facilitate coordination both among stakeholders and between managers and stakeholders.

A. *Conflicts of Interest Among GP Interest Holders*

Three main situations involve potential conflicts among interest holders in GP institutions.[45] These are: (1) consumption and enjoyment of GP assets; (2) investment and managerial control of the assets; and (3) membership in the GP institution.

1. Consumption and Enjoyment of GP Assets

Some GP institutions share similar consumption or use problems with the commons. In these institutions, interest holders enjoy simultaneous privileges to possess or enjoy the asset, creating potential conflicts of overuse and underinvestment. Consider cotenancies, for example. Both joint tenants and tenants in common hold separate, individual shares that are undivided, meaning that each tenant is entitled to possess and enjoy the entirety of the asset.[46] Obviously, it is impossible for all cotenants to exercise their right of occupancy simultaneously; therefore, some norm or mechanism for resolving this conflict must be developed. Similarly, when one cotenant occupies or possesses the entire asset, the other nonoccupying cotenants may claim that they are entitled to payment of an amount equal to the

[45] For a substantially similar analysis, see Hanoch Dagan & Michael Heller, *Conflicts in Property*, 6 THEORETICAL INQUIRIES L. 37, 40-45 (2005), which identifies the three main conflicts of interest in property law as "dilemmas . . . [arising] from consumption and investment, collective governance and decision-making, and policing exit from and entry into group property resources."

[46] *See* DUKEMINIER ET AL., *supra* note 21, at 319-22.

value of their respective interests in the asset.[47] Other conflicts may arise over questions concerning contributions for improvements and repairs to the asset, and so on.[48] All of these conflicts require background norms for mediating disputes.

Other GP institutions involve conflicts different than those facing commons-like institutions. Institutions in which relations between interest holders are not strictly horizontal or in which the interest holders' rights of possession or enjoyment are successive rather than concurrent pose two types of conflicts that are unique to GP institutions: (1) opportunistic behavior by those interest holders who have power to manage the asset and (2) conflicting investment goals among interest holders whose enjoyment rights are successive rather than concurrent. Trusts nicely illustrate both problems. As previously noted, trusts have two types of interest holders—trustees, who hold legal title to the trust assets, and beneficiaries, who have the beneficial (or "equitable") interest.[49] Because the trustee holds legal title and nearly always has the power to sell the assets, there is a risk that he will use that position for his personal gain and to the disadvantage of the intended beneficiaries. The second problem—conflicting investment goals among beneficiaries—results from the nearly inevitable division of beneficial ownership between those beneficiaries whose interests are presently possessory and those whose interests will or may become possessory in the future. This temporal division of the rights of possession and enjoyment creates an inherent conflict between the two groups regarding the proper investment objectives of the trust. Presently, possessory interest holders will prefer investments in assets that maximize current yield at the expense of long-term capital growth.[50] Future interest holders will prefer precisely the opposite investment strategy.[51] To accommodate the interests of the two groups of beneficiaries, the law has to develop some coordinating norm.

---

[47] *See id.* at 348-51.

[48] *See id.* at 353-58.

[49] *See id.* at 275.

[50] *See* GALLANIS, *supra* note 40, at 673 (defining a possessory estate as "an ownership interest in property granting the owner the current right to possession or enjoyment").

[51] *Id.* ("'Future interest' means an ownership interest in property where the right to possession or enjoyment is deferred until some time in the future; the future possession or enjoyment may be certain to occur or may be uncertain to occur.").

2. Preservation and Managerial Control of Assets

A second, and somewhat overlapping, area of potential conflict among GP interest holders concerns management and investments aimed at preserving and, where appropriate, growing GP assets. For instance, both cotenants and residents of common interest communities may have conflicts over expenditures for repairs or improvements to co-owned structures.[52] Married couples sometimes have conflicts over capital investments in the family residence that they own either jointly or as a community.

Conflicts may also arise over management of GP assets. In vertical GP institutions such as trusts and close corporations, the question of who has power to manage and invest assets is settled by the institution's structure. The characteristic separation of management from beneficial enjoyment resolves the issue. However, in horizontally structured institutions, this question is a source of potential friction. In community property, for example, where some assets titled in one spouse's name are in fact legally owned by both persons equally,[53] authority to manage the community assets may be a source of conflict. The same is true of other forms of co-ownership. A related and equally important question concerns the liability of one co-owner for management actions unilaterally made by another co-owner. Imagine *H* and *W* own their home as tenants in common, and *H* executes a mortgage on the entire interest in the house. Is *W* bound by *H*'s action such that if *H* defaults on payment of the mortgage obligation, the mortgagee can proceed against *W*'s interest as well as that of *H*?

3. Membership

A third area of potential conflict among interest holders in governance property concerns membership in GP institutions. This area involves questions of entry, exit, and alienability. First, consider entry. Suppose a very wealthy, well-known, controversial former politician wishes to purchase a unit in an exclusive housing co-op on Manhattan's Upper East Side. Based on past experiences in such situations, we can

---

[52] Carol J. Silverman & Stephen E. Barton, *Shared Premises: Community and Conflict in the Common Interest Development* (suggesting that the need for governing board approval of expenditures can lead to "bitter disagreements" between owners), *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 129, 134 (Stephen E. Barton & Carol J. Silverman eds., 1994).

[53] *See* DUKEMINIER ET AL., *supra* note 21, at 388.

be fairly certain that existing member-owners are likely to disagree about whether the ex-politician should be permitted to join the co-op.[54] To move to a more serious source of conflict, suppose a recent legal immigrant from a Latin American country who speaks only halting English applies to rent an apartment. Her status as a non–English speaking immigrant may cause conflict, either because of the landlord's own discriminatory beliefs or those of other tenants.[55] Coordination norms and enforcement mechanisms are needed to resolve such conflicts if they occur and to protect vulnerable applicants.

Exit is an equal if not greater source of conflict, to which numerous examples attest. For instance, cotenants often find that they cannot resolve their differences, and one or both of them may wish to dissolve the co-ownership arrangement. When married couples exit their relationship, conflicts often arise over the division of marital assets. Owner-residents in common interest communities may desire the freedom to transfer their property to whomever they choose, but the homeowners association has a competing interest in restraining the alienability of its members' interests in order to control membership in the development. Trust beneficiaries whose interests are certain to become possessory in the future sometimes seek to capitalize their future interests by selling them for their present discounted value, but trust creators commonly want to control the identity of their beneficiaries as long as possible and so impose restraints on alienation. Exit can be a means of ending conflict, but as these examples indicate, it can also be a *source* of conflict.

B. *Coordination: Norms and Mechanisms*

1. The Heterogeneity of Coordination Norms and Devices

Much of property law consists of norms and doctrines that are intended to facilitate coordination among multiple interest holders of

[54] Among the rich and famous who have been turned down by co-op boards are Mariah Carey, Madonna, Barbra Streisand, and former President Richard Nixon. *See* DUKEMINIER ET AL., *supra* note 21, at 898-99 ("Tenants in exclusive cooperatives in Manhattan place a premium on having neighbors of high status or well-seasoned money in conservative surroundings. As a result of their screening procedures, numerous prominent persons have been excluded . . . and under New York state law no [reason for the rejection] is required.").

[55] *Cf.* Fair Housing Act, 42 U.S.C. § 3604(a) (2006) (making it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin").

governance property assets.[56] This collection of norms and doctrinal tools is heterogeneous. Some are simply default rules, operating in the background of social interactions, while others are mandatory rules. In addition, the norms and doctrines vary in how they resolve conflict. Some are voice oriented, facilitating participation among interest holders; others resolve conflicts by permitting exit.[57] Finally, Hanoch Dagan has persuasively argued that the underlying character of the relationships involved in various GP institutions—personal, social, or commercial—strongly influences the type of coordination device adopted by the law. "The closer a property institution is to the social pole," he argues, "the greater the emphasis is on voice . . . ."[58] Moreover, "the more social [the institution] is, the more collective control we see over exit and entry."[59] We may also add that the closer the institution is to the social end of the pole, the more we see use of substantive equality norms.

2. Norms

There are two main kinds of legal norms that regulate governance property institutions: fairness and equality. Fairness norms may be divided into two types. The first type responds to consumption and use conflicts, such as the duty against waste in landlord-tenant law.[60] These conflicts are horizontal among multiple persons with either successive or concurrent legal interests in GP assets. The second type of fairness norm responds to problems regarding management and control of GP assets. Examples include the fiduciary duties of those who control GP assets to exercise their managerial powers in ways consistent with beneficiaries' interests. In trusts law, for instance, the duty of impartiality requires that the trustee not favor one group of beneficiaries over another when investing GP assets or allocating receipts between them.[61] The same logic explains the duties of care

---

[56] For an excellent discussion of this topic, see generally HANOCH DAGAN PROPERTY: VALUES AND INSTITUTIONS ch. 10 (with Michael Heller) (2011), which argues against the traditional view of property as fueling conflict and for a concept of property as fostering cooperation among various interests.

[57] Hanoch Dagan argues that mechanisms that rely on exit, such as partition of co-owned property, do not resolve conflicts as much as they avoid them. *Id.* at 232-33.

[58] *Id.* at 237.

[59] *Id.* Dagan bases this assertion on the greater risk of opportunistic exit and entry in socially oriented property institutions.

[60] *See* DUKEMINIER ET AL., *supra* note 21, at 505-06.

[61] *See* RESTATEMENT (THIRD) OF TRUSTS § 79 cmts. a & b (2007).

and loyalty that apply to corporate fiduciaries and trustees.[62] The warranty of habitability in landlord-tenant law can also be explained in these terms.[63]

Equality norms are primarily a problem in the context of consumption and exit in social-type GP institutions. For example, the norms of concurrent estates entitle each interest holder an equal right to use, possess, and enjoy the GP asset during their respective lives.[64] Similarly, when a couple ends their relationship, they may be able to agree on the division of their assets, or a premarital contract may already settle most or all of the issues for them.[65] If they cannot agree, legal norms must do this work for them. Equality is the basic norm in virtually all states for distributing property upon divorce, either through the community property system or equitable distribution statutes.[66]

3. Management Mechanisms

Collective management mechanisms reflect a recognition of the difference between vertically and horizontally arranged governance property institutions.[67] Governance property institutions with interest holders tend to fall toward the commercial end of the spectrum of GP institutions. These institutions are, with few exceptions, structured vertically. This structure facilitates decisionmaking and avoids familiar collective action problems because managerial control over and responsibility for the assets is concentrated in a centralized authority. Some of these institutions, such as common interest communities, are democratic governance mechanisms insofar as the managers are elected

---

[62] *See id.* § 77 cmts. b-d; *see also id.* § 78 cmt. a.

[63] *See, e.g.*, N.Y. REAL PROP. LAW § 235-b (McKinney 2006) ("In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased . . . are fit for human habitation . . . ."); Hilder v. St. Peter, 478 A.2d 202, 208 (Vt. 1984) (adopting the implied warranty of habitability, meaning that "a tenant who enters into a lease agreement with knowledge of any defect in the essential facilities cannot be said to have assumed the risk . . . .").

[64] *See* DUKEMINIER ET AL., *supra* note 21, at 319-21.

[65] *See, e.g.*, Simeone v. Simeone, 581 A.2d 162, 167-68 (Pa. 1990) (holding that a premarital agreement signed on the eve of a wedding was enforceable upon divorce); Reece v. Elliot, 208 S.W.3d 419, 423 (Tenn. Ct. App. 2006) (determining that a surviving spouse who was not "misled" in signing a premarital agreement rendered the agreement "binding and enforceable" upon her husband's death); *see also* UNIF. PREMARITAL AGREEMENT ACT § 6 (1983) (defining nonenforceable premarital agreements as those agreed to involuntarily and unconscionable at the time of execution).

[66] *See* GALLANIS, *supra* note 40, at 349-51.

[67] For a similar analysis, see Dagan & Heller, *supra* note 45, at 46-54.

by a majority of the interest holders.[68] In other similar institutions, such as the trust, the power holder is appointed and not subject to majoritarian approval or removal at the behest of the interest holders.

Horizontally arranged institutions lack top-down managerial devices. Because most of these institutions are social rather than commercial institutions, there is less need for a central managerial agent to exercise control of the assets. In these arrangements, social norms usually are adequate to facilitate effective and efficient coordination among interest holders. Indeed, a centralized authority would risk damaging the personal nature of the interest holders' relationships. Such an arrangement, moreover, would be incompatible with the equality norm that characterizes horizontally arranged institutions. Marriage and domestic partnerships provide a good example of this phenomenon. Under community property regimes, neither partner acting alone during the relationship can convey his or her undivided one-half share of community assets except to the other partner.[69] This differs from common law tenancies in common and joint tenancies, in which a tenant may unilaterally convey her undivided share to a third party.[70]

As to tenancies by the entirety, the husband had complete control and use of entirety property during the marriage at common law.[71] Not being under any legal disability, the husband, but not the wife, could unilaterally transfer a separate share to a third party.[72] Under the principle that creditors may reach whatever interests the debtors can voluntarily alienate, the husband's creditors could reach all of the entirety property.[73] The wife could not transfer her interest without her husband's consent; hence, her creditors could not reach it.[74] The nineteenth century Married Women's Property Acts, which were enacted in all states, significantly changed the common law. State courts

---

[68] *See* Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1523, 1543 (1982) (explaining that homeowners asssociations "elect a board of directors to manage association affairs" with voting rights proportionate to share ownership).

[69] *See* DUKEMINIER ET AL., *supra* note 21, at 389.

[70] *See id.*

[71] *See id.* at 360 (explaining that under the English marital property system, the wife received the husband's support and protection, while the husband gained control over the wife's property).

[72] *Id.*

[73] *Id.*

[74] *Id.*

have interpreted their respective acts differently, however.[75] In states where tenancy by the entirety continues to be recognized,[76] different views exist regarding creditors' rights in entirety property.[77] In most states, a creditor of one spouse cannot reach the other spouse's interest in entirety property because neither spouse can unilaterally convey his or her interest to a third party.[78] A handful of states protect both parties while they are alive but allow creditors to reach the debtor spouse's survivorship interest in entirety property.[79] In a minority of states, husbands and wives have equal rights to entirety property, and their respective creditors can reach their individual interests both during their lives and at death.[80] The majority approach most closely resembles community property and requires genuine collaboration between spouses and domestic partners in states that recognize domestic partnership co-ownership.[81]

Finally, to reduce conflicts over membership issues, some GP institutions adopt membership control mechanisms. For example, housing cooperatives have traditionally used restrictions on entry to assure that persons deemed incompatible with the co-op's ambience and purposes are not admitted.[82] Courts have been more tolerant of these restrictions on co-op entry than they have been with other forms of co-

---

[75] *Id.* at 366-67.

[76] In some states, enactment of a Married Women's Property Act led to abolition of the tenancy by the entirety estate altogether. *See* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 41 ("In some states, courts took the entirely logical position that once the rights of married women to hold property were recognized, the two were no longer one and there was no longer any such estate as tenancy by the entirety.").

[77] *See* Patricia A. Cain, *Two Sisters vs. A Father and Two Sons: The Story of* Sawado v. Endo (identifying three categories of protection from creditors in a tenancy by the entirety which correspond to whether the state provides high, intermediate, or minimal protection from creditors), *in* PROPERTY STORIES 99, 119 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

[78] *See* DUKEMINIER ET AL., *supra* note 21, at 367.

[79] *See, e.g.*, Robinson v. Trousdale County, 516 S.W.2d 626, 632 (Tenn. 1974) (holding that the right of survivorship may be alienated in a tenancy by the entirety, but no other property rights may be transferred without the consent of both spouses).

[80] *See, e.g.*, Coraccio v. Lowell Five Cents Sav. Bank, 612 N.E.2d 650, 652 (Mass. 1993) ("We declare that . . . one spouse, acting alone, . . . [can] encumbe[r] his or her interest in property held by the entirety.").

[81] *See* Cain, *supra* note 77, at 110.

[82] *See* DUKEMINIER ET AL., *supra* note 21, at 898-99 (discussing the ability of cooperatives to exclude potential tenants through rigorous screening procedures).

ownership housing, largely because of the co-op's interdependent form of financing.[83]

IV. GOVERNANCE PROPERTY: VALUES AND VIRTUES

Like exclusion property, governance property aims at achieving certain values. Some of these values are pursued by both GP and EP, including autonomy and aggregate welfare. Other values, however, are uniquely associated with GP institutions. As I explain in this Part, GP's moral foundation—that is, all of the values associated with GP—is best understood in terms of the Aristotelian idea of human flourishing. Not to be confused with "welfare" or "well-being,"[84] human flourishing in the Aristotelian tradition roughly means living a life worth having in an objective sense—that is, not based on subjective desires or preferences but in accordance with virtues and practical reason.[85] Human flourishing is a pluralistic moral value; it is comprised of multiple values that cannot be reduced to a single fundamental value, such as utility or Kantian dignity.[86] Among these principles are individual autonomy and freedom, social welfare, community and sharing, and personhood and self-realization.[87]

Elsewhere I have argued in a vein similar to Amartya Sen and Martha Nussbaum's capabilities approach[88] that humans require cer-

---

[83] *See, e.g.*, 40 W. 67th St. Corp. v. Pullman, 790 N.E.2d 1174, 1178-80 (N.Y. 2003) (adopting a weaker business judgment rule as the standard of review with respect to co-ops); *see also* DUKEMINIER ET AL., *supra* note 21, at 898-99, 918-20.

[84] Welfare, in its current usage, is a monist term; that is, it is a single, foundational moral value. In contrast, human flourishing is a pluralist term in the sense that it rejects the notion that there exists any single, foundational good or value. Instead, goods are plural and commonly (though not inherently) incommensurable. *See* Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1034-35 (2011).

[85] The term "flourishing" is a better translation of Aristotle's term *eudaimonia*, which is often translated as "happiness." "Flourishing" more accurately captures Aristotle's meaning because, unlike happiness, *eudaimonia* does not connote a mood, as "happiness" does. *See* RICHARD KRAUT, ARISTOTLE 53 n.4 (2002) ("It would be a great mistake to assume without argument that one's good consists in experiencing a certain pleasant state of mind called 'happiness' . . . we should not be misled by the translation of *eudaimonia* as 'happiness' into supposing that [Aristotle] erred in this way."). Moreover, it is all too easy to understand happiness as a matter of physical pleasure or subjective desires, neither of which is the meaning of *eudaimonia*. *Id.*

[86] *See* Alexander, *supra* note 84, at 1020.

[87] *See generally* Alexander, *Social-Obligation Norm*, *supra* note 5.

[88] For a discussion of the capabilities approach, see generally MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011); MARTHA C.

tain capabilities in order to flourish. A relatively uncontroversial list of those capabilities includes the following: life (including health and security); personal freedom (including identity and self-knowledge); practical reason (the ability to deliberate about what actions are good for one to take); and sociability (including self-respect, participation, and friendship).[89] I have further argued that material resources may be necessary to provide those essential capabilities and that ownership includes an inherent obligation to provide, at times and in appropriate ways, those resources out of one's surplus.[90] Here, I propose that ownership of governance property contributes to the development of human flourishing. While I do not wish to overstate its contribution, the contribution is nonetheless real and serves to further distinguish governance property from exclusion property.

Ownership of governance property, as opposed to exclusion property, contributes to the development of virtues.[91] Eduardo Peñalver has succinctly defined virtues as "acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing."[92] I argue that governance property inculcates certain important virtues more effectively than does exclusion property and that virtue development is both a distinctive characteristic of GP institutions and a major reason for their remarkable growth.

A. *Governance Property Values*

The moral foundation of governance property is human flourishing.[93] The pluralistic conception of human flourishing means that

---

NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000); AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985); AMARTYA SEN, THE IDEA OF JUSTICE (2009); Martha C. Nussbaum, *The Supreme Court 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007).

[89] *See* Alexander, *Social-Obligation Norm*, *supra* note 5, at 765 (explaining that the well-lived life includes life, freedom, practical reasoning, and sociality); Alexander & Peñalver, *supra* note 7, at 138 (identifying the four main capabilities of human flourishing as life, freedom, practical reason, and affiliation).

[90] Alexander & Peñalver, *supra* note 7, at 146 (arguing that to survive, human beings need certain resources and must sometimes share their surplus resources with others).

[91] *See* ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 167 (1999) (defining a virtue as "a character trait that a human being needs . . . to flourish or live well.").

[92] Peñalver, *supra* note 7, at 864 (citation omitted).

[93] I entirely agree with Merrill and Smith in their assertion that "no system of property rights can survive unless property ownership is infused with moral significance." Merrill & Smith, *supra* note 1, at 1850. However, the substantive content of property's morality remains in question.

property serves multiple values and that these values are incommensurable.[94] These values include: personal autonomy, individual security, self-development or self-realization, social welfare, community and sharing, fairness, friendship, and love.[95] No form or institution of property necessarily contributes to or guarantees the realization of all components of human flourishing; the relationship between property and love, for example, is particularly tenuous. Property, including governance property, is not a sufficient condition for human flourishing but it does contribute in important ways to many aspects of flourishing.

Consider the values of community[96] and sharing. Governance property forms nurture community and sharing values in multiple ways.[97] First, GP requires interest holders to yield exclusivity with respect to important rights and powers over the asset. Some GP forms, for example, require interest holders to share the right to possess, enjoy, or consume. Moreover, rights of equal enjoyment among some GP co-owners may not depend upon agreement between them or some metric of desert such as a percentage-of-contribution rule. Community property[98] is an obvious example of such a phenomenon.[99]

---

[94] *See* Douglas B. Rasmussen, *Human Flourishing and the Appeal to Human Nature*, 16 SOC. PHIL. & POL'Y 1, 14 (1999) (acknowledging various components essential to human flourishing but cautioning that "an examination of human nature may reveal basic . . . virtues, but it does not reveal what the weighting or balancing of these . . . virtues should be for the individual") (citation omitted).

[95] *See* Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach* (enumerating "important spheres of experience recognized by Aristotle" and the corresponding virtues they represent), *in* ETHICAL THEORY: AN ANTHOLOGY, 686-87 (Russ Shafer-Landau ed., 2007).

[96] I wish to reject a possible reading of this Article as premised on the unarticulated assumption that community is an unadulterated good. As I have expressed in another context, there is a potential "dark side" to community, as well—one that results from its inherently exclusionary character. "Communities by their very nature exclude." Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 52 (1989). Therein lies what I call the "paradox of exclusion": "by excluding others, communitarian groups radically limit their capacity to develop sympathy for others and thereby contradict the communitarian ideal itself." *Id.* This dilemma does not provide a reason to reject community as a value, only a reason for caution about pursuing it.

[97] *See* Dagan & Heller, *supra* note 45, at 45-46.

[98] Recall that a community property regime is one in which each spouse immediately owns a one-half interest in all assets that come into the marriage (other than by gift or inheritance) merely by virtue of their marital status.

[99] Hanoch Dagan and Michael Heller point out how rules such as this illustrate marital property law's rejection of the "Lockean desert-for-labor principle." *See* Dagan & Heller, *supra* note 45, at 50. Other GP arrangements, however, are contribution-based.

Additionally, some GP forms require that interest holders share the power to manage, such as community property.[100] Some GP forms promote community in less direct ways. One such way is by restricting the interest holders' right to exit the form. For example, parties to a tenancy by the entirety may not unilaterally exit that form of co-ownership by individually and nonconsensually deeding their interest to a third party.[101] Only death or divorce terminates the tenancy by the entirety.[102] Moreover, neither tenant may unilaterally exit from co-ownership entirely by obtaining judicial partition of the property.[103]

Governance property facilitates community in more subtle ways as well. An important aspect of community is sociality, the social relationships and interactions characterized by mutual respect and even sympathy. Sociality includes getting along—and constructively engaging—with others in shared interests, projects, and endeavors. G.H. Mead discussed sociality in terms of transitions and changes in the self that result from social interaction.[104] Sociality is a matter of apprehending and responding to the perspectives of others.[105] Mead explained this process as operating in two systems at once, a situation that necessarily invokes continual adjustments between the two systems with resulting mutual effects on each.[106] As Sandra Rosenthal argued, from this perspective, "[t]he self in its bipolar dynamics is constituted by an ongoing process of mutual or reciprocal adjustments of these two poles, each to the other."[107] Through this process, the individual develops relationships of understanding and attachments with the other.

---

[100] All community-property states have statutes giving both parties equal management powers over community assets, such as the power to transfer or to mortgage the assets. *See* DUKEMINIER ET AL., *supra* note 21, at 390-91.

[101] *See id.* at 321.

[102] *See id.*

[103] *Id.* at 338.

[104] *See, e.g.*, George Herbert Mead, *The Social Self* (finding that the self is continuously altered by moral problems experienced by socialization), *in* SELECTED WRITINGS: GEORGE HERBERT MEAD 142, 148 (Andrew J. Reck ed., 1964).

[105] *Id.*; *see also* Martha Nussbaum, Reflection, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 23 (2007) (suggesting that among the "central human capabilities" is the ability "to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another").

[106] *See* Mead, *supra* note 104.

[107] Sandra B. Rosenthal, *Self, Community, and Time: A Shared Sociality*, 50 REV. METAPHYSICS 101, 108-09 (1996).

The very nature of governance property forms promotes and depends on community and sharing.[108] Not all forms, of course, do so equally and not all of them effectively inculcate these values. But their very structure facilitates sharing among multiple interest holders. The intensity of that sharing will differ among the various forms and institutions of GP. The variety of these GP forms and institutions, in turn, largely tracks their social background.[109] Hence, sharing norms are more intense in the context of marital property, where the social background normally includes expectations of sharing.[110] Such norms are more attenuated in the context of commercial organizations such as close corporations, where the dominant character of the social relationships is economic.

The best way to conceptualize the relationship between community norms and GP forms is as a spectrum of strength. At one end, there are GP forms in which the fit between sharing and the relationship is quite strong. Community property is perhaps the best example of such a GP form. Because community property is restricted to married couples (and in a few states, such as California, domestic partners), in which the social relationship is close and intimate (at least ideally), sharing norms should work better in that context than in one in which the relationship is between parties who know and interact with each other only for their individual economic purposes. At the other end of the spectrum are those forms in which the primary basis of the relationship is economic or commercial. True, a degree of sharing and community exists among the interest holders, but the fit is weaker than in the community property context. Business partnerships are prime examples. Although the parties may have a pre-existing social relationship, the common basis of the business relationship is maximization of each individual's wealth. Intimacy is seldom a part of these relationships, in contrast to marriage or a domestic partnership. All of the remaining GP forms occupy various points along this spectrum.

---

[108] *See* Dagan & Heller, *supra* note 10, at 572-74 ("Cooperation . . . is a good, in and of itself, in addition to its importance in facilitating economic success," and is promoted by participating in "a group with a joint commitment").

[109] *See* Dagan & Heller, *supra* note 45, at 45-46 (arguing that the degree to which interpersonal benefits are the primary purpose of the property institution influences community values).

[110] *See* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 81-83 (2004) (suggesting that communal marriage depends on cooperation and each spouse avoiding the making of individual claims of entitlement).

Individuals in governance property arrangements necessarily engage with each other on a continual basis rather than having sporadic interactions as do exclusion property owners.[111] Even when GP institutions fall on the strictly economic end of the spectrum, GP owners must work constructively with their co-owners if they are to maximize the value of the enterprise. Value maximization requires that co-owners try to understand the perspective of other co-owners. For instance, when a co-owner disagrees with another's perspective, he must make serious attempts to engage constructively with the other co-owner. Voice is the preferred response as exit is normally the response of last resort.[112] In this way, GP arrangements both depend on and facilitate sociality and other aspects of community.

The dominant role of voice in governance property institutions underscores another aspect of community as a moral value—commitment. Commitment may be very thick, to the point of requiring one or some interest holders to sacrifice or subordinate personal interest for the sake of the other interest holders. The requirement that trustees act on the basis of undivided loyalty to the trust beneficiaries, for example, illustrates a particularly *thick* form of commitment. To some extent, the thickness that governance property involves depends on the social character of the GP arrangement. Marital property forms, such as community property and tenancy by the entirety, rest on thick personal commitment of the individuals to each other as long-term intimate companions. Exit is available through divorce, but few people enter into marriage expecting or planning to exercise that option.

More commonly, GP arrangements require and promote a thinner form of commitment, though commitment is still required for the arrangement to successfully provide social or economic benefits to the co-owners. For example, property owners in common interest communities cannot receive the benefits of such housing arrangements without committing themselves to a plan that connects them with the development's other owners. Even if their only expected benefit is economic—maintaining a relatively high market value of their own property—they must commit themselves to a development plan that binds them with their neighbors. Exclusion property ownership does not require such

---

[111] *See* Dagan & Heller, *supra* note 10, at 575.

[112] *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3-5 (1970) (explaining that the "voice option" is the mode of directly expressing dissatisfaction to management within a group, organization, or some other authority).

commitment to others. Owners make decisions about the use, enjoyment, and management of their property free from the kinds of connections with other owners, and their attending obligations, that characterize GP ownership.

The role of commitment reflects another important aspect of community and of governance property: sharing. Governance property both requires and facilitates sharing in ways that EP does not. By definition, EP permits individual owners to exclude all others, and owners may exercise their right to exclude in several different respects. Not only may they exclude the rest of the world from physically entering or possessing their property, but they may also exclude others from transferring their assets, managing the property, and using the property as they wish.

Of course, the right to exclude is not absolute, and there are situations and respects in which the law may require EP owners to share enjoyment or control with others.[113] For our purposes, however, the key distinction between EP and GP ownership is that EP ownership is structurally *singular* and *unilateral.* In contrast, GP ownership is structurally *shared.* While one co-owner may have unilateral and singular rights with respect to some dimensions of ownership, no one person has unilateral control over every aspect of the asset's possession, use, transfer, or management.

To illustrate structural sharing, consider the trust. In trusts, the trustee has sole power to manage the trust property, but the right of enjoyment is shared among multiple persons even where the trustee is also a beneficiary. All co-owners must be able to exercise at least one right or power with respect to the asset. They need not exercise that right or power jointly, but multiple owners must be legally authorized to exercise it concurrently or sequentially.

Sharing in GP arrangements is a matter of degree. In some GP forms, a strong degree of sharing exists. A clear example is community property ownership—regardless of how title to a community asset is registered, both spouses (or domestic partners) simultaneously hold rights to enjoy or possess the asset. Neither has the right unilaterally to transfer or devise the entire title to third parties, and neither spouse can unilaterally change the character of the asset from community property to separate property. The power to manage community

[113] Elsewhere, I have analyzed this sharing dimension of exclusive ownership in terms of a social obligation norm in property law. *See* Alexander, *Social-Obligation Norm*, *supra* note 5, at 753-60.

assets is shared, although community property states differ in the details of how they assign management.[114]

B. *Governance Property and Virtues*

While scholars have noted the relationship between property and values, property's relationship to virtue is largely neglected in legal literature. Virtues are what enable a person to act according to values.[115] As such, they are at least partly constitutive of human flourishing.[116] To the extent that we perceive human flourishing as the value that morally grounds property, virtue is important to realizing property's moral purpose.

Only a full appreciation of virtue ethics makes sense of governance property and the centrality of its position in property law. It is difficult to understand the prevalence of GP institutions through a wide variety of social and economic spheres unless one takes into account those institutions' role in facilitating the development of virtues necessary for human flourishing.[117] I cannot fully discuss here all of the possible virtues connected to governance property, but a brief explanation of how governance property relates to two important virtues—cooperation and honesty—will suffice to illustrate the point.

One of the virtues with which governance property is closely connected is cooperation.[118] The relationship between cooperation

---

[114] *See* J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMP. PROBS. 99, 107 (1993) (noting that states have adopted a variety of management rules to govern community property).

[115] *See* RICHARD KRAUT, *supra* note 85, at 70-76 ("[Virtues] are not merely one component of a good life among others; rather, they exercise control over the components, including the other goods in our lives.").

[116] As Aristotle pointed out, virtues are necessary but not sufficient conditions of flourishing; external goods are also needed for flourishing. *See* Aristotle, *Nicomachean Ethics*, *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1737 (Jonathan Barnes ed., 1984). Hence, the causal relationship between virtues and goods runs both ways: goods require virtues (e.g., we cannot attain enduring friendship without certain virtues), but when we have other goods we find it easier to act virtuously. *See* KRAUT, *supra* note 85, at 74-75.

[117] This claim puts some distance between me and other scholars, such as Hanoch Dagan and Michael Heller, who have also examined the benefits of property arrangements that I have been calling governance property. *See generally* Dagan & Heller, *supra* note 45; Dagan & Heller, *supra* note 10.

[118] I do not suggest that all governance property institutions always or inherently facilitate cooperation. Indeed, I do not suggest that all GP institutions are inherently virtuous. Certain types of GP institutions can undermine cooperation and be nonvirtuous. Consider, for example, the spendthrift trust. Because beneficiaries of these trusts are immune from creditors' claims, the risk is that these trusts cultivate depend-

and governance property is reciprocal; that is, successful GP arrangements require cooperation, and GP in turn nurtures cooperation. For present purposes, cooperation may be roughly defined as working with others for mutual benefit or toward an agreed-upon goal. Cooperation is a virtue in multiple spheres of human activity, including economics and politics. In recent years, an extensive literature on cooperation has appeared, and much of it has been analyzed from the perspective of game theory.[119] This scholarship has produced important insights about the circumstances of cooperative behavior. Among these observations is the importance of the relationship between what Bernard Williams called "dispositions" and cooperation.[120] Cooperation cannot occur in the absence of a disposition to cooperate.[121] However, a disposition to cooperate need not be altruistic; it can also be egoistic.[122] Moreover, cooperative dispositions may be general ("macro-dispositions") [123] or only occasional ("micro-dispositions")[124] Much of the literature on cooperation and disposition focuses on how micro– and macro–cooperative dispositions contribute to economic gains and aggregate welfare.[125] Here, I wish to focus on how cooperative dispositions can contribute to virtues. Virtues promote social welfare themselves, but their importance is broader than that. They contribute to human flourishing, which includes not only social welfare but also extends to other contexts as well.

---

ence rather than virtues like responsibility. In this sense and to this extent, then, the spendthrift trust can be characterized as antivirtue.

[119] For the seminal works on the subject, see generally ROBERT AXELROD, THE COMPLEXITY OF COOPERATION (1997) [hereinafter AXELROD, COMPLEXITY OF COOPERATION]; ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) [hereinafter AXELROD, EVOLUTION OF COOPERATION].

[120] Bernard Williams, *Formal Structures and Social Reality*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 3, 6 (Diego Gambetta ed., 1988).

[121] *Id.* at 8.

[122] *Id.* at 10.

[123] *See id.* at 9-10 (explaining that an agent has a "*macro-motivation* towards cooperation" when the "agent regularly performs acts of cooperation, and . . . the cooperative aspect of the acts is an intentional feature of them").

[124] *See id.* at 10 ("A *micro-motivation* to cooperation is a motive to cooperate, on a given occasion or occasions, which does not imply any general motive to cooperate as such.").

[125] *See generally* AXELROD, COMPLEXITY OF COOPERATION, *supra* note 119; AXELROD, EVOLUTION OF COOPERATION, *supra* note 119; A. ALLAN SCHMID, CONFLICT AND COOPERATION: INSTITUTIONAL AND BEHAVIORAL ECONOMICS (2004); LESTER G. TELSER, A THEORY OF EFFICIENT COOPERATION AND COMPETITION (1987).

Governance property arrangements may require only a micro-disposition to cooperate, but they may also nurture macro-dispositions of cooperation. No GP arrangement can achieve its objectives without at least a minimal degree of cooperation between the co-owners. Some GP arrangements require only a modest amount of cooperation, while others require much thicker forms of cooperation. But the type of arrangement alone does not determine how much cooperation is necessary for collective action. Much depends on the goals or objectives of participants in the arrangement. Equally important are the character of the social relationships among the participants and the expected duration of the arrangement. There is no available metric by which to calculate the level of intensity of cooperation that is required. There is no single problem of cooperation; rather, there are multiple problems with varying degrees of complexity.[126]

Governance property institutions can nurture cooperation by creating cooperation norms and facilitating communication. Cooperation norms may be legal, social, or moral.[127] As Dagan and Heller point out, "Formal law is often not powerful enough, by itself, to establish directly the trust, cooperation, and mutual reliance that any successful commons requires for the day-to-day routines of self-governance."[128] Usually, social norms are sufficient to regulate ongoing relationships in GP arrangements, but legal norms can also effectively promote cooperation between co-owners. For example, restrictions on the right to exit the arrangement may encourage co-owners to resolve differences in a cooperative manner.[129] Exit restrictions range from the severe, such as trust law's spendthrift restraints and the rule

[126] Power asymmetry has the potential to undermine cooperation in some GP institutions. For various reasons, some interest holders may possess much more information than others about the institution's structural features, and with that information comes greater power in the form of practical access to mechanisms of decisionmaking. New owners, for example, may lack institutional knowledge about how the organization works in detail, rights they possess, issues that have arisen in the past, and their resolution. The informal nature of some GP arrangements may make it costly to obtain this information, and new owners may be reluctant to aggressively confront issues out of a desire to maintain cordial relations with their new neighbors. In such situations, a more diluted form of cooperation may occur.

[127] *See* JON ELSTER, THE CEMENT OF SOCIETY 186 (1989).

[128] Dagan & Heller, *supra* note 10, at 578.

[129] Exit restrictions are by no means certain to facilitate cooperation. They may have the opposite effect of breeding resentment. At a minimum, then, it is important that parties entering into GP institutions clearly understand the existence and legal effect of any restrictions on their right to exit the arrangement.

against premature beneficiary termination,[130] to the weak, such as rights of first refusal and consent clauses used in some condominium and other forms of common interest associations.[131] Exit restrictions such as these facilitate cooperation both ex ante by signaling to entrants that they cannot side-step disagreements simply by costlessly exiting the arrangement and ex post by preventing or discouraging opportunistic behavior through exit.[132]

Cooperation norms spark awareness in governance property interest holders that ownership obliges them to cooperate and that cooperation is essential to human flourishing. As owners increasingly act on that awareness, their willingness to cooperate increases. Of course, this is not invariably true; frustrations with co-ownership governance sometimes stifle the inclination to cooperate, leading co-owners to prefer going it alone. However, such instances are the exception rather than the rule. Participation in GP institutions is educative, and one of its primary lessons is that the path to human flourishing is social and cooperative.

Governance property institutions also nurture cooperation through communication. Many GP institutions structurally encourage communication. Consider the tenancy by the entirety.[133] The structure of the tenancy by the entirety, at least as interpreted by some states, envisions a particular kind of relationship that depends on communication between cotenants.[134] This institution encourages both parties to keep each other informed regarding use of their jointly-owned property because the exercise of property rights depends upon the other's consent. Structural features of other GP institutions, especially those with vertical power relations, similarly require communication between co-owners. In trusts, for example, trustees must keep

---

[130] *See* Claflin v. Claflin, 20 N.E. 454, 456 (Mass. 1889) (restricting trust beneficiaries' power to terminate a trust prematurely); Broadway Nat'l Bank v. Adams, 133 Mass. 170, 173 (1882) ("[I]f the intention of the founder of a trust . . . is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity.").

[131] *See, e.g.*, Laguna Royale Owners Ass'n v. Darger, 174 Cal. Rptr. 136, 144 (Ct. App. 1981) (permitting "reasonable restrictions on the alienation of condominiums" in condominium sales agreements).

[132] *See* DAGAN, *supra* note 56, at 182.

[133] I am indebted to Eduardo Peñalver for bringing this example to my attention.

[134] In Hawaii, for example, the tenancy by the entirety is viewed as a unity of equals; neither party may convey, lease, mortgage, or encumber the property without the other party's consent. *See* Sawada v. Endo, 561 P.2d 1291, 1295 (Haw. 1977).

beneficiaries informed regarding actions that materially affect the beneficiaries' interests.

Another virtue with which governance property is closely associated is honesty. As a virtue, "[h]onesty is a disposition to tell the truth, or at least a disposition not to lie."[135] But honesty is thicker than that simple definition suggests. When in a relationship of trust and confidence, honesty involves affirmatively keeping the other individual informed and not suppressing pertinent information. In this sense, honesty exists in many governance property institutions. The most obvious examples are institutions in which the fiduciary nature of the relationship among interest holders requires thick forms of honesty. Examples are the duties that trustees owe to trust beneficiaries and those that corporate officers and directors owe to shareholders.[136] Marital property is another example of an arrangement in which honesty is expected. Married couples ordinarily expect each other to be honest about their financial dealings.

Honesty is not always simply a matter of telling the truth in a frank or straightforward manner. Indeed, it is more nuanced than that, as the marital relationship illustrates. Marital partners certainly expect honesty from each other, but marital honesty does not necessarily involve telling one's partner the brutal truth. For example, if I ask my wife what she thinks of a new tie I recently purchased, she may shift the discussion if she in fact detests it.[137] She does so to avoid offending me and, perhaps, even out of respect for me. The example illustrates an aspect of honesty that is important in GP arrangements as well as in marriage. Honesty requires the exercise of practical wisdom, another virtue that governance property both requires and nurtures. Through the exercise of practical wisdom, one learns how *not* to lie and to respect the truth while also respecting other values that may be equally important to a successful relationship. Through participation in GP institutions, co-owners develop that virtue.

---

[135] CHRISTINE SWANTON, VIRTUE ETHICS: A PLURALISTIC VIEW 246 (2003).

[136] The classic statement here is, of course, then-Chief Judge Cardozo's observation in *Meinhard v. Salmon* that fiduciary duties involve "not honesty alone, but the punctilio of an honor the most sensitive." 164 N.E. 545, 546 (N.Y. 1928).

[137] Gary Watson uses this hypothetical situation to demonstrate that the response of shifting a discussion topic "may be admirable in its own way, expressing a virtue." Gary Watson, *Virtues in Excess*, 46 PHIL. STUD. 57, 65 (1984).

CONCLUSION

Governance property now dominates the landscape of property institutions. As a result of this development, the conception of ownership depicted by metaphors of fences and castles has become grossly misleading. That understanding supposes that ownership is solely a matter of the individual's relationship with the external world and that the internal workings of ownership are irrelevant to a proper concept of ownership. In fact, ownership's internal relations are every bit as essential to understanding ownership as are its external relations.

The rise of governance property means that the right to exclude can no longer be considered the single most important element of ownership. The right to exclude is neither characteristic of governance property nor central to its workings. What characterizes governance property, and most forms of property today, are mechanisms of internal governance.

Property theorists should focus on governance property as a distinct mode of ownership. Governance property promotes human flourishing in ways that exclusion property does not. It nurtures certain virtues that enable the multiple goods that together constitute a well-lived life to be realized. It underscores the inevitably social character of private ownership, and indeed of humanity, in a particularly vivid way. The time has come for greater recognition of governance property within property scholarship.