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## Joint ownership and alienability

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### Abstract

Most legal traditions view individual ownership as paradigmatic. Yet most property is jointly owned. This paper analyzes how joint ownership affects alienability by focusing on two fundamental issues raised by joint ownership—the nature of the class of those who may benefit from a joint asset and the nature of the process for making decisions about such an asset. I identify four possible ways to resolve these issues. These possibilities coincide with the four general approaches by which joint property has been held over time and across legal traditions. This four-fold categorization and the different effect each has on alienability is used to analyze a broad array of laws and practices, ranging from Hindu inheritance law to the Uniform Partnership Act to the growing shareholder democracy movement.

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Most legal traditions, including the Anglo-American one, view individual ownership as paradigmatic. Blackstone, for example, defines private property as “that sole and despotic dominion which one man claims.”<sup>1</sup> Yet much, perhaps most, property is jointly owned. Married couples own houses together; partnerships own much of the commercial real estate; and corporations own everything from factories to patents.

In spite of the ubiquity of joint ownership, surprisingly little academic research addresses the fundamental property-rights issues that arise when property is jointly held. The leading property-rights paper is a case in point. Although some of the property in Coase’s social cost paper is undoubtedly jointly held, he does not even raise the issue of joint

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<sup>1</sup> Blackstone (1766) at 212.

ownership.<sup>2</sup> To be sure, some papers analyze specific forms of joint ownership, such as corporate or governmental ownership, and other papers address common ownership.<sup>3</sup> But broader issues associated with joint ownership in general have received relatively little attention.<sup>4</sup>

This paper analyzes the impact of joint ownership on alienability. With joint ownership two fundamental issues arise that are absent with individual ownership: What class of individuals will receive the benefits produced by a joint asset and how will decisions concerning the asset be made. I propose that there are two basic ways to assign these benefits and two basic ways to make these decisions. The four possible combinations to resolve these issues constitute the four general approaches by which joint property has been held over time and across legal traditions. The four approaches have different effects on the alienability and hence on the ultimate allocation of both a joint asset and individual beneficial interests in such an asset.

The paper is organized as follows. [Section 1](#) explains how joint property differs from individual property. The focus here is on the two possible classes of beneficiaries and the two possible processes of decision-making. [Section 2](#) shows that the four ways to resolve these issues constitute the four general approaches by which joint property has been held over time and across legal traditions—the group approach, the organizational approach, the partnership approach, and the corporate approach.

[Section 3](#) uses the four-fold taxonomy and the differing impact each approach has on alienability as a framework for analyzing and gaining new insights into a broad array of legal doctrines and practices. For example, I show how English inheritance law evolved to facilitate transferability, both by moving away from the group approach to joint ownership and by discouraging joint ownership in general. Hindu inheritance law, in contrast, for thousands of years impeded transferability by following the group approach. Partnership law is used to illustrate how joint property is often held under a mixture of the conceptual approaches. Next, the widely accepted premise of the separation of corporate ownership from management is questioned as the focus turns to the decisions that corporate shareholders reserve for themselves. Finally, apparent inconsistencies in Anglo-American laws on the partitioning of joint property are reconciled. A brief conclusion follows.

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<sup>2</sup> Coase (1960).

<sup>3</sup> In this paper I do not address common ownership because it is not a type of joint property. Private property and voluntary exchange are predicated on exclusion; by definition there is no exclusion with a common-access resource. Holderness (1989) analyzes how some property-rights articles (e.g. Frech, 1979 and Mohring & Boyd, 1971) incorrectly apply the Coase Theory, which is a theory about voluntary exchange, to situations in which voluntary exchange is infeasible. Gordon (1954) and Hardin (1968) are the classic analyses of common-access resources. There is now a large body of literature on common ownership. Other insightful papers on common ownership include Caputo and Lueck (1994), Liebecap (1998), Lueck (1994), Miclei and Sirmans (2000), Rose (1985), and Schlager and Ostrom (1993).

<sup>4</sup> For instance, I know of only one other paper that offers a taxonomy for joint ownership, Ellickson (1993). Ellickson's taxonomy is substantially different from the one proposed here. Among other differences, Ellickson limits his analysis to land and focuses almost exclusively on the number of joint owners. In contrast, I focus on the nature of the class of beneficiaries and the process used to make decisions about the property. My taxonomy is not limited to land ownership.

## 1. Special issues with joint ownership

### 1.1. *The dynamic of a market economy*

The essential dynamic of a market economy is that property, whether it is held individually or jointly, will over time be transferred to higher-valued uses. When economists say that rights are alienable, they mean that there is both the opportunity and the incentive to transfer resources to higher-valued uses.

Legal scholars, starting with Blackstone, have often stressed exclusion as the essence of private property.<sup>5</sup> Although exclusion is a necessary condition for market transactions, not any orderly assignment of exclusionary rights will lead to the voluntary, value-enhancing exchanges that are the essence of a market economy. Feudal society, for example, had very specific assignments of exclusionary rights that endured for centuries, but often those rights were transferable only by descent from (typically) father to son and not by voluntary exchange.<sup>6</sup> Those assignments were consistent with a static feudal society, not with a dynamic market economy.

With individually owned property, alienability is achieved by assigning all exclusionary rights over an asset to the same person, including the right to any benefits the asset produces, the right to sell the asset, and the right to any proceeds from a sale of the asset. This collocation of decision rights and wealth effects provides both the incentive and the feasibility for value-enhancing transfers.<sup>7</sup> Berle and Means (1932) appropriately call collocation the “atom of property” and view it as “the very foundation on which the economic order of the past three centuries has rested.”<sup>8</sup>

With joint property two crucial questions arise that are largely absent with individual property. What class of individuals may receive the benefits the asset produces? What process will be used to make decisions concerning the asset? These two basic questions profoundly affect the alienability of both the joint asset itself and individual beneficial interests in the asset. These effects are the focus of this paper.<sup>9</sup>

One preliminary note. With joint property it is important to distinguish between a jointly owned asset and individual beneficial interests in such an asset. Often one may purchase

<sup>5</sup> See, for example Cohen (1954, p. 374); Harris (1996); Merrill (1998) and Penner (1997, p. 71).

<sup>6</sup> See Plucknett (1956), especially pp. 712–746, for a discussion of the many restraints on alienation in feudal times.

<sup>7</sup> Other facets of the law can likewise affect the costs of exchanging (alienable) rights. For example, if courts do not enforce voluntary contracts, some assets will still be transferred in the context of self-enforcing contracts. The incidence of exchange, however, will be lower than under a legal system that enforces contracts.

<sup>8</sup> Berle and Means (1932, pp. 7–8).

<sup>9</sup> Alchian (1965) distinguishes the partitioning of property from the sharing of property. Partitioning arises when one person has the right to take a certain action with a particular property, say the right to plant corn on Blackacre, while another person (say) has the right to halt activities that create loud noises emanating from Blackacre. In other words, partitioning arises when different people have different rights over the same asset. In contrast, the sharing of property rights, or joint property, exists whenever several people simultaneously have the right to benefit from the exercise of a particular right associated with an asset. For example, joint ownership arises if (say) 10 people have the right to eat any crops grown on Blackacre. The partitioning of rights is inevitable whenever physical interferences are possibly among neighboring parcels of property. The sharing of rights is not (physically) inevitable. Alchian, like Coase (1960), focuses on the partitioning of rights and largely ignores the sharing of rights. In contrast, I in this paper focus on the sharing of rights and largely ignore the partitioning of rights.

one without purchasing the other. For example, you may purchase IBM stock without purchasing an asset owned by the IBM Corporation and vice versa. This distinction, which is often over-looked, is used throughout this paper.

### 1.2. *The class of beneficiaries—open or closed?*

A central theme of this paper is whether an *open* or *closed* class of individuals is assigned the rights to receive the benefits produced by a joint asset.<sup>10</sup> A class is closed when individuals can enter the class, and thus obtain the right to receive the benefits an asset produces, only by first obtaining the permission of a current member of the class. Typically, this permission is obtained by buying the interest of a current member of the class, a current owner. But beneficial ownership can be obtained in other ways as well. For instance, one could work one's way in, as with a law partnership. Similarly, one can be voted into a country club for personal attributes or professional connections. The key in all instances is that the current owners, the current members of the class, must approve any new beneficiary.

When the class of beneficiaries is closed, a prospective owner can purchase the asset, if need be by purchasing the right from each individual owner. (This assumes that the beneficiaries are the decision-makers. Below I analyze what happens when the beneficiaries are not the decision-makers.) Over time the resource can thus be transferred to higher-valued uses. Examples of closed classes include shareholders of for-profit corporations, members of private country clubs, and partners of law firms. In all instances you must buy your way in (more precisely, you must secure the permission of the current owners), and this affords the opportunity to buy the joint asset itself.

Even when a class of beneficiaries is closed, transferability will be impaired as more people are in the class (or if membership in the class is ill defined). At some point, although in theory it is possible to contract with all members of the class and thus purchase the joint asset, the potential costs of arranging so many exchanges becomes prohibitive, and the rights effectively become non-transferable.

In contrast, a class is open when individuals can enter the class, and thus obtain the right to receive the benefits an asset produces, without first obtaining the permission of a current class, without typically first purchasing the right. Examples of open classes include congregations of most churches, citizens of political entities, and beneficiaries of non-profits. In all instances at least some individuals may join the group and benefit from the joint asset without first purchasing any rights.<sup>11</sup> When one leaves the group, the right to use or benefit from the joint asset is forfeited. There is no transfer to departing class members.

Openness poses an insurmountable obstacle to transferability. To see this, assume that all citizens of the United States have the right to enjoy a certain park. Assume further that this land would be more valuable as (say) an airport. There is no way for a prospective developer to buy the land because people are constantly becoming citizens, not by buying a right but by being born in or migrating to the United States. To be sure, a developer could purchase the right from any given citizen, but ultimately these purchases of individual beneficial interests

<sup>10</sup> Holderness (1985).

<sup>11</sup> Another way to say this is that the current members of the class lack to power to exclude at least some individuals from entering the class. If they can not exclude anyone from entering the class, then the resource is a common-access resource. The openness of common-access resources prevents their transfer (Holderness, 1985).

would be futile because there is no way to buy the rights from future citizens. There is no way for the developer, or indeed for any private citizen, to close the class, buy all of the individual rights in the park, and then develop an airport.

Sometimes the open nature of a class is not immediately obvious. For instance, an open class results with a transfer of Blackacre to “A for life, then to the children of A alive at the time of A’s death.” Because A can have additional children, there is no way to contract now with all who will be her children in the future. The class will remain open until A’s death, which could be years in the future. Consequently, the property can not be fully transferred until A dies.

A fundamental characteristic of private property is a closed class of beneficiaries. It is always satisfied with individual property; it is only sometimes satisfied with joint property. It is, for example, the fundamental difference between ownership by a for-profit corporation and ownership by a non-profit organization.

### 1.3. The process of decision-making—aggregate or entity?

The other central issue raised by joint ownership is the process for making decisions about the asset. Will Blackacre be planted with corn or will it be sold to Ms. Smith? With individual property, the individual owner, by definition, unilaterally decides how the property will be used. Decisions with joint property are inherently more complicated.

If one looks across legal traditions and over time one can identify two general decision-making processes with joint property—the *aggregate* process and the *entity* process. Under the aggregate process, each of the beneficiaries exercises decision rights over the undivided joint property. Unanimity is therefore needed to transfer the joint asset, either internally to another use or externally in a sale. An example would be if someone wishes to purchase a house from a married couple. To obtain title to the property, you must purchase both the husband’s and the wife’s interest. Under the aggregate process, the decision-makers are congruent with the beneficiaries.

Under the entity process, in contrast, decision rights over the joint asset are delegated to a single individual or small group of individuals, who may or may not be beneficiaries. The

Table 1

Two fundamental property-rights issues raised by joint ownership and the choices for their resolution

Class of beneficiaries	
Closed	Individuals can obtain the benefits of a joint asset only with the permission of a current member of the class, a current beneficial owner
Or	
Open	Individuals need not obtain any permission to obtain the benefits of a joint asset
Process of decision-making	
Aggregate	All beneficiaries collectively make all decisions concerning the joint asset
Or	
Entity	Decision rights over the joint asset are delegated to a small group of individuals who need not be beneficiaries

decision-makers, therefore, are not congruent with the beneficiaries. This typically lowers the costs of transferring the asset. In some instances, it makes exchange feasible. Thus, to buy a factory owned by a corporation, you need obtain the assent of only a few directors, not many individual shareholders. This decision-making process lowers the costs of transferring an asset, but it creates agency costs due to the paucity of collocation of wealth effects and decision rights. The directors selling corporate property personally bear few of the wealth effects of their decisions.

Table 1 summarizes how the two crucial property-rights issues raised by joint ownership can be resolved. The resolution of these two issues and the resulting impact on alienability is the story of this paper.

## 2. Four property-rights approaches to joint ownership

With two types of classes of beneficiaries possible and two types of decision-making processes possible, there are four conceivable combinations. If one looks across legal traditions and over time, these four combinations coincide with the four general property-rights approaches to joint ownership.

Each of the four approaches to joint ownership affects alienability differently. That is, each of the four approaches affects collocation and transferability differently. Because decision-makers with joint property do not, by definition, individually bear all of the wealth effects of their decisions, collocation will never be as complete as it is with individual property. Another way to say this is that joint ownership inherently gives rise to conflicts of interest. These conflicts are summarized in Table 2.

Joint property is also more costly to transfer than individual property. The transferability of individual interests in a joint asset is determined by the nature of the class of beneficiaries. The transferability of the joint asset itself is determined both by the nature of the class of beneficiaries and by the nature of the decision-making process. These points are also summarized in Table 2.

### 2.1. *The group approach*

The first approach for assigning property rights in jointly owned property is what I call the group approach. This is the combination of the aggregate decision-making process and an open class of beneficiaries. The group approach makes both the joint asset itself and individual beneficial interests in it non-transferable. Furthermore, the attenuated collocation with this approach to joint ownership creates a conflict between current and future class members.

The group approach to joint ownership can be illustrated with Anthony Trollope's novel *The Eustace Diamonds*. In that novel Lizzie Eustace has possession of a valuable diamond necklace given to her by her late husband, Lord Florian Eustace. When the family attempts to regain possession of the diamonds, Lizzie resists, so the family hires a lawyer. The lawyer's position is that the diamonds are an heirloom of the Eustace family. Consequently, Lizzie may not sell them. Nor may Lizzie's child and heir to the Eustace fortune sell them when he comes of age. In other words, the family owns the diamonds as opposed to any individual family member.

Table 2  
Four property-rights approaches to joint ownership and their impact on alienability

<b>Approach to joint ownership</b>	<b>Class of beneficiaries</b>	<b>Decision-making process</b>	<b>Examples</b>	<b>Nature of conflict due to attenuated collocation</b>	<b>Transferability of individual beneficial ownership interests</b>	<b>Transferability of joint asset</b>
<i>Group</i>	Open	Aggregate	Legitim, community property, English inheritance laws prior to 1400 (entail, primogeniture), Hindu inheritance law	Between current and future class members	Not possible	Not possible
<i>Organizational</i>	Open	Entity	Non-profit, government, church ownership, family trusts	Between decision-makers and both current and future beneficiaries	Not possible	Possible
<i>Partnership</i>	Closed	Aggregate	Partnerships, joint tenancy, tenancy in common	Among the owners	Possible but often restrictions on transfers	Possible
<i>Corporate</i>	Closed	Entity	For-profit corporations	Between principals and agents	Possible and seldom restrictions on transfers	Possible

Because ownership is vested in an open class and because by definition with the aggregate decision-making process all beneficial owners must consent before the joint asset may be transferred, The Eustace Diamonds may not be transferred. How could a potential purchaser contract with future members of the Eustace family? But this is what would be required to buy the diamonds given their effective ownership by all members of the Eustace family, present and future. This non-transferability, this freezing of a joint asset in its current use, is a central implication of the group approach to joint ownership.

Under the group approach, individual beneficial interests in a joint asset are also not transferable. This follows from the nature of ownership by an open class. To receive the benefits associated with a group-owned asset one must join the group. If one could receive these benefits by purchasing an individual beneficial interest, the essential nature of ownership by an open class would be violated.

The group approach also differs from individual ownership along the dimension of collocation. With individually owned property, the sole owner makes all decisions and has the right to all cash flows. Collocation of wealth effects and decision rights is, thus, complete. With the group approach, in contrast, any specific current decision-maker bears only those effects that occur during his lifetime. Therefore, with group ownership there is an inevitable conflict between current and future class members.

Of the four approaches to joint ownership, the group approach minimizes the number of transfers. Indeed, it effectively halts all transfers. This keeps assets within a group and thereby helps to perpetuate the group; if one leaves the group any benefits the asset produces are forfeited. Such effects can be beneficial if preservation of the group is desired. In the next section of the paper I address specific past and current uses of the group approach.

## *2.2. The organizational approach*

The second approach for assigning rights in jointly owned property is what I call the organizational approach. This is the combination of an open class of beneficiaries and the entity decision-making process. Examples of organizational ownership include ownership by most churches, non-profits, and governments. In such instances some individuals can become members of the organization and benefit from the joint asset without obtaining the permission of the current beneficiaries. Hence beneficial ownership is open. In contrast to the group approach, under the organizational approach decision rights over the joint asset, including the right to sell it, are assigned to a clearly identifiable and finite group of individuals. These individuals need not be beneficiaries.

To illustrate the impact of the organizational approach on the transferability of joint property, consider the legal treatment of one of the first organizations to own large amounts of land, abbeys. Assume, as would be the case under the group approach, that all monks have the right to any benefits produced on their abbey's land. This is an open class because people can become monks without first purchasing the right from (or otherwise transferring benefits to) an existing member of the order.<sup>12</sup> The combination of an open class of beneficiaries and the aggregate decision-making process would, as with The Eustace Diamonds, present an

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<sup>12</sup> If prospective monks first had to purchase rights or obtain the permission of the current monks, then the class would be closed and this form of joint ownership would not be applicable.

insurmountable problem for one wishing to buy land from an abbey. How could someone identify, much less negotiate with, future monks to buy their rights?

This impediment to transferability is removed if organizations, such as abbeys, are treated as legal entities and a specific person, often the leader, or a small group of individuals, often the board, is assigned exclusive decision rights over the jointly owned property. This helps to explain why early English law evolved to “treat the abbot as the one and only natural person who has anything to do with the proprietary rights of the abbey. To the complete exclusion of [the] monks, he fully represents the abbey before the law; he sues and is sued alone.”<sup>13</sup> Because an abbey at any time had but one abbot, only one clearly identifiable individual had the right to transfer abbey-owned property.<sup>14</sup> In this way use of the entity process of making decisions made abbey property transferable.

As is inherent with joint ownership in general, collocation is never as complete with organizational ownership as it is with individual ownership. Abbots who have decision rights over their abbey’s property do not have the right to personally capture any proceeds from its sale. Thus, under the organizational approach there is an inevitable conflict between the organizational decision-maker and both current and future beneficiaries.

As is inherent with ownership by an open class, monks do not have the right to sell their individual beneficial interests. Alchian (1965, p. 138) argues that the essential difference “between public [an example of what I call organizational ownership] and private ownership arises from the inability of a public owner to sell his share of public ownership.” I agree, but this raises the question of why individuals’ interests are not transferable with public (government) property, but they are transferable with many other types of property. I maintain that it is because the class of beneficiaries is inherently open with public property and closed with many other types of joint property. Thus, even if I were to buy all of the individual beneficial interests in Yellowstone Park, I still would not own the park. If I could buy Yellowstone in this way, then the park would not be public. This is why we do not observe individuals’ interests in public property being sold.

The situation is fundamentally different with private property. If I were to buy all the individual interests in a private park, I would become the sole owner of the park. This is why we observe individuals’ interests held under other approaches to joint ownership often being sold. I turn to those approaches now.

### 2.3. *The partnership approach*

The third approach for assigning rights in jointly owned property is what I call the partnership approach. This is the combination of a closed class of beneficiaries and the aggregate decision-making process. This approach evolved at English common law and is a natural extension of basic contract law.

Under the partnership approach, each beneficiary exercises all decision rights over the (undivided) joint property. Someone wanting to acquire full title to the property can do so only by purchasing the right from each owner. An example of this approach would be when

<sup>13</sup> Pollock and Maitland (1898, Vol. I, p. 504).

<sup>14</sup> One benefit of a hierarchical organization, such as an abbey, is that it is relatively inexpensive for outsiders to identify the person who can bind the entity.

someone wishes to purchase a house owned by a married couple as joint tenants. Both the husband and the wife must sign over their interest for title to pass.

A key implication of aggregate decision-making is that as the number of decision-makers increases, so do the costs of transferring the asset, in two respects. First, a prospective buyer must negotiate not with just one person but with several persons. Second, the possibility arises of some decision-makers acting opportunistically in a holdout scenario. Holdouts result from the combination of a veto power and attenuated collocation. When the number of decision-makers becomes sufficiently large, these coordination costs will effectively frustrate any exchange. In theory the joint asset will be transferable, but in practice it will not be.

The potential impediment to transferability posed by the partnership approach is illustrated in Peter Mayle's best-selling novel *A Year in Provence*:

Under French law, property is normally inherited by the children, with each child having an equal share. All of them must be in agreement before their inheritance is sold, and the more children there are the less likely this becomes, as in the case with the old farmhouse not far from us. It has been divided between fourteen cousins, three of whom are of Corsican extraction and thus, according to our French friends, impossible to deal with. Prospective buyers have made their offers, but at any given time nine cousins might accept, two would be undecided, and the Corsicans would say no. The farm remains unsold, and will doubtless pass to the thirty-eight children of the fourteen cousins. Eventually, it will be owned by 175 distant relatives who don't trust one another.<sup>15</sup>

Under the partnership approach, individuals can sell or otherwise transfer their undivided ownership interest because the class of beneficiaries is closed. A closed class of beneficiaries is a necessary condition for individual interests in joint property to be transferable. We often observe voluntarily restraints on the transferability of individual ownership interests, however. For example, ownership interests in most country clubs are seldom freely transferable because one's enjoyment depends in part on the identity of the other members.<sup>16</sup> As a consequence, often the other joint owners are given a right of first refusal on the sale of individual beneficial ownership interests.

The partnership approach, like all forms of joint ownership, differs from individual ownership along the dimension of collocation. With the partnership approach, any specific owner has a veto over any transfer of the asset but the right to only  $1/n$  of any proceeds from the transfer (where  $n$  is the number of joint owners). Collocation with respect to any individual decision-maker, therefore, is attenuated. There, thus, arises under the partnership approach an inevitable conflict among the joint owners.

<sup>15</sup> Mayle (1991, p. 67). The core problem with the partnership approach, too many owners each of whom has a veto, is also the core of the anticommons problem analyzed by Heller (1998). Heller (p. 639) shows how a widespread problem in many former Communist nations (he focuses on Russia) is that many assets have "too many owners, each exercising a right of exclusion." This, of course, is identical to the problem with the farmhouse in the South of France. It will be interesting to see if the laws of nations such as Russia evolve as the laws of many Western nations evolved to cure this problem, namely by giving a right of partition to any beneficiary and through majority (as opposed to unanimous) decision-making by the beneficiaries. It will also be interesting to see if these former Communist countries make greater use of entity decision-making, as has been the case in the West.

<sup>16</sup> The classic movie *Caddy Shack* vividly illustrates this point.

#### 2.4. *The corporate approach*

The fourth and last approach for assigning rights in jointly owned property is what I call the corporate approach. This is the combination of a closed class of beneficiaries and the entity decision-making process. Under this approach the joint asset and individual ownership interests in it are both transferable.

This form of joint ownership can be illustrated by the modern public corporation. The class of beneficiaries is closed because one can obtain the right to receive any benefits produced by corporate assets only by first obtaining the permission of the current owners. This is done by purchasing (a current owner's) stock. Moreover, corporations primarily use the entity decision-making process, which reduces the costs of transferring joint property. To purchase corporate property, one need negotiate with at most a relatively small number of directors rather than (in some corporations) millions of shareholders.

Finally, as with all four approaches to joint ownership, collocation is attenuated. With the corporate approach, the conflict is between the decision-makers, who have most of the decision rights but bear few of the wealth effects, and the shareholders, who bear most of the wealth effects but have few of the decision rights. This is the classic agency conflict, which has been studied by economists from [Adam Smith \(1776\)](#) to [Jensen and Meckling \(1976\)](#).

#### 2.5. *The mixture of decision-making processes*

Joint property often is held under a mixture of the aggregate and entity decision-making processes. This point is illustrated with corporations in [Fig. 1](#). Because most decision rights over corporate assets are delegated by shareholders to a board of directors, a corporation largely follows the entity process of decision-making. But it does not completely follow it. Complete fidelity to the entity process would involve the non-revocable delegation of all decision rights to a single chief executive. I know of no such for-profit corporation.<sup>17</sup> For example, shareholders delegate rights not to a single individual but to a board of several directors. Shareholders also reserve some decisions for themselves, including the right to choose the directors and the right to approve mergers. A requirement of supermajority shareholder approval for mergers would be a further movement toward the aggregate process. A movement all the way to the pure aggregate process would entail unanimous shareholder approval for all corporate decisions. I know of no such corporation.

Although there is often a mixture of decision-making processes with joint property, a class of beneficiaries is either open or closed.<sup>18</sup> Thus for example, I know of no for-profit corporation that has an open class of shareholders; corporate ownership is inherently

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<sup>17</sup> It does, however, occasionally happen in the non-profit sector. An example would be a non-profit foundation with only one trustee who exercises all decision-rights over foundation property and has the exclusive right to choose his or her successor. Some press reports suggest that this describe the non-profit trust that at one time controlled the Boston Red Sox.

<sup>18</sup> Of course, a class can be open to all individuals, in which case it is a common-access resource, or it can be open to a limited number of people, such as the citizens of a political entity.

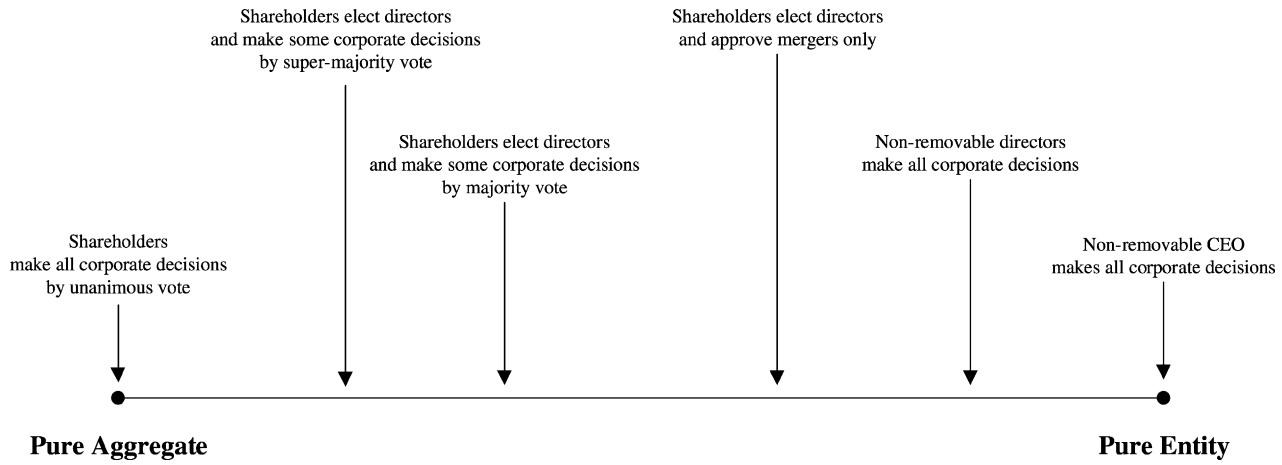


Fig. 1. Idealized illustration of how corporate property can be held under various combinations of the aggregate and entity decision-making processes.

closed. I conversely know of no non-profit organization that has a closed class of beneficiaries.<sup>19</sup>

## 2.6. *Summary of the four approaches*

The cost of the group approach, relative to individual ownership and relative to the three other forms of joint ownership, is that both the joint property and individual interests in it are not transferable. The potential to create value through voluntary exchange is, therefore, lost. The benefit of the group approach is that preservation of the group is furthered.

The cost of the organizational approach is that the beneficiaries have little control over the decision-makers. This means that sometimes joint assets will be used or transferred in ways that harm the beneficiaries. A benefit of the organizational approach is that joint assets are in fact transferable.

The cost of the partnership approach is that the number of decision-makers can quickly become so large that coordination costs will impede transfers of joint assets to more valuable uses. The benefit of the partnership approach is that there is little chance of transfers to less valuable uses because all owners have the incentive and the right to stop such transfers.

The cost of the corporate approach is that agency costs will cause some transfers to less valuable uses.<sup>20</sup> The benefit of the corporate approach is that transfers of the joint asset are relatively low cost to arrange. Also under the corporate approach individual beneficial interests are easily transferable.

Thus, each of the four approaches to joint ownership has fundamentally different implications for alienability, both from each other and from individually owned property. In the next section of the paper I argue that these costs and benefits help us understand why particular approaches to joint ownership are used in particular situations.

All four of the property-rights approaches to joint ownership have costs not found with individual property. Specifically, collocation is never as complete as it is with individual property, and the costs of arranging a transfer of joint property are never as low as with individual property. Accordingly, jointly held property, no matter which of the four approaches is used, will be allocated differently than individually owned property. Some benefit other than completeness of collocation or ease of transferability, such as the ability to raise capital for projects that would exceed the resources of any one person, must ultimately justify holding property jointly as opposed to individually.<sup>21</sup>

<sup>19</sup> Non-profits have classes of beneficiaries that are open to a finite, usually narrowly defined group of individuals. Thus for example, a college is open only to those individuals selected by the school's admission staff. Typically of course, most students must pay tuition and other fees. But prospective students never purchase the right to admission from another (departing) student. Similarly, beneficiaries of the American Red Cross are limited, by the terms of its charter, to victims of natural disasters and other individuals deemed needy. As with Universities, one does not purchase the right to become a beneficiary of the Red Cross.

<sup>20</sup> This, in theory, is correctable from a societal point of view as subsequent owners can transfer the property to more valuable uses (Coase, 1960).

<sup>21</sup> The benefit that leads to joint ownership can be the private interest of government officials. McChesney (1990) presents persuasive empirical evidence that the self-interest of Indian bureaucrats in the 1920s and 1930s halted the government's policy of transferring land ownership to individual Indians and replaced it with the current policy. That policy vests ownership with the government, an example of the organizational approach to joint ownership, by assigning many key decision rights to the Indian bureaucrats.

### 3. A property-rights framework for joint ownership—new insights into laws and practices

Two salient trends arise from examining a wide variety of laws and practices on joint ownership through the taxonomy of joint ownership and alienability. First, over time the law has evolved to close classes of beneficiaries. Second, over time the entity decision-making process has grown in use. These two trends coincide with the growth of a market economy and reflect the same benefit—enhanced alienability.

Before illustrating these trends, it should be cautioned that the laws and practices analyzed below could be profitably analyzed from other perspectives as well. Furthermore, there are aspects of joint ownership that have nothing to do with alienability and, consequently, are not addressed. There are also many laws on joint ownership pertaining to alienability that I do not address. Finally, I am not attempting a definitive study of any of the legal regimes below, something which is far beyond the scope of this paper. I am simply illustrating how the property rights of joint ownership and alienability can offer a new perspective into a variety of laws and practices.

#### 3.1. *Inheritance laws and practices*

Joint ownership often arises through inheritance, especially with property that is not easily partitioned like a small farm. As such, inheritance laws and practices present a rich area to use the framework of joint ownership proposed in this paper, with its emphasis on the class of beneficiaries, the process of decision-making, and the resulting alienability (or lack thereof). Inheritance reflects all four approaches to joint ownership and shows how the law often changes as an economy changes.

##### 3.1.1. *Pre-literate societies*

We are used to the value of alienability, but in some circumstances alienability will be detrimental. This will often be the case in subsistence or pre-literate economies. In these economies land and one's own labor are the major assets. There will be few exchanges of land, both because little wealth has been accumulated and thus few individuals have the means to buy land and because the nature of technology is such that a given individual can farm only so much land. An effective farmer, in other words, has limited opportunities to "leverage" his skills by farming additional land. Under these circumstances, the value of land is unlikely to vary with the identity of its owner.

The family is pivotal in a subsistence economy. It is crucial for protection and it is the primary unit of production.<sup>22</sup> Transactions tend to be within a family, not among strangers. The group approach to joint ownership helps to perpetuate families because if one leaves the family, or more realistically if one leaves the geographic area, any benefits from a joint asset are lost.<sup>23</sup> In a subsistence economy this can be fatal.

<sup>22</sup> Rubin (1998).

<sup>23</sup> With the group approach there is an inevitable conflict between current beneficiaries and future beneficiaries. Over-planting will produce more crops this year but fewer crops in subsequent years. The survival of the family as the dominant social unit throughout human history suggests that family members take into consideration the

The group approach to joint ownership can be seen in certain inheritance practices of a broad array of pre-literate societies. In ancient Sparta, for example, property would pass under a law known as “keeper of the hearth” (εστιάουσι). As the name suggests, the current occupant had an obligation to preserve the property for future family members.<sup>24</sup> When William conquered England in 1066, he decreed with great clarity to his new subjects: “I will that every child be his father’s heir.”<sup>25</sup> The laws that he subsequently imposed enforced this decree. Other examples of the group approach to inheritance in pre-literate economies included Papua New Guinea,<sup>26</sup> Celtic tribes, Southern Sweden, Norway, Northern Italy, and the Slavic populations of the Balkan Peninsula and Russia.<sup>27</sup> “In all such cases, there could be no real inheritance and succession but merely the stepping in of the next generation into the rights and duties of the representatives of an older generation on the latter’s demise. In legal terminology, it is a case of accretion and not of succession.”<sup>28</sup>

In parts of India for over 5000 years the Hindu law of inheritance likewise has reflected the group approach to joint ownership. Under this law, “the father or head of such a joint family was in truth only the manager of its property during his lifetime, and though on his demise this power and right of management had to be regulated anew, the property itself could not be said to pass by succession: it remained as formerly in the joint family itself.”<sup>29</sup>

### 3.1.2. *The evolution in English law*

England largely followed the group approach with inheritance while it was a feudal society.<sup>30</sup> After all, at that time England was largely a pre-literate society with a limited market economy. Most notably, legitim kept property within a family.<sup>31</sup> To stop testators

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impact of their actions on the welfare of their relatives. This is not to say that considerations of blood relations eliminate the conflicts created by group ownership, only that these conflicts will be reduced when the group is a family. And this typically was the case in pre-literate societies.

<sup>24</sup> For a discussion of inheritance practices in Sparta during the archaic and classical periods (c. 900 B.C. until the death of Alexander the Great in 323 B.C.), see [Hodkinson \(1986\)](#). Sparta, like other Greek states, followed a practice of partible inheritance, whereby a father’s estate passed in equal shares to his sons. See also [Fox \(1985\)](#).

<sup>25</sup> Quoted in [Plucknett \(1956, p. 713\)](#). See [Plucknett \(1956, pp. 712–746\)](#) for additional discussion of various aspects of English inheritance laws that keep land within families. See also [Dainow \(1940\)](#).

<sup>26</sup> [Cooter \(1991, pp. 759–760\)](#).

<sup>27</sup> [Seebom \(1904\)](#) and [Vinogradoff \(1910\)](#). In some instances, the property would stay within a family for a limited number of generations. In most instances, however, property would stay within a family indefinitely.

<sup>28</sup> [Vinogradoff \(1910\)](#). In his extraordinary essay, Vinogradoff refers to this as the joint family approach to succession. Interestingly, some other ancient legal traditions, notably the Roman tradition, apparently did not use the group approach for joint ownership. [Ellickson \(1993, pp. 1367–1372\)](#) also discusses kinship inheritance in pre-literate societies.

<sup>29</sup> [Vinogradoff \(1910\)](#). See also [Jolly \(1885\)](#). This approach was widely used for land in India, less so for personal property. Typically, there was greater freedom of testation with the latter.

<sup>30</sup> William the Conqueror introduced feudalism to England after the invasion of 1066. Prior to this, there were limitations on the alienability of land that also reflected the group approach. For instance, a doom (law) of King Alfred (reign 871–899) held that: “If a man has book-land which his kinsmen left him, we decree that he is not to alienate it outside his kindred.” Quoted in [Pollock and Maitland \(1898, Vol. II, p. 235\)](#).

<sup>31</sup> [Helmholz \(1984, pp. 665, 667–669, 672\)](#).

from circumventing legitim, entails developed which prevented the inter vivos transfer of property out of a family.<sup>32</sup> “Under entailment, a family, not an individual, owned land. On the death of the current scion, it passed automatically to the next member of the family in line to inherit.”<sup>33</sup> Finally, there was no right of partition at this time. All of these laws were consistent with the group approach as ownership was vested in an open class, current and future family members, and property was not transferable. All of these laws also helped to perpetuate feudalism.

As England evolved from a feudal economy to a market economy, notably in the 16th century, alienability became increasingly valuable. Now the value of an asset began to depend upon who owned it. Two legal developments in England facilitated this transition. First, use of the group approach declined. Second, joint ownership in general was discouraged.

Perhaps the most far-reaching change in the long history of English inheritance law was the abolition by Henry VIII of mandatory primogeniture.<sup>34</sup> With that change, much of the most valuable resource at the time, land, could be transferred. Thereafter, primogeniture continued to be influential but in a way that facilitated alienability, not impeded it. This was because the landed gentry continued to leave entire estates to eldest sons. The crucial change was that the eldest son was now allowed to sell his family’s property. Someone wishing to buy any part of an estate, consequently, had to negotiate with only one individual, the eldest son.<sup>35</sup> Transaction costs were thus reduced; alienability was enhanced.

Limitations also arose in England on the right of testators to convey some but not all future interests to open classes. For example, a transfer of property to “A for life, then to A’s heirs,” is such a transfer. Someone could not effectively purchase the property, at least as long as A is alive, because A can have additional heirs, say through the birth or adoption of a child. The common law Doctrine of Worthier Title over-ruled such transfers by automatically converting the remainder interest in “A’s heirs” into a reversionary interest in A. Joint ownership was thus terminated.

English law also came to favor joint tenancy over other forms of joint ownership, in particular tenancy in common. The key characteristic of joint tenancy is that upon the death of one joint tenant, her share passes to the surviving tenant(s). This aspect of the law has been criticized by generations of legal scholars. For example, [Friedman \(1985\)](#) labels the practice “obnoxious” and “ill-suited.” Why did such an “obnoxious” and “ill-suited” doctrine survive for so long? With joint tenancy, over time the class of owners becomes

<sup>32</sup> [Bergin and Haskell \(1985\)](#), pp. 28–33.

<sup>33</sup> [Bosselman \(1994\)](#), p. 1439.

<sup>34</sup> I address only the inheritance of real property and ignore the inheritance of personal property. This distinction, which figures prominently in many legal traditions, arose in England after the Norman Conquest. At that time the King and the Church worked out a compromise whereby the royal courts, and later the common law courts, had jurisdiction over real property, while ecclesiastical courts had jurisdiction over personal property. Real and personal property were not subject to the same inheritance laws in England until the Property Act of 1925.

<sup>35</sup> There are other interesting questions with primogeniture that can not be answered with the property-rights principles developed in this paper: Why did the eldest son typically inherit; why not the youngest son? In only one jurisdiction did the youngest son inherit his parent’s entire estate. That practice was called Borough English. [Pollock and Maitland \(1898\)](#), Vol. II, pp. 262–278). Another question is: Why did sons and not daughters inherit under primogeniture? If all heirs were daughters, they shared equally in co-parcency. Difficult questions such as these are better addressed with the rapidly developing learning on evolutionary biology.

smaller, thereby reducing the costs of transferring the asset.<sup>36</sup> Once all of the tenants save one have died, the property becomes individually owned. Joint tenancy in this way enhances alienability.<sup>37</sup>

With the aggregate process to decision-making, the number of decision-makers can become large and thereby impede transfers. One way to overcome this impediment is by using the entity decision-making process. English inheritance law made such a transition with the development of the trust, starting with the Statute of Uses in 1535 (yet another alienability-enhancing legal development introduced by Henry VIII). With a trust the trustee has the sole power to convey property; the trustee looks like the individual owner of the property to the entire world, save for the beneficiaries.

Finally, English law eventually came to allow a joint tenant to force a partitioning of property even against the wishes of the other tenants and the grantor. (Partitioning is analyzed later in the paper.) These laws and practices, limitations on future interests to open classes, voluntary primogeniture coupled with the right of the eldest son to sell the property, joint tenancy, and partitioning all terminate joint ownership and replace it with individual ownership. Such is the pull of alienability.

### 3.1.3. *Contemporary laws*

While the group approach to inheritance has waned with the development of a market economy (as we have just seen with English law), its influence can still be seen in some contemporary laws. One such example is with the laws of community property. Under the concept of community property, some assets belong neither to the husband nor to the wife but to the marriage, to the group.

The influence of the group approach can also be seen in the contemporary laws of many nations that limit the right of testators to disinherit their children, legitim. These nations include Argentina, Austria, Belgium, Brazil, France, Germany, Greece, Italy, Japan, Spain, Sweden, and Switzerland.<sup>38</sup> Because testators can have additional children, legitim effectively grants rights to an open class, unborn children. To make this grant effective, these countries limit inter vivos transfers of family property.<sup>39</sup> For example, under French law transfers either inter vivos or by will cannot exceed one-half of an individual's property if that individual has one child. If an individual has two children, transfers may not exceed one-third of the person's property; where there are more than two children, transfers may not exceed a quarter of one's property.<sup>40</sup>

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<sup>36</sup> Citing Coke, Pollock, and Maitland's explanation for this law is that "the object . . . seems to have been that of defeating the lord's claim to the wardship of an infant heir or to a relief of full age." Pollock and Maitland (1898, Vol. II, p. 20).

<sup>37</sup> Modern law, in contrast, favors tenancy in common under which the decedent's interest passes to her heirs. If the decedent has more than one heir, the number of owners of the property, and thus the costs of transferring the property will increase. This is an example of a modern trend that tends to impede transferability, as opposed to the general trend of improving transferability. I do not have an explanation for this alienability-diminishing development.

<sup>38</sup> See generally Batts (1990) and Brashier (1994).

<sup>39</sup> Batts (1990, pp. 1211–13) contains an extensive description of current forced inheritance laws in a number of nations.

<sup>40</sup> Encyclopaedia Britannica Online, "Inheritance."

### 3.2. Partnership law

The partnership form of conducting business is over 4000 years old.<sup>41</sup> Nevertheless, scholars still disagree over fundamental issues: Should a new partner be liable for pre-existing partnership debts? When does one partner bind other partners? May partnerships own land? Such questions and the turbulent history of partnership law reflect the troublesome property-rights issues that arise when property is jointly held. Such questions also come down to the same fundamental issue—Should the aggregate or the entity decision-making process be used?<sup>42</sup>

The Uniform Partnership Act has largely resolved which of the two decision-making processes are used for partnerships in the United States.<sup>43</sup> Perhaps the most salient feature of the Act for our purposes is that it is another example of how joint property is typically held under a mixture of conceptual approaches.<sup>44</sup> For instance, a partnership may be sued in its own name, which follows the entity decision-making process (the corporate approach to joint ownership). At the same time, partners may also be personally sued for partnership debts, which follows the aggregate decision-making process (the partnership approach to joint ownership).

Although the Act uses entity decision-making in places, the aggregate process dominates. The dominance of the aggregate process, however, is unlikely to impede transferability for several reasons. First, the Act follows the entity process for the one major transferable asset of most partnerships, real estate.<sup>45</sup> The other valuable assets of a partnership, the human capital of its partners and associates, are non-transferable due to prohibitions on the sale of human capital.

Under the still-applicable rule of partner personal liability for partnership debts, the value of claims against a partnership will vary with the identity of its partners. For instance, a

<sup>41</sup> Some scholars trace the origins of the partnership form of business to the Code of Hammurabi in ancient Babylon (c. 2083 B.C.); it figures prominently in Jewish and Roman law and was used extensively throughout the Middle Ages. See generally [Henn and Alexander \(1983, § 5\)](#).

<sup>42</sup> With partnerships, as with other for-profit organizations such as corporations, the crucial issue involves only the decision-making process. The class of beneficiaries in for-profit organizations is inherently closed. You must first obtain the permission of the current class members, here the current partners.

<sup>43</sup> All states except for Georgia and Louisiana have adopted the Act. Georgia's statute is based on the common law, while Louisiana's statute is based on civil law.

<sup>44</sup> Lengthy debates between the Act's reporters centered on whether partnership law should follow the aggregate approach or the entity approach to decision-making. The first reporter, James Barr Ames, espoused the aggregate approach, while his successor, William Draper Lewis, espoused the entity approach.

<sup>45</sup> Section 8 (3) of the Uniform Partnership Act allows a managing partner or committee of partners to convey partnership real estate. Partnership ownership of real estate has been a troublesome legal issue over the years. Under the common law, a partnership could hold real property only in the names of its individual partners, who were treated as joint tenants. One problem was that a potential purchaser of the property would have to negotiate with each partner. Another problem was that a creditor of an individual partner could levy on the partner's interest in any partnership property. Although joint tenants at common law generally could sell their individual ownership interest, eventually the law prohibited a partner from doing this. Moreover, once a partner died, there arose the question of what happened to his ownership interest in any joint property. If it passed to his heirs, someone who had no connection with the firm and often would not be a lawyer would take ownership. Eventually, English and American law simply prohibited partnerships from owning real estate. See *Riddle versus Whitehall*, 135 U.S. 621 (1890) ("a partnership . . . could not hold the legal title to real estate, as it is not a person in fact or in law"). See also [Reuschlein and Gregory \(1979, § 218–219\)](#) and [Story \(1980, § 120\)](#).

loan to a partnership with wealthy partners would be less risky, and would consequently carry a lower interest rate, than would a loan to a partnership with poor partners. This gives creditors and partners alike the incentive to restrict the transferability of partnership interests, in this instance to wealthy individuals. Partnership claims, however, are almost always limited to employees of the firm and do not trade.<sup>46</sup> Thus, any incentive for restrictions on transferability will have little, if any, impact with partnerships.

In contrast, limited liability for corporate shareholders, the converse of partner liability for partnership debts and a logical implication of entity process (the entity alone enters into contracts and the entity alone is liable under those contracts), helps lower the costs of transferring corporate stock. With limited liability, the identity of shareholders is irrelevant.<sup>47</sup> Perhaps this is best reflected in the French term for public corporations, “*Société Anonyme*.” Creditors and other shareholders consequently have no incentives to restrict the alienability of a corporation’s stock.<sup>48</sup>

### 3.3. *The separation of ownership from management*

#### 3.3.1. *The nature of the separation*

A key premise of the agency literature is that in public corporations ownership is separate from management. This characterization began with [Veblen \(1923\)](#), who warned of “absentee ownership.” It was the core argument of [Berle and Means \(1932\)](#), who claimed that the separation of ownership from management “destroys the very foundation on which the economic order of the past three centuries has rested.” The notion of a separation of ownership from management continues to be influential.<sup>49</sup> For example, [Fama and Jensen \(1983\)](#) write of the “complete separation of decision-making from residual claims.” [Gordon \(1991\)](#) describes the current allocation of decision-making authority to corporate directors as “absolute delegation.”

It is misleading to speak of the “complete separation of ownership from management” or the “absolute delegation of decision-making authority.” With private property, beneficial owners (those who have the right to the residual benefits) always manage. With private property, there is never a complete separation of ownership and control. Complete separation would be the effective transfer of beneficial ownership from shareholders to managers.

The key issue, thus, is the degree to which shareholders will manage. Although corporations largely use entity decision-making, they never do so completely. All corporations, consequently, use a mixture of the entity and aggregate processes as shareholders inevitably reserve some decisions for themselves ([Fig. 1](#)).

<sup>46</sup> [Fama and Jensen \(1983\)](#) analyze this practice.

<sup>47</sup> Some argue that rights will remain transferable even with unlimited liability for shareholders. Although this may be true, these arguments fail to recognize that transferability is continuous not binary. The costs of transferring rights with unlimited liability will undoubtedly exceed the costs of transferring rights with limited liability. Thus, although ownership interests in *Lloyd’s of London*, which carry unlimited liability, are traded, such trades are infrequent.

<sup>48</sup> [Woodward \(1985\)](#).

<sup>49</sup> To the extent this view has been modified, it is with managerial stock ownership not with shareholder decision-making. See, for example, [Holderness, Kroszner, and Sheehan \(1999\)](#) and [Morck, Shleifer, and Vishny \(1988\)](#).

### 3.3.2. *A different perspective on shareholder democracy*

Recognizing that the separation of ownership from management is never absolute opens up an array of interesting questions: What type of decisions do shareholders reserve for themselves? Have these decisions changed over time? Do these decisions change with the nature of a firm's business or assets? What is the impact on firm value of alternative allocations in decision-making authority between shareholders and directors?

Such questions go to the heart of the nascent shareholder democracy movement in which shareholders have attempted to set corporate policy directly by amending their firms' by-laws. Let us start with Professor Coffee's provocative observation: "Although a broad exclusion [on shareholder decision-making] makes life easier for the SEC, it never answers the basic question of why shareholders, as owners of the company, should not be able to impose normative restrictions on their corporation's behavior."<sup>50</sup>

The property-rights argument against shareholder democracy—the argument against greater use of aggregate decision-making—is that the number of decision-makers will increase from a handful of directors to potentially millions of shareholders. This will increase coordination costs and will ultimately impede the transferability of corporate assets.

The property-rights argument in favor of shareholder democracy is that collocation will be enhanced by shareholder decision-making and agency costs will decline accordingly. The debate over shareholder democracy is thus fundamentally a debate over the optimal mixture of the aggregate and entity decision-making processes. It is a debate over the tradeoff between the coordination costs of the aggregate approach and the agency costs of the entity approach.

### 3.3.3. *A 100-year trend toward the entity process*

Shareholders over the past 100 years have responded to this tradeoff by greater use of entity decision-making. In the early days of the modern public corporation, for instance, unanimous shareholder approval was required for mergers, an example of the pure aggregate decision-making process for one corporate decision.<sup>51</sup> It soon became apparent that this requirement acted as an impediment to alienability because the class of rights holders, the shareholders, although closed was so large that the coordination costs stymied all but a handful of acquisitions. Eventually, state corporation laws changed to allow a majority (occasionally a super majority) of shareholders to approve a merger.<sup>52</sup>

Approval of mergers is an example of a mixture of the aggregate and the entity processes; directors typically may not unilaterally sell the corporation. Some use of the aggregate decision-making makes sense here. Alternative methods to control agency costs might be relatively ineffective because after such transactions the corporation often ceases to exist. Thus, ex post settling up, say by firing directors, might offer little succor to shareholders. In addition, malfeasance by directors in such transactions could be especially damaging,

<sup>50</sup> The Wall Street Journal, 2 February 1993, p. A14. See also Coffee (1997).

<sup>51</sup> See Manning (1962).

<sup>52</sup> The Australian High Court has ruled that minority shareholders could not be required to sell their stock in a "freezeout" merger. By requiring unanimous shareholder consent, the High Court was implicitly adopting the aggregate decision-making approach. See DeMott (1996) for an analysis of this case from a United States perspective.

potentially approximating much of the value of a company. For such reasons, shareholders apparently want additional control of agency costs and are willing to incur the extra coordination costs that are inevitable with shareholder ratification.

Another decision right that shareholders, and indeed owners of all for-profit enterprises (of all closed-class organizations), retain is the right to hire and to fire directors. Retention of this right is imperative for the smooth functioning of several mechanisms that control agency costs. As [Alchian and Demsetz \(1972, p. 788\)](#) write, “In assessing the significance of stockholders’ power, it is not the usual diffusion of voting power that is significant but instead the frequency with which voting congeals into decisive change. . . . The question is the probability of replacement of the management if it behaves in ways not acceptable to a majority of the stockholders. The unrestricted salability of stock and the transfer of proxies enhances the probability of decisive action in the event current stockholders or any outsider believes that management is not doing a good job with the corporation.”

The trends of the past century, a pronounced movement toward entity decision-making coupled with shareholder retention of a few key decision rights, must be viewed in the context of the development of a variety of mechanisms that reduce agency costs. Prominent among these are greater managerial stock ownership and an active market for corporate control.<sup>53</sup> Without such controls, it is questionable whether there would have been such a pronounced movement to entity decision-making because of the inherent agency costs of that process. In the corporate setting, at least, it typically appears to be less costly to develop ways to enhance collocation, such as with stock options and an active market for corporate control, than it is to develop means to reduce the coordination costs of decision-making by a large number of individuals.

Finally, the optimal mix of aggregate and entity decision-making is likely to vary by corporation because it involves a tradeoff between the reduction in agency costs of aggregate decision-making versus the reduction in coordination costs of entity decision-making. This suggests that shareholders should have latitude in determining which decisions they will retain and which they will delegate, in other words what the mixture of the entity and aggregate processes will be for their corporation. In this respect, Professor Coffee’s admonition for shareholder freedom to choose “normative restrictions on their corporation’s behavior” makes sense.

### *3.4. Partitioning of joint property*

The laws on partitioning of joint property appear, at first glance, to be inconsistent. Typically, it is not possible to partition group held property; it is relatively easy to partition property held under the partnership approach; and it is difficult though possible to partition property held under either the organizational or corporate approaches. These disparate treatments are in fact consistent with underlying alienability of each of the four approaches.

One could argue that the essential goal of group ownership is the preservation of the group, typically the family. Consistent with this goal, group property typically may not be transferred out of the group nor may it be partitioned. Thus, in feudal England, for example,

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<sup>53</sup> For instance, during the 1930s stock options were rare. Today, approximately 90% of all public corporations in the United States use stock options ([Holderness et al., 1999](#)).

there was no right of partition.<sup>54</sup> Similarly, Pollock and Maitland writing in 1898 noted that there was no right of partition in the Indian states of Malabar and Canara.<sup>55</sup> This reflects the Hindu law of vesting ownership with families, not with individuals. The laws of other subsistence economies likewise suggest that joint property, which was normally held under the group approach, could not be partitioned.<sup>56</sup>

As use of the group approach declined with the rising importance of alienability, a right of partition arose, especially with property held under the partnership form of joint ownership. In England, for example, owners of joint property during the reign of Henry VIII (1509–1547) were first given the right to partition property.<sup>57</sup> If a right of partition had not been established, joint property using the aggregate decision-making process could have become as incapable of being transferred as the farmhouse in the south of France described by Peter Mayle. The coordination costs would simply have become too large.

In contrast to the ease of partition under the partnership form, it typically is difficult to partition property held either under the organizational or corporate form of joint ownership. If someone wants to partition (dissolve) a corporation, for example, the approval of a majority or sometimes a super majority of the shareholders is required. A non-profit organization is perhaps even more difficult to dissolve, as it requires action both by the non-profit's board and by the state attorney general. Certainly, there is no way that a single individual can trigger a partition of either a corporation or a non-profit, as she can with property under the partnership approach.<sup>58</sup> Of course, property held under either the organizational or corporate approach remains transferable, as both approaches use the entity decision-making process. In most instances, this means that only a few individuals are needed to approve a transfer.

Ironically, if it were easy to partition property under either the organizational or corporate forms, alienability would be impaired. One of the fundamental advantages of entity decision-making, be it with the organizational or corporate form, is perpetual existence. This facilitates long-term contracts because parties can contract with entities and not have to worry that their contracts will terminate with the death of any owner or a manager. This important benefit would be lost if it were easy to dissolve an entity.<sup>59</sup>

Thus, when seen through the lens of alienability, the apparently disparate legal treatments of partition for the four different approaches to joint ownership are consistent with the

<sup>54</sup> Pollock and Maitland (1898, Vol. II, p. 246). The one exception prior to this time was that co-parceners “had this power from a remote age. It makes sense.” Co-parceners were daughters who inherited land in the absence of a surviving brother. Because most women at this time lived with their husbands often in other villages, it made sense to have a way to partition land that passed exclusively to daughters.

<sup>55</sup> Pollock and Maitland (1898, Vol. II, p. 246). See also Vinogradoff (1910).

<sup>56</sup> See Vinogradoff (1910).

<sup>57</sup> Henry VIII expropriated monastery land from the Papacy on behalf of the crown. Because the crown could have used only so much of this land, Henry naturally wanted to get some benefit from the rest by selling it. Apparently, this was the immediate reason why a number of alienability-enhancing laws were passed during his reign. Whatever may have been Henry's motivation, the effect was to put into place important legal foundations for alienable rights and a market economy. I plan to explore in future research the alienability-enhancing legal changes instituted during Henry VIII's reign.

<sup>58</sup> See Hansmann and Kraakman (in press).

<sup>59</sup> Perpetual existence also facilitates the separation of a corporation's production decisions from its shareholders' consumption decisions.

underlying alienability of each. The ease of partition under the partnership form and the difficulty of partition when entity decision-making is used both help to preserve transferability. One does it by eliminating joint ownership; the other does it by making it costly to terminate joint ownership. The absence of partition of property held under the group approach helps ensure that the asset will not be transferred out of the group and thereby helps to perpetuate the group. And that, after all, seems to be the ultimate goal of group ownership.

#### 4. Conclusion

Joint ownership of property gives rise to two fundamental issues: What class of individuals will receive the benefits produced by a joint asset and how will decisions about the use or sale of the asset be made? The resolution of these issues will significantly affect the alienability of both the joint asset itself and individual beneficial interests in the asset. Because of these two issues, the alienability and hence the ultimate allocation of joint property will differ from the allocation of individual property.

A class of beneficiaries can either be closed or opened. The decision-making process can either be aggregate or entity. A class is closed when the benefits of a joint asset can be obtained only by securing the permission of a current class member, typically by purchasing a current class member's ownership interest. A class is open when one can obtain such benefits without the permission of a current class member. With aggregate decision-making, all beneficiaries collectively decide how an asset will be used, including whether it will be sold. With entity decision-making, these decisions are delegated to a small group of individuals who need not be beneficiaries. Entity decision-making lowers the costs of transferring joint property but creates agency costs.

This paper has examined a broad array of laws and practices on joint ownership through the lens of the class of beneficiaries, the process of making decisions, and the resulting impact on alienability. Several broad conclusions emerge.

The broadest conclusion is that the four possible ways these property-rights issues can be resolved constitute the four approaches by which joint property has been held over time and across legal traditions. I classify these approaches as the group (open classes and aggregate decision-making), organizational (open and entity decision-making), partnership (closed and aggregate), and corporate (closed and entity). This taxonomy of joint ownership is summarized in [Table 2](#).

Which of the four approaches to joint ownership is used is influenced by the nature of the economy and by the nature of the asset. In feudal England, for example, preservation of the status quo was important. Much property was held under the group approach, arguably because it made it difficult to transfer property and thus helped to preserve the status quo. Today, in contrast, much property is held under the organizational form, arguably because entity decision-making makes jointly held assets easily transferable.

Another major conclusion is that over time classes of beneficiaries have been closed. This has enabled transfers of individual beneficial interests in joint property. For instance, the common law evolved to prohibit certain transfers to open classes even though this over-rode the obvious desires of those who would make such transfers. In these instances, the common law sided with alienability over individual sovereignty.

The last broad conclusion is that use of entity decision-making has increased over time. This is despite the widespread criticism the very concept of an entity has endured for years. Chief Justice Marshall in his famous definition of a corporation, for example, criticized the entity concept as “an artificial being invisible, intangible, and existing only in contemplation of law.”<sup>60</sup> Likewise, Pollock and Maitland in their monumental treatise complained that “the adjectives which are often used to qualify this personality [of an entity] are open to serious objection, since they seem to speak to us of some trick or exploit performed by lawyers and to suggest a wide departure of legal theory from fact and common opinion.”<sup>61</sup> The beneficial effect of entity decision-making for the alienability of joint property, I believe, does much to explain its widespread use in the face of such hostility.

Several unanswered questions remain. Perhaps most importantly, are there other property-rights approaches to joint ownership? Were pre-literate economies truly devoid of closed classes of beneficiaries? Why have certain uses of the group approach persisted in a market economy? Will use of the entity form of decision-making continue to increase, or will there be greater use of the aggregate form, as suggested by the growing shareholder democracy movement?

The lack of definite answers to these difficult questions should not be allowed to obscure the central point of this paper. There are two fundamental issues raised by joint ownership, the class of beneficiaries and the type of decision-making process. Their resolution will—by necessity—profoundly affect the alienability of joint property.

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<sup>60</sup> Trustees of Dartmouth College, 17 U.S. (4 Wheat) 518, 636 (1819).

<sup>61</sup> Pollock and Maitland (1898, Vol. I, p. 486 continue: “This idea [of a legal entity] was gradually fashioned, and when we attempt to analyze it we find that it is an elastic because it is . . . a very contentless idea, a blank form of legal thought.”

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