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Amnon Lehavi
Interdisciplinary Center (IDC) Herzliya, alehavi@idc.ac.il

THE LAW OF TRUSTS AND COLLECTIVE ACTION: A NEW APPROACH TO PROPERTY DEADLOCKS

Amnon Lehavi[§]

I. INTRODUCTION

On April 21, 2016, music icon Prince Rogers Nelson was found dead of fentanyl overdose at Paisley Park, his studio complex outside of the City of Minneapolis, Minnesota. Prince had died intestate, and the challenge of administering his estate has been lingering since. This is because the estate was in a state of "personal and corporate mayhem" for a substantial period of time, as described in 2017 by the county district court judge overseeing the case.[1] Only after over a year from his death did the court finally certify that Prince's sister and five half-siblings were the rightful heirs to the estate in equal shares, based on Minnesota's inheritance laws, and after it had thrown out about forty other contenders to the estate.[2]

But the challenge of administering Prince's estate has been going well beyond identifying the overall value of the estate (estimated in 2017 at around $200 million), paying the Internal Revenue Service and the State of Minnesota their share in taxes (which could amount to about a half of the estate's worth),[3] and dividing the remaining fortune between the six heirs. This is particularly so because much of the value of the estate lies in unreleased recordings that Prince kept hidden in two storage vaults at his studio, with most of the contents in the vaults not even catalogued at the time of Prince's death.[4] The vaults are said to contain hundreds of completely unheard songs in addition to multiple other materials.[5] This means that the estate has to make principled decisions about which unpublished materials to release and which record companies to sign

§ Dean and Atara Kaufman Professor of Real Estate, Harry Radzyner Law School, and Academic Director, Gazit-Globe Real Estate Institute, Interdisciplinary Center (IDC) Herzliya.

1. Ben Sisario, *Disputes Over Prince's Estate Throw the Future of His Vault into Question*, N.Y. TIMES (June 25, 2017), https://www.nytimes.com/2017/06/25/arts/music/new-disputes-over-princes-estate-cloud-the-future-of-his-vault.html.

2. Daniel Kreps, *Prince Estate: Sister, Five-Half Siblings Named Heirs*, ROLLING STONE (May 20, 2017), https://www.rollingstone.com/music/music-news/prince-estate-sister-five-half-siblings-named-heirs-193646/.

3. Steve Karnowski, *As Prince Heirs Stew, Bankers and Lawyers Cash in on Estate*, ASSOCIATED PRESS (Apr. 15, 2018), https://apnews.com/d9847863113d4ff8bd70850dd6a6cd2e/As-Prince-heirs-stew,-bankers-and-lawyers-cash-in-on-estate.

4. Sisario, *supra* note 1.

5. David Browne, *The Prince Estate's Big Plans: Inside the Upcoming Purple Reign*, ROLLING STONE (July 13, 2018), https://www.rollingstone.com/music/music-features/prince-estate-big-plans-upcoming-purple-reign-698529.

contracts with. Additionally, particularly in regard to published music, the estate will have to make decisions about awarding "grand rights" (required for some types of public performances in which Prince's repertoire would be used)[6] as well as the licensing of copyright for movies, commercials, and so forth. In addition, the estate holds property rights to trademarks and, more generally, rights to merchandizing based on Prince's right of publicity.[7]

The first two years after Prince's death have proven chaotic. For example, Bremer Trust, a Minneapolis bank appointed by the court soon after Prince's death, signed a $31 million deal with Universal Music for rights to music that Prince started making in the mid-1990s, after his tenure with Warner Brothers ("WB"). But a few months later, Universal asked to void the contract once it learned that the rights conflicted with those granted to WB.[8] Comerica Bank and Trust, appointed by the court to replace Bremer as the executor of the estate, then found itself in conflict with three of the six heirs on several fronts; for example, because of its decision to move the contents of Prince's vaults from Paisley Park to Los Angeles. Although engaged in this internal strife, the six heirs showed rare unity in objecting in April 2018 to an "entertainment transaction" that Comerica sought to promote, which the heirs said would be "an embarrassment to Prince's legacy."[9] During that period, the heirs did not receive a single cent, while Comerica and its lawyers collected $5.9 million in fees and expenses.[10]

Matters seem to have improved by mid-2018, with a deal signed in June 2018 between Comerica and Sony Legacy for the rights to release the bulk of Prince's back catalog, starting with the albums Prince published after he left WB in the mid-1990s. Beginning in 2021, Sony will also reissue the bulk of Prince's WB albums.[11] On September 21, 2018, the first album containing previously unpublished materials was released. It was based on a nine-song, 35-minute tape that Prince had made in 1983, which was found among the 8,000 cassettes in the vaults. The estate is advancing

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6. Grand rights, when applicable, require direct consent/license from the copyright holder. This is unlike "small rights," which are administered by collective organizations representing copyright holders, such as the American Society of Composers, Authors, and Publishers (ASCAP). For the applicability of grand rights, see Brent Giles Davis, Note, *Identity Theft: Tribute Bands, Grand Rights, and Dramatic-Musical Performances*, 24 CARDOZO ARTS & ENT. L.J. 845, 868-75 (2006).

7. Prince's right of publicity survived his death, under Minnesota law. *See* Tamera H. Bennett, *Updates on Prince Estate - Heirs Determined; UMG Deal Voided; Possible Disputes Over Prince Stage Show*, BENNETT LAW OFFICE: BLOG (Aug. 14, 2017), http://www.tbennettlaw.com/createprotect/2017/6/8/updates-on-prince-estate-heirs-determined-will-umg-deal-be-voided-possible-dispute-over-prince-stage-show.

8. Sisario, *supra* note 1.

9. Karnowski, *supra* note 3.

10. *Id.*

11. Browne, *supra* note 5.

other deals, such as a merchandizing pact with the Minnesota Twins baseball team and other clothing and merchandizing deals with retailers.[12]

Interestingly, while the heirs and the estate's professional advisers attested that they constantly keep in mind what Prince might have wanted to leave as his legacy, they nevertheless openly declared that this goal should be balanced with financially serving the estate. As suggested by Troy Carter, Spotify's global head of creator services at the time, who was named in 2017 as the estate's entertainment adviser: "If we went by 'we have to follow it to the T of exactly how Prince would do things,' you can't really do that and run an estate at the same time."[13]

This case seems to entail a number of key insights, explored in detail in this Article. These insights demonstrate the challenge of collective action for some types of assets or estates while suggesting how trust governance can aid in alleviating conflicts among multiple beneficiaries.

First, the fact that Prince did not write a will or otherwise devise a plan for the governance of his repertoire and other types of intellectual and physical property posthumously requires others—whether courts, the estate administrators, or heirs—to make such choices. Second, the initial appointment of an estate administrator prior to the certification of the heirs did not necessarily serve the estate well during this interim period, with agency problems manifesting themselves. Third, the certification of multiple heirs has led to internal conflicts that have gone beyond identifying the proper criteria for an equitable partition. In fact, the existence of multiple heirs underscored the challenge of running the entire estate to substantiate and increase its overall value. Fourth, and finally, the collective action only started to move forward at a later stage, in which a trustee, aided by capable advisers, started managing the estate under the court's supervision, while being held accountable to a certified group of heirs.

This does not mean, of course, that no friction might arise between the trustee and the beneficiaries, or alternatively, that multiple heirs can never be trusted to run an estate independently. But it does emphasize the potential advantages of a multi-beneficiary trust, at least for a certain period of time or for the duration of a specific project. This is especially so if the property is not readily divisible, and unified governance may work to prevent a deadlock among co-owners.

These lessons are helpful outside of the somewhat idiosyncratic case of Prince's estate. Trusts created *ex ante* or *ex post* to handle collective action problems may prove effective in a variety of settings involving multiple owners, beneficiaries, or other entitlement holders. This could be

12. *Id.*

13. *Id.*

so for land, when different pieces of adjacent land must be assembled for redevelopment, or whenever the common governance of a multi-owned property cannot be advanced merely by direct bargaining or through an institution such as a homeowner association. This is also the case for various scenarios concerning intellectual property assets that cannot or should not be broken down into pieces and divided among co-owners. It might also apply to physical objects, such as artworks, cultural artifacts, or other tangible assets that are valuable as part of a collection, and for which conventional co-ownership may result in a deadlock.

This Article argues that trust law can offer an institutional alternative. It would rely on the longstanding law and practice that governs the fiduciary administration of assets by a trustee in favor of multiple beneficiaries, while extending current doctrine that focuses on the multi-beneficiary intergenerational trust to multiple contemporaneous beneficiaries. In addition to encouraging the voluntary creation of this mechanism, such as through the settling of an *inter vivos* or testamentary trust, statutory law should authorize courts in appropriate cases to grant a remedy of establishing a trust as a matter of law (*ex lege*). Turning co-owners faced with a property deadlock into co-beneficiaries should not be considered a taking if properly devised and might prove less intrusive than other solutions, such as expropriation or a forced auction.

The rest of the Article is structured as follows. Part II identifies the problem of potential deadlocks in the governance of assets. It frames the issue within the general challenge of collective action, which may pertain to situations involving multiple stakeholders in the same asset (commons) or adversely, fragmentation of private property rights that may hinder the efficient pooling or coordination of assets (anticommons). It then analyzes various situations in which the partition of the asset, or its sale and division of proceeds among the co-owners, is not a viable or efficient solution to resolve such deadlocks. Part III assesses current institutional solutions to property deadlocks among multiple stakeholders: direct governance by majority vote; incorporation and the transfer of asset ownership to the corporation; appointment of a receiver; and a forced preemption of rights, such as by eminent domain. Part IV introduces the key features of the common law trust and identifies the functional and organizational attributes of the fiduciary administration of property. It then illuminates the under-utilized potential of trust law in governing assets with multiple beneficiaries, such as through the duty of impartiality. Finally, this Article calls to expand the use of both voluntary trusts and *ex lege* trusts to foster collective action.

II. DEADLOCKS IN MULTI-PARTY PROPERTY GOVERNANCE

A. Multiple Stakeholders, Commons, and Anticommons

Various scenarios implicating multiple stakeholders, collective action, and asset governance have long preoccupied theory and practice. At one end, Garret Hardin's work on the *Tragedy of the Commons*[14] highlighted the ways in which an open-access regime—under which each person has a liberty to use a resource as he or she deems fit, but no right to prevent others from doing the same—will likely result in overuse of, underinvestment in, and the inevitable depletion of the resource.[15] One prominent solution to this "tragedy" is privatization—moving assets from an open-access regime to a private property regime. According to Harold Demsetz, private property facilitates the internalization of costs and benefits pertaining to an asset, such that a self-interested action by the owner may also promote the overall efficient use of the asset.[16] The clear identification of borders and right-holders allows for an effective ordering of asset use, even for those residual types of actions that may spill over to affect assets owned by others.[17]

At the other end, "too much" private property could also be detrimental for effective asset governance and collective action. Under the anticommons theory, the over-fragmentation of private property rights can lead to inefficient and unjust results, from potential deadlocks among adjacent landowners concerning the restructuring of rights to allow for effective redevelopment, to the undersupply of biomedical innovation due to exclusive patents over fragments of knowledge.[18]

Realizing that straightforward regimes of private property do not serve as a panacea for all types of asset-governance problems, scholars and policy-makers have become increasingly interested in other institutional alternatives for asset governance; namely, public property regimes,[19]

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14. Garret Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

15. Fifty years after its publication, Hardin's insights about unmanaged resources preserve their dominant stance, despite some challenges about their theoretical and policy implications. *See, e.g.*, The Cegla Ctr. for Interdisciplinary Research of the Law, *The Tragedy of the Commons at 50: Context, Precedents, and Afterlife*, 19(2) THEORETICAL INQUIRIES L. 395-703 (2018).

16. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

17. *Id.* at 356−59.

18. MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (Bill Frucht ed. 2008). This view has not remained uncontested. *See, e.g.*, Richard A. Epstein, *Heller's Gridlock Economy in Perspective: Why There is Too Little, Not Too Much Private Property*, 53 ARIZ. L. REV. 51 (2011).

19. Authors have noted, for example, that general circulation and commerce routes have been historically supplied publicly, as is still generally the case today, given the high transaction costs of organizing a private system of easements, as well as the positive synergy or network effect of opening

common property regimes,[20] and hybrid or mixed property regimes.[21] In the context of this Article, particular attention should be paid to common property regimes ("CPRs"), also termed "limited common property regimes,"[22] in which an identifiable group of persons collectively holds the formal property rights to an asset to the exclusion of nonmembers.

Elinor Ostrom, a prominent academic voice endorsing CPRs as an institutional alternative for asset governance,[23] identified their fundamental challenge: "how a group of principals who are in an interdependent situation can organize and govern themselves to obtain continuing joint benefits when all face temptations to free-ride, shirk, or otherwise act opportunistically."[24]

Ostrom outlined certain design principles that could aid groups in fostering collective action in CPRs over time, among them active monitoring within the group and graduated sanctions for violations of group rules.[25] However, while close-knit groups—comprising a "social network whose members have credible and reciprocal prospects for the application of power against one another and a good supply of information on past and present internal events"[26]—are able to employ both formal and informal mechanisms for constant enforcement and reinforcement of norms, this may not be the case for most types of CPRs. Once members may exit the group freely, such that they are not bound by the infinite "repeat play" dynamics that may discipline group members,[27] they may be tempted to engage in various types of opportunistic behavior.[28]

In particular, potential problems of deadlocks may thwart asset

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such routes to use by the general public. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1381-82 (1993). Such rationales have also prompted calls to reconsider public governance models for modern channels of transportation and communication, including digital networks. *See, e.g.*, Andrew N. Liaropoulos, *Cyberspace Governance and State Sovereignty*, *in* DEMOCRACY AND AN OPEN-ECONOMY WORLD ORDER 25, 25-35 (George C. Bitros & Nicholas C. Kyriazis, eds., 2017).

20. *See* Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 139 (1998).

21. *See* Amnon Lehavi, *Mixing Property*, 38 SETON HALL L. REV. 137 (2008) (identifying different types of hybrids).

22. Rose, *supra* note 20, at 139.

23. Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (James E. Alt & Douglass C. North eds.,1990).

24. *Id.* at 29.

25. *Id.* at 90.

26. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 177-78 (Harv. Univ. Press 1991).

27. ROBERT AXELROD, THE EVOLUTION OF COOPERATION (Basic Books, Inc. 1984).

28. The challenge of devising a legal setting that would promote "liberal commons" -- preserving the right to exit while mitigating the potential for intragroup opportunism -- is one that looms large over such cooperative types of asset governance. *See* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 553 (2001).

governance based either on a common property regime or, conversely, on a private property setup requiring the aggregation of consent from parties who each hold a fragment of the asset. This may be so not only because of free-riding, shirking, or other types of opportunism, as Ostrom has identified, but also because of genuine heterogeneity among the group members. The joint owners or stakeholders may simply fail to agree on a certain course of action for governing the asset because of diverging tastes and preferences, which span from different levels of risk-aversion or managerial styles to genuine disputes about the goals that the asset should serve. Should single homes on various plots of land be destroyed to make room for a more condensed redevelopment? Should copyrighted musical works of a deceased artist be licensed for a certain TV reality show that may be considered by some heirs as diminishing the artist's reputation? Should a collection of artworks be displayed in a country that is willing to pay handsomely for the exhibition, but is much less generous on human rights? To the extent that differences are not merely tactical, the problem of deadlock may be particularly troublesome. The collective action problem intensifies when the asset cannot be partitioned among co-owners or sold off to a third party while distributing the proceeds. This is so whether such division is practically impossible or would result in a major deadweight loss.

B. Land Assembly and Multi-owned Properties

In the context of land, collective action problems may manifest themselves in the mirror-image scenarios of commons (namely, a multi-owner property) and anticommons (namely, fragmented ownership of adjacent pieces of land that are better served by their consolidation). Thus, while this Section focuses on the challenge of land assembly, and therefore looks mostly at anticommons scenarios, the basic tenets of such challenges relate also to commons. Accordingly, both scenarios face essentially the same types of potential deadlocks among stakeholders.

The challenge of land assembly has been traditionally linked with the establishment of public projects and the corresponding justification for granting government the power of eminent domain to take land for "public use" against payment of "just compensation."[29] Land assembly for projects, such as roads, navigable water routes, and other linear infrastructures and utilities, is prone to potential market failures. The market for the purchase of land, or for a right of way in land, is particularly thin because often there may be only one feasible route for

29. "… Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 4.

the project. This is especially true when the process of land assembly has already started such that path-dependency (literally speaking) makes irrelevant the option of looking for alternatives outside of the chosen route. Accordingly, persons owning land along the designated path may be incentivized to hold out.[30]

But land assembly problems also arise in the context of essentially private, for-profit projects. This is so whether the project is advanced by a group of current landowners who wish to come together in amassing land for the purpose of self-initiated redevelopment, a private entrepreneur seeking to acquire land from multiple owners, or a local government that seeks to promote "economic development," which may eventually translate into benefits to private developers.

In some cases, land assembly is able to take place through a series of voluntary transactions. Thus, for example, in December 2015, Harvard University bought 19.6 acres of land in Allston, Massachusetts, for a combined $97.3 million, rounding out a fifteen-year process of assembling a 90-acre plot known as Allston Landing, formerly owned by the railroad company CSX Transportation Inc.[31] With the "consolidation of land with one owner," and the removal of the railways and other CSX structures,[32] Harvard moved forward in November 2018 with setting up a land company, one that will oversee Harvard's various projects on its growing campus in Allston.[33]

In fact, the purchase of Allston Landing was preceded by an earlier series of land assembly transactions in Allston between 1988 and 1994, one that followed very different dynamics. During that earlier period, Harvard purchased 14 separate parcels totaling over 52 acres.[34] Unlike the later Allston Landing land assembly, Harvard made the earlier purchases, at a total amount of $88 million, without revealing its identity to sellers, residents, or city officials. The university made the news public only in 1997. Then-mayor Thomas Menin reacted furiously, writing to Harvard's president that the secret acquisitions reflected "the highest level of arrogance seen in our city in many years." [35] Harvard, on its part, argued

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30. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74-77 (1986).

31. *See* Catherine Carlock, *Harvard Completes Allston Landing Acquisition with $97M Land Buy*, BOSTON BUS. J. (Dec. 16, 2015) https://www.bizjournals.com/boston/real_estate/2015/12/harvard-completes-allston-landing-acquisition-with.html. The initial purchases from CSX were made in 2003, with these earlier agreements allowing CSX to continue using the property as an active rail yard, until CSX agreed in 2009 to the "yield up" of easements at the property and to the relocation of its rail operations. *Id.*

32. *Id.*

33. Press Release, Harv. Univ., Harv. Univ. to Establish Land Co. in Allston (Nov. 29, 2018), https://www.harvard.edu/media-relations/harvard-university-to-establish-land-company-allston.

34. Tina Cassidy & Don Aucoin, *Harvard Reveals Secret Purchases of 52 Acres Worth $88m in Allston*, BOSTON GLOBE (Jan. 10, 1997), https://www.newspapers.com/newspage/441985021/.

35. *See* Sara Rimer, *Some Seeing Crimson at Harvard 'Land Grab,'* N.Y. TIMES (June 17, 1997),

that "[w]e were really driven by the need to get these properties at fair market value' and avoid 'overly inflated acquisition costs.'"[36]

The success of Harvard University in assembling land may also attest to the scenarios under which such projects may face anticommons hurdles. The first series of transactions in Allston moved forward because Harvard, being practically a single actor on the demand side, was able to keep quiet about the interrelated transactions in a move reminiscent of the strategy used by Walt Disney in the mid-1960s to secretly assemble over 27,000 acres in Orlando.[37] The second series of purchases relied on the fact that while Harvard acted overtly, it faced a willing buyer who had no internal conflicts in moving forward with the gradual process of assembly.

In contrast, when either the demand side or the supply side of land assembly is not typified by unity, homogeneity, or effective divide-and-rule dynamics, the possibility of authentic or strategic holdouts increases dramatically. Consider again the example of a group of adjacent landowners who try to come together to assemble land for the purpose of its redevelopment and its subsequent reapportionment. Internal conflicts on both sides of the transaction might hamper consensual land assembly, requiring the use of other mechanisms that facilitate collective action.

The most dramatic and coercive mechanism is, of course, eminent domain. Part III-D will consider the use of eminent domain in the context of land assembly, vividly demonstrated in the seminal U.S. Supreme Court's decision in *Kelo v. City of New London*,[38] which constitutionally authorized the use of eminent domain. It will address the political and legal backlash of this decision, and subsequent calls in the literature to replace straightforward eminent domain with alternative mechanisms that will resolve property deadlocks through a lesser degree of coercion.

C. Intellectual Property and its (Re)composition

As is the case with land, deadlocks may occur in the governance of intangible assets, such as creative works or technological innovations, which are protected by intellectual property rights. Collective action problems may result from either commons or anticommons dynamics.

Consider first a potential deadlock in a commons setting. This may result from a lack of consent among co-owners or joint controllers of an

https://www.nytimes.com/1997/06/17/us/some-seeing-crimson-at-harvard-land-grab.html.

36. *See* Cassidy & Aucoin, *supra* note 34.

37. *See* RICHARD E. FOGELSON, MARRIED TO THE MOUSE: WALT DISNEY WORLD AND ORLANDO 34–53 (Yale Univ. Press 2001); Mark Andrews, *Disney Assembled Cast of Buyers to Amass Land Stage for Kingdom*, ORLANDO SENTINEL (May 30, 1993), https://www.orlandosentinel.com/news/os-xpm-1993-05-30-9305280833-story.html. For the importance of secrecy in promoting land assembly, see Amnon Lehavi, *Property and Secrecy*, 50 REAL PROP., TR. & EST. L. 381, 425-31 (2016).

38. 545 U.S. 469 (2005).

asset, protected by an intellectual property right, about its proper use. An example of such deadlock is demonstrated above in the context of Prince's musical repertoire.

The magnitude of the commons problem is obviously implicated by the background legal rules, addressing questions such as whether one (or more) of the co-owners is entitled to use the protected asset, license its use to a third party, or assign his or her rights in it, without requiring the consent of the other co-owners of the patent, copyright, or trademark. To the extent that a co-owner is entitled to act unilaterally in this manner, then such a rule alleviates the potential for a fully blown deadlock preventing any exploitation of the asset.

At the same time, unilateral actions can generate other types of collective action problems. This is so, for example, when concurrent or even conflicting licenses to the same asset, issued by each one of the co-owners to different licensees—in a legal regime that allows for such unilateral measures—might hinder the overall efficient use of the asset. Even though information or technology is considered as an essentially non-rivalrous asset (allowing multiple parties to use it simultaneously, unlike most physical goods), the commercial exploitation 'downstream' of such an asset can be rivalrous, such that concurrent or conflicting licenses or other forms of downstream uses can result in inefficient over-exploitation. This, in turn, may adversely affect the willingness of parties to engage in the joint process of creation or innovation in the first place. It also means that the benefits and costs of unilateral uncoordinated use should be weighed against the respective cost-benefit analysis of a rule that requires consensus among all co-owners of an intellectual property right for asset use or commercial exploitation.[39]

The doctrine on this matter diverges among legal systems and may also change, within a single system, in regard to the specific type of intellectual property right. For example, in the case of patents, U.S. federal law generally allows each co-owner to freely use the patent-protected asset, grant a non-exclusive license to use it, or assign his or her right to a third party without requiring the consent of other co-owners or being obliged to account for his or her profits from doing so.[40] In contrast, in most countries within the European Union, national legal systems place limits on the ability of a co-owner to act in such a unilateral fashion, such that, in countries like Germany, France, and the United Kingdom, a co-owner of a patent cannot license the patent, even non-exclusively, without

39. Andrea Fosfuri, Christian Helmers & Catherine Roux, *Shared Ownership of Intangible Property Rights: The Case of Patent Coassignments*, 46 J. LEGAL STUD. 339, 339-40, 365-66 (2017).

40. 35 U.S.C. § 262. *See* Lorenza Ferrari Hofer et al., *The Impact of Co-Ownership of Intellectual Property Rights on their Exploitation*, 3-5 (Int'l Ass'n for the Prot. of Intellectual Prop., Report of Swiss Group Q 194, 2009).

the consent of the other co-owners.[41]

Further, within the United States, federal law diverges on the rules pertaining to legal relations among co-owners based on the specific type of intellectual property right. Thus, whereas in the case of patents, a co-owner is entitled to unilaterally grant to a third party a non-exclusive license and is not required to share in the profits from doing so, in the case of copyrights, a co-owner who grants such a non-exclusive license has the duty to account to the other co-owners for their ratable share of the profits from the license.[42] The situation is less clear-cut in the case of trademarks, where the very idea of joint ownership is in tension with the fundamental purpose of identifying a single entity's goods or services in commerce, and is generally viable only where the co-owners have an institutional structure in place to ensure joint control over the use of the market. Whereas under U.S. federal law, a co-owner does not infringe on other co-owners' rights by exercising his or her right to use the trademark, the law is silent on whether a co-owner is entitled to unilaterally license use of the trademark to a third party, and if so, whether such a co-owner is accountable to others for their ratable share of the profits. Such questions are thus governed by state law and are still unsettled among many state courts.[43]

Another set of potential deadlock scenarios is driven by the mirror-image problem of anticommons, under which various persons or corporations each hold an intellectual property right to a distinctive piece of work, design, technological innovation, etc. This fragmentation of property rights may make it difficult for the different parties—and even more so for a third party—to assemble the different assets for purposes of an integrative research, technology, or production. This could be so, for example, when the creator of a documentary movie needs to assemble licenses for use of video footage from different archives, agencies, media outlets, etc.

The problem of anticommons in intellectual property arises prominently in the context of biomedical innovations protected by patents. In their 1998 article, Michael Heller and Rebecca Eisenberg argue that awarding intellectual property rights, and in particular patents on 'upstream' biomedical innovation, could block others from conducting integrative research or developing applicative 'downstream' products essential for medical treatment.[44] This would be so particularly when individual patents are awarded on concurrent fragments of technology or

41. Fosfuri, Helmers & Roux, *supra* note 39, at 345-46.

42. Melville Nimmer, Nimmer on Copyright §§ 6.10-6.11 (Melville Nimmer et al., eds., 2018).

43. Hofer, *supra* note 40.

44. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998).

knowledge (such as DNA sequences), or when owners of distinctive pieces of upstream research grant overlapping and inconsistent licenses of use to multiple downstream producers.[45]

In a 2018 *Science* article, reviewing "The Anticommons at 20," Jorge Contreras shows that such concerns over the effects of anticommons in biomedical research may have been overstated. This is so because the biomedical sector has found ways for voluntary outpouring of valuable discoveries to the public domain, such as in the 1996 Bermuda Accord reached by leaders of the Human Genome Project (HGP) and the 2007 "Nine Points" set of principles for information-sharing, subscribed to by more than one-hundred leading universities and research institutes around the world.[46] Moreover, at least in the United States, it has become increasingly difficult to patent basic biomedical discoveries, especially after the U.S. Supreme Court's series of recent decisions, by which "products of nature" or "mental processes" are not eligible for patent protection. That said, biomedical research may still be prone to other types of anticommons problems, for example, because valuable data may be protected by trade secrets rather than by patents.[47] Property deadlocks thus remain a concern in the context of intellectual property rights.

D. Tangible Collections: Artwork, Archeology, and Other Gems

Another property setting, in which both commons and anticommons problems may lead to property deadlocks, concerns artwork, archeological artifacts, and other tangible assets that have a particular value as part of a collection, or that are otherwise substantively interconnected.

This could be so when an amalgamation of assets is jointly owned by a group of persons, such as heirs of a deceased artist's estate, thus implicating potential problems of internal governance and even deadlock in the joint management of the estate (i.e., a commons problem). Alternatively, collective action problems may occur when different parties each hold proprietary or controlling rights to fragments or to distinctive assets, thus creating a challenge for their potential assembly—embodying an anticommons scenario. As suggested briefly in this Section, trust or trust-like mechanisms could alleviate at least part of these collective action problems.

As presented in the Introduction, joint heirs of an artist's estate may come across various collective action problems. Even for physical assets

45. *Id.* at 699-700.

46. Jorge L. Contreras, *The Anticommons at 20: Concerns for Research Continue*, 361 SCI. 335, 336 (2018).

47. *Id.* at 336-37.

that can be divided or partitioned among the various heirs, the co-owners would have to agree on the value of the various items and the specific allocation of assets for each co-owner. The five heirs of Pablo Picasso, who died intestate in 1973, while leaving behind about 45,000 works, went through six years of bitter negotiations at an overall cost of $30 million prior to reaching a settlement about the division of the estate.[48] Interestingly, the division of Picasso's works also involved the French government, which agreed to accept works of art in lieu of estate taxes.[49] High-profile sagas in relation to the allocation and administration of estates involved other prominent artists—as with the case of American painter Mark Rothko, causing a particularly notable legal and public outrage.[50]

In addition to the potential division of the physical works among co-heirs or co-owners, other assets related to the estate cannot be partitioned and, therefore, require continuous governance. In the case of Picasso, his son Claude Picasso, who had been named legal administrator of Picasso's estate by a French court, created the Picasso Administration in 1996.[51] This organization acts for and on behalf of "Succession Picasso" or "Indivision Picasso" ('indivision' being a form of joint ownership under French law).[52] The Picasso Administration manages the assets that remain indivisible: rights to Picasso's reproductions and exhibitions; issuance of merchandizing licenses for the use of Picasso's name, image, autograph,

48. Milton Esterow, *The Battle for Picasso's Multi-Billion-Dollar Empire*, VANITY FAIR (Mar. 7, 2016), https://www.vanityfair.com/culture/2016/03/picasso-multi-billion-dollar-empire-battle.

49. These works included "203 paintings, 158 sculptures, 88 ceramics, nearly 1,500 drawings, more than 1,600 prints, and 33 sketchbooks." *Id.* This transfer to the French government formed the core collection of the Picasso Museum in Paris. *Id.*

50. *See, e.g.*, Harriet Fitch Little, *How an Artist's Legacy Became Big Business*, FINANCIAL TIMES, (Aug. 26, 2016), https://www.ft.com/content/d77d5e74-69e5-11e6-ae5b-a7cc5dd5a28c; LEE SELDES, THE LEGACY OF MARK ROTHKO: AN EXPOSÉ OF THE GREATEST ART SCANDAL OF OUR CENTURY (Da Capo Press, Inc. 1978). In 1968 -- two years prior to killing himself in his Manhattan studio -- Mark Rothko wrote a will, leaving all of his residual estate (including nearly 700 of his paintings) to a non-profit foundation he had organized, engaging three of his friends as executors, with the key purpose of keeping the estate intact such that it would not be atomized. In 1969, Rothko entered an agreement with the Marlborough Gallery, in which he agreed not to sell any works for a period of eight years, other than to Marlborough, under a separate agreement that was to be entered into, but was never done. Following his death, and that of his wife Mary Alice a few months later, the executors broke up Rothko's estate, selling a large part of it to Marlborough at extremely low prices, and giving the gallery the right to sell other works on consignment for higher than normal commissions. A year later, Rothko's then 20-year-old daughter Kate sued on behalf of herself and her younger brother. The court ruled in favor of the children -- exposing the wrongful self-dealing of the executors and the gallery -- but the damage was done. Many of Rothko's paintings had already been sold by the gallery to collectors and could not be returned. Id.

51. *See* Picasso Administration, *"Rights,"* PICASSO, http://picasso.fr/en/rights (last visited July 3, 2020).

52. The legal status of indivision is governed by the provisions of Article 815-1 and 1873 of the French Civil Code.

etc.; responsibility for authentication of Picasso's work, while fighting against misattributions, forgeries, and so forth; and other issues relating to the management of Picasso's estate as a whole, including his legacy and reputation.[53] The Picasso Administration, operating as an administrative trust-like entity for the benefit of the heirs as a group, is an essential tool for collectively managing the indivisible parts of Picasso's estate while also streamlining the occasional reassembly of divided parts of the estate, such as when Picasso's physical works are loaned for the purpose of a retrospective exhibition.

Assembling distinctive works of art from different right-holders, such as museums, collectors or heirs, for purposes of a retrospective exhibition or another integrative project, is a challenge that highlights the potential anticommons problems that often involve cultural or artistic assets.

Probably the best-known example illustrating the inherent value of tangible goods as a collection or an entirety, alongside the multiple facets of anticommons problems involved with such assembly or coordination, is that of the Parthenon marbles, taken from the 5th century BC temple dedicated to the goddess Athena, located on top of the Acropolis Hill in Athens, Greece.

The Parthenon marbles are currently split between the Acropolis Museum located at the footsteps of the Acropolis Hill and the British Museum in London. The source of the split lies in the period between 1801 and 1805, when Lord Elgin, a British diplomat in then-Ottoman-ruled Athens, took 247 feet of frieze from the Parthenon comprising fifty-six blocks and nineteen statutes under a dubious claim of permission granted by Ottoman authorities. Elgin shipped the marbles to Britain and sold them in 1816. The British Museum eventually acquired the marbles.[54]

Despite longstanding diplomatic efforts by the Greek government, amplified over the past few years, especially following the inauguration of the new Acropolis Museum in 2009, the British Museum has been reluctant to negotiate any such return or a long-term loan that would allow presentation of the collection in its entirety. In a 2019 interview, the director of the British Museum, Hartwig Fischer, insisted that the "the objects that are part of the collection of the British Museum are in fiduciary ownership of the Trustees of the Museum," and that the placement of the Elgin marbles in a "museum of the world, for the world"

53. Esterow, *supra* note 48; *See also* Sara Hamdan, *Lawsuits, Forgeries and Family Feuds: The Afterlives of Famous Artists*, CNN (Mar. 31, 2017), https://edition.cnn.com/style/article/afterlives-of-famous-artists-estates/index.html.

54. Kerry Kolasa-Sikiaridi, *The History of the Parthenon Marbles*, GREEK REP. (Jan. 27, 2019), https://greece.greekreporter.com/2019/01/27/the-history-of-the-parthenon-marbles/.

should be rather viewed as a "creative act."[55] This stance sparked a fierce response from the Greek Government, with the Culture Minister Myrsini Zorba calling Fisher a "cynic,"[56] and the director of the Acropolis Museum arguing that "everything that is inextricably linked to the monument should be reunited."[57] This position has received support from prominent archeologists and other professionals. American archeologist Stephen Miller argues that the collection "deserves to be all together in one place," that splitting it is "not the way to treat such an important monument," and adding ironically that "we should persuade the Greeks to send the Parthenon to England."[58]

Obviously, the story of the Parthenon marbles is exceptional in the scale of the conflict, the parties involved, and the history of property rights (or claims thereto); but it does illustrate the unique sense in which certain types of tangible assets, such as archeological artifacts, artworks, and other objects may have a particular value as a collection, and how collective action problems may undermine their overall social value and could even result in a property deadlock.

III. CURRENT (LIMITED) SOLUTIONS TO PROPERTY DEADLOCKS

Having identified in Part II various settings in which multiple stakeholders may come across collective action problems, whether in the

55. Benjamin Butterworth, *British Museum 'Rules Out' Returning Elgin Marbles to Greece*, IN NEWS (Jan. 26, 2019), https://inews.co.uk/news/british-museum-elgin-marbles-not-return-greece-250841 ; Naomi Rea, *The British Museum Says It Will Never Return the Elgin Marbles, Defining their Removal as a 'Creative Act*,' ARTNET NEWS (Jan. 27, 2019), https://news.artnet.com/art-world/british-museum-wont-return-elgin-marbles-1449919 ; Mark Brown, *British Museum Chief: Taking the Parthenon Marbles was 'Creative,'* THE GUARDIAN (Jan. 28, 2019), https://www.theguardian.com/artanddesign/2019/jan/28/british-museum-chief-taking-the-parthenon-marbles-was-creative.

56. Anthee Carassava, *Have the UK and Greece Lost their Marbles?*, DEUTSCHE WELLE (Feb. 21, 2019), https://www.dw.com/en/have-the-uk-and-greece-lost-their-marbles/a-47580973.

57. *Acropolis Museum Director: British Museum is Not Owner of the Parthenon Marbles*, EKATHIMENRI NEWS (Mar. 27, 2019), https://www.ekathimerini.com/237178/article/ekathimerini/news/acropolis-museum-director-british-museum-is-not-owner-of-parthenon-marbles; George Vardas, *The British Museum and the Creative Displacement of the Parthenon Marbles*, NEOS KOSMOS (Jan. 30, 2019), https://neoskosmos.com/en/128306/the-british-museum-and-the-creative-displacement-of-the-parthenon-marbles/.

58. Kostis Geropoulos, *Miller: Bring the Marbles Back or Send the Parthenon to Britain*, NEW EUROPE (Feb. 11, 2019), https://www.neweurope.eu/article/miller-bring-the-marbles-back-or-send-the-parthenon-to-britain/. A minority of commentators sees merit, however, in keeping the Parthenon marbles split. *See* Jonathan Jones, *Let's Not Lose our Marbles over the British Museum's Boss's Remarks*, THE GUARDIAN (Jan. 29, 2019), https://www.neweurope.eu/article/miller-bring-the-marbles-back-or-send-the-parthenon-to-britain/; Florian Schmidt-Gabain, *My Solution to the Parthenon Marbles – Let's Split Them in Half*, THE GUARDIAN (Feb. 15, 2019), https://www.theguardian.com/artanddesign/2019/feb/15/the-parthenon-marbles-debate-british-museum-acropolis-athens-elgin-marbles.

form of a commons setting or the mirror-image one of an anticommons, this Article analyzes in this Part different legal mechanisms that are currently in operation and the extent to which these mechanisms are able to resolve potential property deadlocks.

A. Direct Governance by Majority Voting

Legal regimes relating to joint tenants, tenants in common, coparceners, and other forms of joint owners or stakeholders must address potential differences of opinion within the group and establish rules of decision about control and use of the jointly-owned assets in such scenarios.

In many cases, the most practical way to overcome disagreement is simply by splitting the asset. This could be done either by partition in kind of the asset or by sale and the division of the proceeds among the joint owners based on their ratable shares. When the parties cannot agree on partition, each party is entitled to apply for a court-ordered action of partition, with the court regularly having equitable discretion to determine the type of partition: in kind or by sale.[59]

In other cases, such as when neither party applies for partition, or when partition is otherwise legally constrained, impractical, or outright detrimental to all parties concerned, legal doctrine must otherwise balance between the interests of the co-owners. In particular, rules on governance and use of the joint asset must work to foster effective use of the asset, and to prevent holdouts, freeriding, and other types of opportunistic behavior by any of the co-owners. Even in the case of two co-owners holding an equal share, disparities may arise in the actual power of the parties (consider joint tenancy or tenancy in common by former spouses). In the case of more than two co-owners, a related policy question arises concerning the scope and limits of majority rule among co-owners in decisions about the management and use of the joint asset. Such dilemmas relate not only to the validity of any such nonconsensual decisions, but also to the duty of co-owners to account to other co-owners for rents or profits received from third persons, or for benefits accrued to co-owners from possessing or otherwise using the joint asset.

As Part II-C showed in the context of intellectual property, legal doctrine on these questions diverges among legal systems, such that in most European countries, consent among patent co-owners is required for licensing the patent to third parties; while in the United States, one or more patent co-owners can do so non-consensually without even having to account to other co-owners (whereas U.S. copyright law allows for

59. *See* JESSE DUKEMINIER ET AL., PROPERTY 405-14 (Jesse Dukeminier ed. 8th ed. 2018).

non-consensual licensing but does impose a duty of account among co-owners). Therefore, while European law generally seeks to control against opportunism in the form of non-consensual exploitation of the asset and profit-grabbing, it opens the door to a different kind of opportunism in the form of holdouts and risk of deadlocks. U.S. patent law offers a mirror-image system of balancing, with U.S. copyright law trying to walk a middle ground between increasing the prospects of asset-use while imposing profit-sharing.[60]

Moving to the law governing joint tenancy, tenancy in common, and coparceners in land, statutory and case law in common law jurisdictions generally distinguish between unilateral possession and self-use of the asset by a joint owner, and receipt of revenues from third parties.

Generally speaking, when a co-owner possesses or otherwise uses the asset, he or she is not liable to other co-owners and does not have to account to the co-tenants out of possession for the proportionate share of the rental value or other benefits.[61] This is so unless such a co-owner engages in ousting other co-owners—i.e., excluding them or otherwise refusing their demand for use and enjoyment of the land. Also, under certain circumstances, the court may impose fiduciary duties among co-owners, such as when the co-owners are family members.[62]

In contrast, when one or more co-owners receive rent or other types of benefits from third parties, they must account to other co-owners for the amounts received in excess of their share. Therefore,an action taken by a co-owner, such as renting the land to a third party, without the consent of other co-owners, is not null and void. Rather, the rent is subject to accounting and rent-sharing.[63]

The question of rules of decision in the absence of consent among co-owners, and in particular about the power of a majority of co-owners to make decisions that would also bind a dissenting minority, comes up prominently in the context of common interest developments ("CIDs"), comprising mostly condominiums, cooperatives, and homeowner associations.[64]

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60. *See supra* notes 40-43 and accompanying text.

61. W.W. Allen, Annotation, *Accountability of Cotenants for Rents and Profits or Use and Occupation*, 51 A.L.R. 2d. 388 (1957).

62. DUKEMINIER, *supra* note 59, at 418-19

63. W.W. Allen, *supra* note 61, § 2.

64. For an analysis of the various types of residential community associations, also termed "common interest communities" (CICs), see DUKEMINIER, *supra* note 59, at 873-94; Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 3, 4 (Stephen E. Barton & Carol J. Silverman eds., 1994); Amnon Lehavi, *Law, Collective Action and Culture: Condominium Governance in Comparative Perspective*, 23 ASIA PAC. L. REV. 5 (2015); Amnon Lehavi, *The Culture of Private Law*, 45 REAL EST. L.J. 35, 73-84 (2016).

The types of collective action challenges faced by members of CIDs, and condominiums in particular, may be roughly divided into (1) establishment and management of jointly owned amenities, and (2) control of intra-CID externalities resulting from the use of the housing units.[65]

To meet these challenges, the core of the horizontal collective action among homeowners and co-owners of common property lies in the CID's governing documents, typically comprised of "declarations" containing a set of conditions, covenants, and restrictions ("CC&Rs"), which are recorded with the land registrar.[66] The governing documents and subsequent amendments, rules, and regulations adopted by the CID go well beyond conventional contractual provisions. This is so because under enabling legislation, individually owned units are "burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal."[67] Under such statutes, the CC&Rs and subsequent association rulemaking are considered "enforceable equitable servitudes, unless unreasonable."[68] Such provisions do not require actual notice once registered and apply to subsequent purchasers, even if these provisions would not have otherwise fulfilled the "common law requirements for creation of an equitable servitude or a restrictive covenant."[69]

Decision-making rules come into play in the face of disagreements among CID members. In principle, unless expressly limited by statute or the CC&Rs, simple majority is effective to amend the declarations or to otherwise adopt rules, such as to "make administrative changes reasonably necessary for management of the common property" or to "prohibit or materially restrict uses of individually owned lots or units that threaten to harm or unreasonably interfere with the reasonable use and enjoyment of other property in the community."[70]

In contrast, unanimous consent is required for those prohibitions or material restrictions of individual uses that cannot be grounded in common interest or for changes made to the basis for allocating voting rights or assessments among community members. Also, when an

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65. For a fuller analysis of these realms of collective action, see LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 67-95 (Yale U. Press 2009).

66. These provisions regularly concern "membership and voting rights in the owners association, maintenance responsibilities, procedures for calculating and collecting assessments, accounting and insurance requirements, architectural and/or design control, and enforcement of the declaration." Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 145 Cal.Rptr.3d 514, 523-24 (2012).

67. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.2 (2000) (hereinafter: Restatement, Servitudes).

68. CAL. CIV. CODE §1354(a) (repealed 2014). Other state statutes may define the standard of enforcement of such servitudes somewhat differently. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.8, statutory note (2000).

69. *Pinnacle*, 145 Cal.Rptr.3d, at 525.

70. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, §6.10 (2000).

amendment does not apply uniformly to similar lots, the amendment must be approved by the members whose distinct interests would be adversely affected by it.[71]

In practice, however, courts tend to broadly construe enabling legislation and declarations to settle for simple majority to amend the declaration or to promulgate new rules. In *Villa De Las Palmas Homeowners Association* v. *Terifaj*,[72] the California Supreme Court upheld a majority-approved amendment to the condominium's declarations imposing a no-pet restriction by viewing such a use restriction as "crucial to the stable, planned environment of any shared ownership arrangement" and holding that all homeowners, including those who purchased their units prior to the amendment, are bound by it.[73] The court read Section 1355(b) of California's Civil Code on declaration amendments as settling for simple majority, reasoning it is designed to prevent a "small number of holdouts from blocking changes regarded by the majority to be necessary to adapt to changing circumstances and thereby permit the community to retain its vitality over time."[74] This provision was viewed by the court as presumptively reasonable.[75]

While in a limited number of instances, courts exhibit a more interventionist approach—such as in scrutinizing restrictions on individual political speech within the CID[76]—majority voting by members regularly enjoys broad deference. In legitimizing simple majority voting as the only practical way to facilitate collective action, the law implicitly assumes that members are equal in their ability to influence decisions, that coalitions are only formed ad hoc, and that the majority does not systematically enjoy benefits that a minority does not.

But other cases may raise doubts about whether a group of co-owners becomes controlled by a pre-organized majority, which serves the interests of a sub-group at the expense of others. Restrictions on pets, smoking, certain kinds of outdoor activities, and the like would not implicate "suspect classes" or otherwise raise constitutional issues. But these types of decisions could create over the long run a relatively stable majority, which is at least somewhat coordinated in acting vis-à-vis dissenters. This means that, at least in some instances, direct governance

71. *Id.*

72. 90 P.3d 1223 (Cal. 2004).

73. *Id.* at 1228-29.

74. *Id.* at 1228 (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.10 cmt. A (2000)).

75. This shifts the burden to the party challenging the use restriction, who must show that these restrictions are "wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." *Id.* at 1231 (citing Nahrstedt v. Lakeside Vill. Condo Ass'n, 878 P.2d 1275, 1287 (Cal. 1994)).

76. Amnon Lehavi, *Concepts of Power: Majority Control and Accountability in Private Legal Organizations*, 8 VA. L. & BUS. REV. 1, 53 (2014).

by majority vote may not prove an efficient and fair tool for collective action.

Moreover, CIDs and condominiums in particular, are an exception in the overall landscape of co-tenancy and other forms of common ownership in the sense that CIDs are based on a built-in form of association and organizational structure, which is created by the real-estate developer and to which homeowners must adhere prior to buying property. As such, the CID's institutional structure allows for rules of governance that in other cases may require ex post incorporation.

B. Incorporation

The corporation is a prominent legal mechanism that seeks to promote collective action in the control and use of assets. As this Section shows, while the underlying rationales for creating the institution of corporations lies in resolving potential fragmentation and anticommons problems, the corporation's governance mechanisms work also to alleviate commons problems that may result once a cluster of assets is consolidated under a single legal entity with multiple shareholders. At the same time, creating and governing a formal corporation is not trivial, and it is not a panacea for all types of collective action problems and deadlocks presented in Part II.

In *The Nature of the Firm*,[77] Ronald Coase observed that firms emerge as an alternative mode of operation to markets, whereby an organization is formed to direct resources within the organization rather than relying on external market transactions that may be prone to transaction costs and strategic behavior.[78] Following Coase, Kenneth Arrow identified corporations as typified by "vertical integration," referring to nonmarket resource allocation by organizational fiat.[79] Oliver Williamson further explains that vertical integration allows for adaptive, sequential decision-making without the need to "consult, complete or revise interfirm agreements," such that "[w]here a single ownership entity spans both sides of the transaction, a presumption of joint profit maximization is warranted."[80] Incorporation can thus alleviate anticommons problems.

At the same time, once the corporation has been formed, and capital or in-kind contributions by multiple parties are converted into shareholding,

77. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

78. *See generally*, *id.* at 388 (suggesting that firms serve as "islands of conscious power in this ocean of unconscious co-operation.") (citing D.H. ROBERTSON, THE CONTROL OF INDUSTRY 85 (1923)).

79. Kenneth J. Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Non-market Allocations*, *in* PUBLIC EXPENDITURE AND POLICY ANALYSIS 59, 67 (R.H. Havenman & J. Margolis eds., 1970).

80. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 78 (1985).

the legal institutions of corporations must devise modes of effective rulemaking and governance to overcome potential commons problems among shareholders and other corporate insiders. This is achieved by three types of mechanisms.

1. Transfer of Assets to the Separate Legal Entity.

First, in creating the corporation, members move privately-owned assets or property rights to the organization, or otherwise contribute to establishing resources governed by the collective entity, against non-fixed claims in the form of shares. The corporation's separate legal entity plays a key role in solidifying and ensuring the credibility of the commitment made by each individual equity shareholder to transfer direct control over the now-collectively-governed assets. In particular, Henry Hansmann and Reinier Kraakman view "asset partitioning" —by which the corporation's assets are separated from those of the firm's shareholders and, accordingly, from the personal creditors of the latter—as the "core defining characteristic of a legal entity" and as the essential role of organizational law.[81]

2. Delegation of Decision-Making Powers to Agents.

The second organizational feature of devising mechanisms to alleviate potential commons problems and property deadlocks is the delegation of a key part of the shareholders' decision-making authority to the corporation's board of directors and executive management. In the business corporation, while shareholders must ratify certain decisions such as mergers and charter amendments, they generally lack the power to initiate them. Moreover, in the U.S. legal system, which is considered relatively "board-centric" as compared with other jurisdictions, shareholders do not have the general power to overrule any matter that is within the board's competence.[82] To protect the corporation's members as a class against potential agency problems, corporations maintain the

81. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390, 393 (2000). Asset partitioning has two components. The first is designating a separate pool of assets that are associated with the firm and are distinct from the personal assets of the firm's owners and managers. The second is assigning creditors with priorities in the distinct pools of assets that result from the formation of the legal entity. The assignment of such priorities can take two forms. One form is "affirmative" asset portioning, which assigns to the firm's creditors a claim on the firm's assets that is categorically prior to the claims of the personal creditors of the firm's owners. The other form is "defensive" asset portioning, which does the opposite: "granting to the owners' personal creditors a claim on the owners' separate personal assets that is prior to the claim of the firm's creditors." *Id.* at 393-94.

82. John Armour et al., *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 49, 57-58, 72-73, 75 (Reinier Kraakman et al. eds., 3d ed. 2017).

right of members to elect and re-elect officers and managers, while imposing, to varying degrees, certain procedural and substantive duties—such as fiduciary duties—on these agents at the service of members/shareholders.[83]

3. Residual Governance by Majority.

The third component of structuring the corporation to resolve potential collective action problems among its multiple members-turned-shareholders is by establishing rules on majority vote in matters left for direct decision-making by members. While most decisions in the corporation are governed by a simple majority rule, including appointment rights of the board, a special majority is required for certain types of decisions, such as charter amendments, ratification of mergers, consolidations, and other fundamental organizational changes.[84] Moreover, many U.S. jurisdictions, Delaware being a key example, promote a "majority of the minority" approval as the most reliable guarantee for screening conflicted transactions with controlling shareholders.[85]

While formal incorporation offers many advantages to promoting collective action, and to mitigate deadlocks over the use of assets, it would be impractical to assume that this institutional framework would be utilized to cover all types of multi-party asset governance. Legal transition costs, administrative costs, tax issues, and so forth comprise one set of factors that could pose a challenge for voluntary incorporation. More generally, parties might be deterred from entering into a legal framework that is at least partly irreversible, not only in the sense of transferring title to assets to a separate legal entity as a matter of law, but also of transferring decision-making powers to often-complex corporate organs. Accordingly, requiring parties to incorporate through a court-ordered mandate should be reserved, if at all, to exceptional cases in which

83. For such rules in the context of the business corporation, see Luca Enriques et al., *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 79, 80-81 (Reinier Kraakman et al. eds., 3d ed. 2017).

84. Edward Rock et al., *Fundamental Changes*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 171, 186 (Reinier Kraakman et al. eds., 3d ed. 2017).

85. *See, e.g.*, Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 n.3 (2005) (stating majority of minority voting is useful for litigation disputes); *In re* John Q. Hammons Hotels, Inc. S'holder Litig., No. 758-CC, 2009 WL 3165613, at *12 (Del. Ch. Oct. 2, 2009) (providing that to sufficiently protect minority shareholders, special committees cannot waive the majority of the minority vote because "requiring approval of the majority of all the minority stockholders assures that a majority of the minority stockholders truly support the transaction, and that there is not actually 'passive dissent' of a majority of the minority stockholders").

incorporation would be a lesser evil as compared with other types of top-down coercion, as demonstrated in Part III-D in the context of involuntary land assembly.

In some cases, trusts may offer a more practical and feasible approach. As Part IV shows, the common law trust acts somewhat like a corporation, in that it employs legal mechanisms to govern a distinct pool of assets, while dealing with competing or conflicting claims both among beneficial owners and vis-à-vis third parties. But the common law trust is also more flexible in many respects and can also be utilized on a temporary basis, through either voluntary trust deeds or judicial decrees, while avoiding cumbersome processes such as liquidation of a corporation. The trust can thus serve as an alternative for deadlocked property when an *ex ante* or *ex post* formal incorporation of assets owned or co-owned by multiple parties is unfeasible or inappropriate.

C. Receivership

Another mechanism that could be employed to rescue assets from deadlocks and other types of collective action problems is one of receivership. Generally, receivers are appointed by courts to handle distressed assets, including, but not limited to, assets burdened by debts and other obligations that cannot be met.[86] Governed by state law in the United States, the appointment of a receiver is inherent in the equitable powers of the court. In some U.S. states it is also based on specific statutory authority. While receivers are generally appointed as ancillary relief, typically in a foreclosure case, courts may also appoint a receiver as a primary relief under rare and unusual circumstances when there is no other adequate remedy under law.[87]

Alongside "passive" receivers who are tasked by the court with simply conserving the property at stake, the court can also appoint "active" receivers who can employ broader powers, such as the power to sell, to contract, and to settle and compromise claims with the court's approval. "Commensurate with these broad powers, an active receiver is tasked with stringent reporting duties to the . . . court, the lender, and the debtor" (for assets burdened by an outstanding debt).[88]

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86. *See* Brian S. Dervishi & Steven E. Seward, *Using Receiverships to Maximize the Value of Distressed Assets*, 83 FLA. BAR J. 8, ¶¶ 3-5 (2009) (explaining how receiverships are appointed and providing examples of the traits and powers of receiverships).

87. *See, e.g.*, *id.*, at ¶ 13-14 (explaining that "[appointing] of a receiver as a primary relief appears to require a showing of what necessitates the appointment of a receiver and what prevents the petitioning party from filing a complaint to foreclose the property."); Stephen R. Miller, *Distressed Condos: The Chicago Case*, 45(2) REAL EST. REV. J. ART. 5 (2016) (providing that "appointment of a receiver is considered an extreme remedy in equity, when there is no adequate remedy under law").

88. Dervishi & Seward, *supra* note 86, ¶ 21.

In some cases, receiverships are operated in the context of condominiums and other multi-owned properties. This is particularly so in the context of the equitable lien that CIDs, and condominiums in particular, have against unit owners who do not pay the CID's assessments. Some state condominium acts also permit "the receiver to take possession of the condominium unit, if not occupied by the co-owner, and to lease the condominium unit and collect and apply" the rent to pay for assessments.[89] In so doing, the receivership helps to preserve the common assets of the CID. Moreover, in some states, receivers can also be appointed to ensure that homeowners conform to certain regulatory obligations, such as making repairs or meeting city safety requirements.[90]

In view of the broad equitable powers that courts have in the matter, in addition to or in lieu of specific statutory provisions, one could think about employing receivership more broadly as an instrument to overcome other types of collective action problems in multi-owned assets. Such an institutional change—especially if receivership is to play a primary role rather than serving as an ancillary remedy to foreclosure or insolvency—requires legislatures or courts to develop a much thicker body of legal norms on receivership.

This Article suggests, however, that employing receivership is unnecessary because there is already a different institutional setup that shares some of the basic traits of receivership, but is already well developed—trust law. Just like a receiver, a trustee serves as a fiduciary who is accountable not only to the trust's beneficiaries but also to a court, and who can operate on a temporary or permanent basis, based on the underlying nature of the trust. It should thus be favored as an institutional mechanism for the governance of deadlocked assets.

D. Eminent Domain

As suggested in Part II-B, in the context of land assembly, the most dramatic and coercive mechanism currently in existence for handling property deadlocks is the power of eminent domain. To understand its role— and also its inherent disadvantages—one should briefly recall the state of events leading to the U.S. Supreme Court's decision in *Kelo v. City of New London*,[91] as well as the political and legal backlash that followed the use of eminent domain.

In the year 2000, the then-distressed City of New London approved a

89. Patrick E. Mears and C. Kim Shierk, *Workouts, Receiverships, and Foreclosures on Michigan Residential Condominium Projects: A Road Map for Mortgage Lenders*, 36 MICH. REAL PROP. REV. 177, 181 (2009).

90. Dervishi & Seward, *supra* note 86, ¶¶ 21, 31.

91. 545 U.S. 469 (2005).

redevelopment plan for the ninety-acre Fort Trumbull site. The City hoped that this redevelopment adjacent to and in conjunction with a new Pfizer research facility would help revitalize the local economy. The Fort Trumbull site, however, included 115 privately-owned properties, as well as thirty-two acres of publicly owned lands. The City tasked a nonprofit corporation, the New London Development Corporation ("NLDC"), with implementing the plan. NLDC was able to successfully negotiate the purchase of most private properties in the plan's designated area. However, it failed to reach agreement with nine property owners, who altogether held fifteen properties. In response, the City and NLDC initiated the state law condemnation procedures. The use of eminent domain was validated by the U.S. Supreme Court, holding that "economic development" may amount to a valid "public use."[92]

The *Kelo* case instigated a stormy legal and public debate, leading legislatures in some U.S. states to limit the use of eminent domain for "economic development."[93] However, that increased protection implicates the potential problem of property deadlocks. With this in mind, scholars have tried to come up with potential "second-best mechanisms" for land assembly[94]—ones that fall short of full-fledged consent, but which also refrain from full-fledged coercion.

Michael Heller and Rick Hills called to establish a Land Assembly District ("LAD"), which would have the power by a majority vote to approve or disapprove the sale of the district's overall area to a developer or municipality seeking to consolidate the land into a single parcel, while also granting landowners a right to opt-out and receive fair market value compensation.[95] Namely, instead of requiring consensus among all landowners, the conceptual assembly of landowners under a "district" would facilitate the move to a majority-based regime. In this sense, the move towards majority-based decisionmaking is different than that introduced in Part III-A. It results from a top-down notional consolidation of decision-making power.

Amir Licht and this author suggested taking further the idea of consolidating landowners under a single institutional framework, from a notional assembly for the purpose of majority vote into a full-fledged incorporation. Under this model, although the taking component of eminent domain may need to remain an involuntary non-market

92. For a detailed analysis of the case and its aftermath, see generally AMNON LEHAVI, THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES 214-219 (2013).

93. *See id.*, at 215.

94. Zachary Grossman et al., *Second-Best Mechanisms for Land Assembly and Hold-Out Problems*, 175 J. PUB. ECON. 1 (2019).

95. Michael A. Heller & Roderick M. Hills, Jr., *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1467-70 (2008).

transaction, a market-based mechanism for the compensation component is established in the form of a Special-Purpose Development Corporation ("SPDC"). The SPDC would acquire unified ownership of the land and the development project and would offer condemnees a choice between receiving pre-project fair market value compensation and pro rata shares in the SPDC. This proposal would make it more likely for compensation to be closely linked to the true economic value of the land and, consequently, that land assembly projects will be both more just and truly welfare-maximizing.[96] This proposal seeks to harness the advantages of corporate governance and single ownership over the consolidated asset, as suggested in Part III-B, through a more moderate top-down fiat.

While the above models should be taken into consideration as an alternative to eminent domain, Part IV of this Article will show how multi-beneficiary trusts can offer yet another alternative for resolving land assembly problems, as well as other types of collective action problems and potential deadlocks pertaining to multi-party ownership and governance of assets.

IV. THE PROMISE OF MULTI-BENEFICIARY TRUSTS FOR INDIVISIBLE PROPERTY

This Part introduces the key features of the trust, focusing on the proprietary and functional attributes of engaging in fiduciary administration of assets held under a trust. It illuminates the under-utilized potential of trust law in governing assets with multiple beneficiaries, such as through the duty of impartiality, and calls to expand the use of both voluntary trusts and *ex lege* trusts to foster collective action. It explains why transforming the legal interests of deadlocked parties into equitable proprietary interests under *ex lege* trusts should not be considered a taking.

A. The Common Law Trust: Separation of Legal and Beneficial Ownership

In Anglo-American systems, a "trust" is a mechanism where a person holds rights in an asset on behalf of another person (or in limited circumstances, for a certain purpose, such as in a private-purpose or a charitable trust).[97] The essence of the trust lies in the separation of legal and equitable interests such that the person creating the trust—the settlor—conveys legal title in the property to the trustee for the benefit of

96. Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704 (2007).

97. MOHAMED RAMJOHN, UNLOCKING EQUITY AND TRUSTS 20 (7th ed., 2019).

the beneficiary, with the beneficiary enjoying an equitable interest in the property. The trustee is placed under fiduciary duties to control and manage the property for the sole purpose of promoting the beneficiary's interests. All powers held by the trustee should be exercised in accordance with these fiduciary obligations, with the beneficiary having a legal standing to enforce them. While the equitable interest of the beneficiary was traditionally treated as a right *in personam*, it is more appropriately viewed in current jurisprudence as a proprietary interest.[98] This is so both in the sense that the beneficiaries may assign their rights to third parties—such as a right to receive payments when the asset generates income[99]—and also in that unauthorized transfers of the asset by the trustee to another person, who is not a *bona fide* purchaser, could be invalidated. Moreover, the beneficiaries can also trace their equitable interests by virtue of the trust through substitution of one kind of property rights to another—such as when an unauthorized sale is made to a *bona fide* purchaser and the beneficiary's legal interest is transferred to the proceeds from the sale.[100]

In addition to the trust's internal governance matters, which address the powers and duties of the trustee and the corresponding rights of the beneficiary, trust law is also typified by "asset portioning" between the trust's property and the trustee's personal assets. The essence of asset portioning lies in its effect on third parties and, in particular, on creditors. Once the trust's assets are separated from property owned or controlled by the trustee in a personal or another non-trust capacity, this means that the trustee's creditors have no recourse against the trust property.[101]

As discussed in Part III-B, asset portioning is a defining feature of organizational law, and corporate law in particular. It is vividly illustrated by the separate legal entity of the corporation. This means that the corporation directly owns assets and, correspondingly, that the corporation's creditors' claims on the corporation's assets categorically have priority to the claims of the personal creditors of the corporation's shareholders.[102] In the case of a common law trust, such a straightforward asset portioning is not possible because the trust is not a freestanding legal entity.[103] Under traditional trust law, the trustee was personally liable for obligations arising from ownership of the trust property, while being entitled to indemnification out of the trust property. However, current trust law enables a creditor of the trustee acting in the fiduciary capacity

98. *Id.* at 27.

99. JAMES E. PENNER, THE LAW OF TRUSTS 27-28 (Nicola Padfield ed., 9th ed., 2014).

100. *Id.* at 312.

101. Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Portioning*, *in* THE WORLDS OF THE TRUST 428, 436 (Lionel Smith ed., 2013) (hereinafter: Sitkoff, Asset Portioning).

102. Hansmann & Kraakman, *supra* note 81, at 393-94.

103. Sitkoff, Asset Portioning, *supra* note 101, at 435.

to recover directly from the trust fund without recourse against the trustee's personally-owned property, and vice versa in regard to obligations of the trustee in a personal or other capacity. Accordingly, from the perspective of third parties, modern trust law effectively splits the trustee into two distinct legal persons, and, correspondingly, splits the two different pools of assets.

B. FIDUCIARY ADMINISTRATION OF THE TRUST'S ASSETS

Trust law identifies a set of fiduciary obligations, which the trustee has toward the trust's beneficiaries. One such prominent duty includes the duty of loyalty, by which the trustee must "administer the trust solely in the interest of the beneficiaries."[104] The trustee is, therefore, not entitled to act to promote her own interest, or even act with a mixed motive. This means that the trustee cannot engage in self-dealing or make personal profits from the trust. To the extent that such self-dealing or other conflicts of interests are shown, it will be enforced by a "no further inquiry" rule.[105] Even in cases where the testator explicitly authorizes the trustee to be positioned in a conflict of interest, the trustee will be held accountable in the form of "especially careful scrutiny." The trustee's actions may be scrutinized even when the beneficiary gives consent for a conflict of interest after full disclosure by the trustee.[106] The duty of loyalty is inherent to the trust, granting clear superiority to the proprietary interests of the beneficiary.

The other major fiduciary duty of the trustee is the duty of care, also known as the duty of prudence, with such prudence applying to all functions of the trusteeship; namely, distribution (i.e., making disbursements of income or principal to the beneficiaries), investment, custody (i.e., collecting and protecting the trust property), and administration of the trust.[107] In England, Section 1 of the Trustee Act 2000 ("Trustee Act") reformulates the duty of care, as it was developed in case law, by replacing the common law duty of care with a limited number of statutory duties identified in the Trustee Act. For the types of duties not enumerated in the Trustee Act, common law duties will continue to apply. Additionally, the duty of care does not apply under the Trustee Act if it appears from the trust instrument that the duty is not meant to apply, such that a settlor may expressly restrict the duty's

104. RESTATEMENT (THIRD) OF TRUSTS, § 78(1) (2007).

105. RAMJOHN, *supra* note 97, at 507-10.

106. Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 41, 44-46 (Evan J. Criddle et al., eds., 2019) (hereinafter: Sitkoff, Principles).

107. *Id.* at 46-51.

application.[108]

The fiduciary obligations of the trustee include other duties, with slight variations between English and American law, such as the duty to inform and account,[109] the duty of the trustee to act personally—while allowing the trustee to delegate certain functions to others[110]—and the duty to act impartially in case of multiple beneficiaries, which is discussed in detail in the following Section of this Article.

More generally, because the voluntary trust—be it an *inter vivos* or a testamentary trust—should reflect and implement the particular wishes of the testator, the fiduciary duties may include additional duties or particular manifestations of the general fiduciary duties developed by law.

The scope of these duties is also impacted by the ability of the testator to exclude certain fiduciary duties, or by that of the beneficiary to release the trustee from liability for conduct that is otherwise considered a breach of duty. This touches on the core issue of whether fiduciary duties developed under statutory or case law are mandatory or, rather, default rules that can be contracted away. Generally speaking, while exclusion clauses in trusts are not considered prima facie invalid on public policy grounds, such exclusion clauses need to be explicit and detailed.[111]

Moreover, such exclusion clauses cannot exempt a trustee from the essential duties imposed on trustees—the mandatory core of trust relations. These core requirements typically include the duty to act in good faith, in honesty, and for the benefit of the beneficiaries, as explained in the seminal English case of *Armitage v. Nurse*.[112] In other words, while an exculpation clause can exclude liability for negligence, it cannot exempt a trustee for an act or omission done in bad faith, reckless indifference, or through intentional or willful neglect.[113]

The core of mandatory duties imposed on a trustee was further explained by the Delaware Supreme Court in the matter of *McNeil v. McNeil*: "[a] trust in which there is no legally binding obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of property."[114] From a property law perspective, this means that the equitable interest of the beneficiary in a trust is inherently and categorically superior to the trustee's legal title, such that the legal title is instated for the sole purpose of serving the equitable interest.

108. RAMJOHN, *supra* note 97, at 484-90.

109. Sitkoff, Principles, *supra* note 106, at 53-54.

110. RAMJOHN, *supra* note 97, at 494-96.

111. *Id.* at 497-500.

112. Armitrage v. Nurse [1997] EWCA (Civ) 1279.

113. Sitkoff, Principles, *supra* note 106, at 55-57.

114. 798 A.2d 503, 509 (Del. 2002).

C. The Duty of Impartiality and Intergenerational Trusts

The duty of impartiality was developed in trust law to cover situations in which the trust has two or more beneficiaries or purposes—whether such purposes are private, charitable, or mixed. It applies whether the beneficiaries' interests or purposes are successive or concurrent.[115]

This doctrine is featured most prominently in the context of an intergenerational or otherwise successive trust, such as when one person is designated as a life beneficiary (e.g., a surviving spouse) and another person (e.g., the testator's and/or the beneficiary's child), known as the remainder beneficiary, receives a future interest to be materialized upon the death of the life beneficiary. Such trusts are often crafted such that the life beneficiary is entitled to "income" from the trust's assets, while the remainder beneficiary is entitled to the trust's "principal" or "capital." In such a case, the classification of a certain return as either income or capital decides which of the beneficiaries will be entitled to it. More fundamentally, such a split between current and future beneficiaries of the trust leads to potential conflicts or preferences with regard to the types of investment and management choices that the trustee has to make, such as whether to look for short- or long-term gains, or to replace assets not prone to appreciation. In the case of multiple present beneficiaries, the parties may diverge in their needs, tax positions, level of risk tolerance, etc. A similar set of differences may also apply to multiple future beneficiaries.[116]

In multi-beneficiary trusts, the trustee is required to give due regard to the interests of the diverse beneficial interests created by the terms of the trust and to act impartially in regard to investing, protecting, and distributing the estate, and in performing all administrative functions. In consulting and communicating with beneficiaries, the trustee is further required to proceed in a manner that fairly reflects the diversity of their concerns and beneficial interests. The duty of impartiality further forbids the trustee from being influenced by personal favoritism or animosity toward individual beneficiaries, or from ignoring their interests due to oversight or neglect.[117]

Impartiality should not be equated, however, with equality. Rather, the balancing of the competing interests should reasonably reflect any preferences and priorities among the beneficiaries that are discernible from the terms and purposes of the trust or from the nature of the beneficial interests. Accordingly, to the extent that such preferences and priorities are not clear from the trust, the trustee must exercise discretion

115. RESTATEMENT (THIRD) OF TRUSTS, Reporter's Notes on § 79, cmts. a, b (2007).

116. *Id.* at General Comments.

117. *Id.* at Reporter's Notes on § 79 cmt. b.

in interpreting and inferring from the terms. More broadly, the trustee should adhere to the rules on impartiality laid down by statute or case law.[118]

While the general nature of the duty of impartiality has not been explained well in statutory or case law, a meaningful development has occurred in the context of the intergenerational trust, especially in regard to the apportionment of revenues between income and capital beneficiaries and to the implications for the investment and management choices that the trustee should make whenever the settlor does not give clear instructions in the terms of the trust about such matters.

In England, prior to the Trusts (Capital and Income) Act 2013, the equitable rules of apportionment were governed by a complex set of norms created mostly by nineteenth-century case law. These norms dealt with various issues, such as an implicit trust for sale in the case of certain residuary personal estates, compensation for the capital beneficiary for loss pending the conversion of such assets, formulas for apportionment for proceeds from non-income producing assets such as life policies, and apportionment of debts payable out of the residuary estate.[119]

As noted by the Law Commission in its 2009 report, such rules are obsolete for addressing contemporary circumstances, and are also "unclear in places and involve cumbersome calculations often relating to disproportionately small sums of money."[120] Following the Law Commission's recommendations, Parliament enacted the Trusts (Capital and Income) Act 2013, by which such rules will not apply to new trusts. The Act thus grants more flexibility to trustees in determining the apportionment rules. Otherwise, the norms concerning sale and reinvestment of trust property are now part of the trustee's general duties under the Trustee Act 2000.[121]

Along somewhat similar lines, U.S. law has also moved toward a more flexible approach for investing and managing assets for multi-beneficiary trusts, rather than engaging in the formal characterization of a certain return as either income or principal. One such reform grants the trustee the power to adjust between income and principal as necessary to comply with the general duty of impartiality. Another reform is the creation of the unitrust, by which the trustee is required to pay a certain percentage (usually between three to five percent) of the value of the trust corpus to

118. *Id.* at Reporter's Notes on § 79, cmts. a, b.

119. RAMJOHN, *supra* note 97, at 491-92.

120. THE LAW COMMISSION, CAPITAL AND INCOME IN TRUSTS: CLASSIFICATION AND APPORTIONMENT, HC 426, at ¶ 6.55 (2009), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/248331/0426.pdf.

121. Trusts (Capital and Income) Act 2013 § 1. *See also* RAMJOHN, *supra* note 97, at 493.

the income beneficiary annually, but is otherwise free to focus on appropriate and prudent investment decisions, without regard for the formal classification of a specific return.[122]

The move toward allowing more discretion to trustees in making investment decisions, while focusing on substance over form, will foster the development of legal principles on the duty of impartiality. This means that the use of multi-beneficiary trusts can be expanded to many other situations, including various forms of contemporaneous multi-beneficiary trusts. This set of norms can be accordingly applied not only to the conventional gratuitous trust, but also to commercial-trust arrangements and, moreover, to the crafting of trusts as an *ex lege* mechanism.

D. Expanding the Scope of Contemporaneous Multi-Beneficiary Trusts

To appreciate the broader potential of the multi-beneficiary trust in addressing various settings of asset governance in the context of divergence or outright conflicts among co-beneficiaries, it is helpful to consider the law and practice of various commercial-trust arrangements. A prominent example is the trust indenture: an agreement between the issuer of a bond—or another type of security interest—and a trustee who represents the interests of the group of security holders.[123]

While the indenture principally deals with the scope of the trustee's right to act vis-à-vis the bond issuer, especially when a default in paying out the debt takes place, the existence of multiple security holders may lead to internal differences of opinion among the security holders. This is chiefly the case when the various security holders are formally divided into groups with different kinds of entitlements under the security interest. One such instance is when the security holders are divided into interest-only and principal-only classes. This division could have implications when the bond issuer wishes to restructure the debt to avoid default. If the trustee agrees to reduce the interest rate, the restructuring would come at the expense of the interest-only class. Alternatively, reducing the principal of the loan adversely affects the principal-only class.[124]

Even more common are situations in which classes of security holders have different ranks or priorities in regard to the underlying assets securing the debt such that, upon foreclosure or other realization of assets, senior creditors get the first cut at the distribution of the proceeds, whereas junior or subordinated creditors are only entitled to share in any remaining

122. Sitkoff, Principles, *supra* note 106, at 55-57.

123. *Trust Indenture*, BLACK'S LAW DICTIONARY (9th ed. 2009).

124. Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV.1867, 1870-71 (2010).

sums. In deciding how to act in such cases, the indenture trustee should consider whether foreclosure and realization of assets would be a better option than restructuring the debt. Such a choice has implications for both allocative efficiency, considering the security holders as a single group, and for the distribution of proceeds among the various ranks of security holders. For example, senior creditors may push for a quick foreclosure realization of the assets to the extent that this would satisfy their prior claims. Alternatively, junior creditors might seek to allow for restructuring, which would lower the amounts due by the issuer or postpone the dates of payment, but would otherwise maintain the pro rata share of the junior security holders in the restructured debt.

Statutory and case law have offered relatively little guidance as to the principles that should instruct the indenture trustee in fulfilling potentially conflicting obligations among such classes. For example, in *Bank of New York v. Montana Board of Investors*,[125] the English High Court of Justice dealt with a scenario where the senior creditors wanted the collateral trustee to foreclose on the financial assets of the debtor, which at the post-2008 financial collapse market prices would have yielded barely enough money to repay the senior investors, but would have left nothing for the subordinated investors. The latter group wanted the trustee to delay foreclosure, hoping to be repaid from a subsequent rise in prices of the financial assets or from collections on them.[126] The court held that the senior creditors had no explicit contractual right to direct the trustee to foreclose on the assets. Applying New York law, the court stated that the "collateral is held for the benefit of all the secured parties," and that the trustee is not merely an "agent of the creditors, but is required to exercise discretion." The court, however, did not provide the trustee with specific guidelines or normative principles as to how discretion should be exercised in the matter.[127]

Steven Schwarcz offered a detailed analysis of the challenges faced by trustees with conflicting obligations in commercial-trust arrangements, identifying the similarities and differences between such settings and those of the gratuitous trust.[128] Per Schwarcz, the two situations may diverge in that beneficiaries of gratuitous trusts typically settle for preserving the value of the trust assets, while commercial investors look to maximize value and take risks in doing so. At the same time, trustees in both scenarios are tasked with governing a consolidated pool of assets to serve beneficiaries as a group, while at the same time considering intra-group differential effects.

125. Bank of N.Y. v. Mont. Bd. of Invs., [2008] EWHC (Ch) 1594.

126. *See* Schwarcz, *supra* note 124, at 1872-73.

127. Bank of N.Y. v. Mont. Bd. of Invs., [2008] EWHC (Ch) 1594, ¶¶ 58-59.

128. Schwarcz, *supra* note 124, at 1872-73.

This means that in both commercial and gratuitous settings, trustees should seek to promote overall efficiency by preserving or maximizing value (as the case may be), while refraining from taking action that may benefit one class of investors—even if such class enjoys priority based on the terms of the trust or the covenant—if it would result in an aggregate deadweight loss. The duty of impartiality, and its equivalents in the commercial context, should therefore seek to serve the interests of all diverse interest groups, without necessarily treating all sub-groups equally. There is little economic or legal sense in creating classes of investors that are defined as "senior" and others as "junior" or "subordinate," if the two classes of investors are treated exactly the same way in allocating proceeds. However, simply disregarding the interests of the junior or subordinate beneficiaries does not conform to the very idea of a trust, be it commercial or gratuitous.

Moreover, in reality, not all actions taken by a trustee can be pareto optimal, meaning that all sub-groups or classes would objectively benefit from a certain action taken in regard to the trust's assets. The extent to which a trustee would still be considered as meeting the duty of impartiality, even if some beneficiaries are disadvantaged by a particular action, would be measured by the trustee's ability to ensure genuine overall efficiency, to consider other options that could achieve the same or a close overall result, mitigate the disadvantage caused to some beneficiaries, and to adequately and transparently inform all beneficiaries of actions taken.

As the next Sections show, the trustee's discretion while acting in the face of potential conflicts among beneficiaries would be influenced by whether the trust is the result of a voluntary trust or a statutory (*ex lege*) one. The terms of a gratuitous or a commercial trust guide the trustee in identifying the purposes for which the trust's assets should be used and the types of benefits it should grant to different kind of beneficiaries, while keeping a core commitment to impartiality, as developed by legal doctrine. Alternatively, a systematic use of *ex lege* trusts would require a thicker array of statutory or case law that would guide trustees in a variety of situations involving the governance of indivisible assets in the face of conflicts among beneficiaries. Such norms could be developed in the context of specific resources (land, chattels, or intellectual property) that face the problem of asset-indivisibility alongside conflicts among beneficiaries.

The general idea here is that the duty of impartiality would be further developed by statutory or case law so as to allow trustees in charge of *ex lege* trusts to exercise discretion and to operate continuously and effectively, without constantly having to approach courts for ad hoc directions. If the court were required to constantly be involved in decision-making, the way it normally does in bankruptcy or receivership cases, then the model of a multi-beneficiary trust would not have a real advantage over the alternatives set out in Part III.

E. Incentivizing Voluntary Testamentary / Inter Vivos Trusts

The chief way in which trusts could be utilized to effectively govern indivisible assets in the face of potential conflicts among beneficiaries is the voluntary express trust, be it *inter vivos* or testamentary. Typically, this would mean that the original single owner of the asset, such as an artist who owns not only copyright to her works, but also the indivisible right of publicity in authorizing the use of his or her name or image for commercial purposes, would create an express trust.

The trust should address first and foremost the governance of the asset in a unified manner over the long term so as to increase the overall value of the estate while trying to foresee potential conflicts among the beneficiaries and giving instructions to the trustee on how to decide such disputes. The term "value" could and should refer not only to monetary value, but also to the broader goals that the estate should promote. Some testators may prefer to be highly selective in selling individual items out of the estate or in granting permission to commercialize the trust's estate as a whole. Other testators may be driven by other preferences. But to the extent that the testator wishes to preserve the entirety of the estate while also seeking to grant the stream of benefits flowing from the trust's estate to multiple persons or purposes, the testator should try to identify the types of decisions that may be particularly prone to causing strife among the estate's multiple beneficiaries and that could bring about property deadlock, absent the creation of a trust.

Not all conflicts can be anticipated in advance, even by the most prudent testator. But the testator should provide the trustee with as many general principles as possible to handle future contingencies—many of which the testator has no way of knowing of at the time of the creation of the trust. If this is the case, the legal institution of the trust could be brought to its fullest potential based on a combination of the express terms of the trust alongside the general rules developed by statutory and case law, including the duty of impartiality. The strength of trust law lies in its ability to engage in the continuous governance of assets, with the trustee being able to make daily decisions without constantly having to approach courts for guidance, but while still enjoying access to the courts when the need for guidance truly arises.

Furthermore, in the case of potentially deadlocked properties (in the sense that they are not effectively indivisible but are designated to benefit multiple beneficiaries), the advantage of creating trusts to govern such assets lies not only with the beneficiaries as a group, but also with society in general. The types of assets and scenarios described in Part II as prominent examples of deadlocked property are ones that the public at large might stand to lose from such a standoff, whether it happens in the context of land, biomedicine, or culture. This also means that, as a matter of public policy, the creation of trusts in such instances might be encouraged by various mechanisms such as tax incentives or other regulatory measures. Such steps could be especially appealing in the case of a testamentary trust, in view of the fact that a posthumous transfer of assets to heirs through a will would be subject to inheritance tax. At the same time, any regulatory benefits should be carefully weighed against other considerations—including societal wealth distribution in the case of taxation.[129]

F. Devising a Multi-Beneficiary Trust as Ex Lege Intervention

Statutory trusts are relatively limited in scope in both the Anglo-American legal system and around the world. One such prominent setting concerns the trust created *ex lege* when a person dies intestate such that, under statutory law, an administrator is appointed by the court to distribute the estate's assets among the rightful heirs under the laws of inheritance.[130] Another key setting in which statutory law provides for the appointment of a trustee by the court is that of insolvency or bankruptcy, such as under the English Insolvency Act 1986,[131] or the U.S. Bankruptcy Code,[132] where an officer is appointed by the court to act as a trustee either for liquidating the debtor's assets or for devising a reorganization plan.[133] Courts also appoint trustees based on statutory provisions when the owner of an asset, or its designated beneficiary, is unable to act independently as a matter of legal capacity, as in the case of minors or those unable to act due to a physical or mental illness.

Trusts are also governed by a statutory mandate in other contexts, such as in the case of sums received by financial intermediaries, lawyers, and insurance or estate agents.[134] These various statutory trusts diverge in the identity of actors involved, kinds of assets implicated, and interpersonal

129. For the long-lasting debate about this tax, see *Inheritance Tax: A Hated Tax but a Fair One*, THE ECONOMIST (Nov. 23, 2017), https://www.economist.com/leaders/2017/11/23/a-hated-tax-but-a-fair-one.

130. *See* Administration of Estates Act 1925 (as amended), 15 & 16 Geo. 5 c. 23, Part III, §§ 32-44.

131. Insolvency Act 1986, c. 45, Part IV, Ch. 4, § 101(3)(b).

132. 11 U.S.C. §§ 101-1532 (2020).

133. 11 U.S.C. § 1104(a).

134. *See, generally* MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 19-20 (Simon Dix trans., Cambridge U. Press 2000) (1997).

circumstances leading to the appointment of a trustee by a court, based on the statutory mandate to do so. All cases, however, are typified by the need for external governance of an asset and, consequently, for separating control from entitlement to the stream of benefits when the rightful owners or beneficiaries are normatively or practically prevented from acting.

Moreover, the two most frequent settings of statutory trusts—intestacy and insolvency—are essentially typified by a collective action problem and, accordingly, by the need of statutory law and judicial intervention to appoint a trustee to engage in such collective action for the benefit of the entire group of beneficiaries, while considering potential differences within group members.

In the case of intestacy, multiple rightful heirs may face difficult problems in coordinating the allocation of property, even if the assets in the estate are otherwise divisible so that they could be distributed in kind among the heirs or sold off to others while dividing the proceeds. Consider again the case of Prince. The divisions among his heirs even for those types of assets that could be separated from the entire estate and distributed or sold may result from disagreements as to which heir would receive which assets, which items should be auctioned or otherwise sold to a third party, and how to calculate the value of each asset. The appointment of a trustee is required to hold an orderly process that will benefit the group as a whole by maximizing the value of the estate while giving each heir his or her own share.

This is also the case with insolvency proceedings. "[T]he collective nature of insolvency proceedings, orchestrated by courts and appointed officers (such as receivers or trustees in bankruptcy), is intended to optimize the process of mapping the different claims [and proprietary interests], identifying the debtor's assets, and distributing proceeds in an efficient manner."[135] As Douglas Baird and Thomas Jackson note: "A collective insolvency proceeding is directed toward reducing the costs associated with diverse ownership interests and encouraging those with interests in the firm's assets to put those assets to the use the group as a whole would favor."[136]

In the case of diverse proprietary interests—such as creditors having a specific security interest over an asset, creditors entitled to a floating lien, employees, suppliers, tax authorities, shareholders, and so forth—absent a collective proceeding, each individual stakeholder or sub-group of

135. AMNON LEHAVI, PROPERTY LAW IN A GLOBALIZING WORLD 257 (2019) (hereinafter: LEHAVI, GLOBALIZING).

136. Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 103 (1984).

creditors would act to promote their own interests in a way that might damage the group as a whole—potentially even through a fire sale of assets well below their market rate. This may not necessarily benefit each individual stakeholder or sub-group of creditors. Granting control over the process to a court-appointed bankruptcy trustee requires the holders of diverse proprietary interests "to act collectively rather than to take individual actions that are not interests of the investors as a group."[137]

The collective insolvency/bankruptcy proceedings conducted by the trustee do not abolish the diversity of proprietary interests. For purposes of distribution of assets or proceeds, each class of stakeholders is ranked based on the particular set of proprietary priorities established by the insolvency/bankruptcy law in the relevant national legal system.[138] Generally speaking, secured creditors are granted priority over non-secured creditors. As is the case with the general duty of impartiality in trust law, impartiality does not mandate equality across different sub-groups or classes that are ranked differently by law for purposes of priority. But the collective process, mandated as a matter of law and administered by a trustee, is intended to promote overall efficiency while considering the diverse property interests of all stakeholders.

The key features typifying *ex lege* trusts in the case of intestacy or insolvency could be embraced, mutatis mutandis, when dealing with the types of situations that are the focus of this Article. This means that statutory law should expand the use of *ex lege* trusts and could accordingly grant courts the discretion to appoint a trustee for the governance of assets that are typified by indivisibility and diverse proprietary interests that may bring about—or already have resulted in—property deadlocks. As a discretionary remedy, the appointment of a trustee in appropriate cases should be done following a motion submitted by one of the interested parties, and after the other stakeholders in the underlying assets have had the chance to respond to the request. The court should consider whether other options would not be applicable and/or preferable over *ex lege* trusteeship, and the extent to which the trust should be established for a fixed period of time, or for the purpose of taking a specific course of action. Alternatively, the court should consider whether it should grant trustees broad discretion that is unlimited in time at the point of establishment, but nevertheless subject to judicial supervision, or one that could be terminated at the consent of all beneficiaries.

137. *Id.* at 106.

138. For the differences among national legal systems in ranking priorities to different classes of stakeholders, based on normative and other considerations, see LEHAVI, GLOBALIZING, *supra* note 135, at 235-37 (providing examples of the differences among national legal systems in ranking priorities to different classes of stakeholders, based on normative and other considerations).

Therefore, as a matter of legal design, such an *ex lege* trust could borrow elements from both fixed trusts and discretionary trusts, as they are known in the case of voluntary gratuitous trusts.[139] Similar to the fixed trust, the *ex lege* trust, as designed by the court in a specific case, should determine in advance the pro rata share and type of interest of each beneficiary in the trust's assets as a whole, with such a determination generally reflecting the pre-trust state of events. At the same time, the court should typically grant trustees broad discretion over determining the types of actions that should be taken regarding the trust's assets, with such discretion going beyond the administrative discretion that is embedded in every kind of a fixed trust.

For example, in the case of an *ex lege* trust established in a particular case to remedy a deadlock among multiple heirs of an artist, with the purpose of governing the repertoire and merchandizing rights of the artist's estate, the court should not guide the trustee in advance as to if and how to grant certain licenses or permissions. This also means that the court should not commit the trustees in advance to distribute each year a certain share of the property (either income or capital) to the beneficiaries. The broad discretion of the trustee should lie exactly in deciding how to govern and manage the asset given the deadlock that has occurred among the co-owners. In so doing, as discussed in Part IV-D above, the trustee should seek to promote the long-term value of the estate while making value judgments on whether a certain license or permission would serve the estate over the long term, considering not only short-term profits but also normative considerations of reputation and legacy, as demonstrated in the Introduction with the case of Prince. In doing so, the trustee should consider the different interests of the beneficiaries, balancing between promoting the good of the group without placing an overly-heavy burden on the interests of certain beneficiaries, such as beneficiaries that are in greater need for short-term income than others. In this sense, the *ex lege* trust should resemble the non-exhaustive discretionary trust, by which the settlor of such a gratuitous trust gives the trustee discretion as to whether or not to distribute the property in the form of income or capital, provided that any such distribution follows the fixed feature of the trust: its pro rata allocation.

One more feature that should be borrowed from the gratuitous discretionary trusts is that of group interest, by which, if all objects entitled to both income and capital act in agreement, they are entitled to terminate the discretionary trust and acquire the property for their own benefit.[140] What this means in the context of the suggested *ex lege* trust is

139. For the features of discretionary trusts versus fixed trusts, see RAMJOHN, *supra* note 97, at 145-46.

140. *Id.* at 146.

that if the formerly deadlocked parties come to their senses after the court intervenes in the matter and orders the establishment of the trust, the beneficiaries should be able to terminate the trust by consent and reclaim their pro rata ownership rights instead of their pro rata beneficiary rights. Such a consensual move should be supported by the underlying statutory provisions creating the framework for the *ex lege* trust, including tax rules that apply to such a re-transfer of the trust's assets to the co-owners.

G. Is a Statutory or Judicially-created Trust a Taking?

A legislative reform that authorizes a court to order the setting up of a multi-beneficiary trust to resolve a property deadlock could be considered as a prima facie violation of property rights. This is so because the right of ownership or entitlement held by each of the parties would be transformed into one of a beneficiary under a trust, and also because control over decision-making would be taken from the co-owners and transferred to a court-appointed trustee.

Therefore, the enactment of such a statutory tool and the decision of a court in a particular case to use its authority and establish an *ex lege* trust could be subject to a constitutional challenge. In certain countries, this could invoke scrutiny under property clauses in supranational conventions, such as under Article 1 of the First Protocol of the European Convention on Human Rights.[141]

Part III-D discussed the use of eminent domain as a compulsory mechanism to resolve anticommons scenarios implicating land assembly for the purpose of redevelopment and the validation of the purpose of "economic development" as a valid "public use" by the U.S. Supreme Court. It also presented scholarly suggestions for alternative mechanisms that could employ a somewhat lesser degree of coercion to allow for this type of collective action to move forward.

That said, the taking of property and its transfer to the government or another external body, such that the former owners are compulsorily "bought out" of their proprietary interests, still represents the most intrusive form of intervention to resolve potential property deadlocks. The other options outlined in Part III present a lesser degree of intervention; but in many cases, these would be impractical or ineffective to resolve property deadlocks for indivisible property. Given the built-in constraints of these alternatives, the multi-beneficiary trust offers an effective mode of action that builds on the law and practice of the centuries-old institution of the common law trust, without fully denying the proprietary rights of

141. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Art. 1, Mar. 20, 1952, No. 2889, 213 U.N.T.S. 262.

the co-owners in the underlying assets.

Accordingly, this Article suggests that neither the enactment of a new type of statutory trust nor a court decision to employ its authority in a particular case to establish such a trust should be considered as a taking of property. Rather, this statutory trust should be viewed as a regulatory measure that intervenes in the control and use of the underlying assets, but should be considered prima facie constitutionally valid and as meeting the "proportionality" standard according to property protection legal instruments, such as the European Convention on Human Rights.

The key argument why the *ex lege* trust is not a taking or an otherwise impermissible intervention with private property lies in the fact that its exercise by judicial decree in appropriate cases is not intended to promote an external public purpose—one that would be enjoyed mostly by other persons or the public at large. This tool is aimed at serving the economic interests of the group of former co-owners now turned into co-beneficiaries of the trust. In simple terms, the employment of the *ex lege* trust is a last resort to save co-owners from themselves.

It is true that, under a joint trusteeship, one or more of the co-beneficiaries may object to certain actions taken by the trustee, leading such a party to argue that a property deadlock is actually better than governance by the trustee. Such a party may also argue that the loss of control, even if joint control, over the governance of the underlying assets establishes an injury in itself—one that has non-instrumental implications, such as a loss of autonomy. That said, the placing of control in the hands of a trustee—one that owes fiduciary duties to the beneficiaries, including the duty of impartiality—resembles at least to some extent other forms of regulation or top-down subjection of individual discretion that is intended to benefit all parties in the long run.

One example is zoning laws, under which the liberty of each landowner to use their land as they deem fit is constrained by external rules that also protect the landowner from unmonitored, adverse land uses by other landowners. Even if zoning laws are not always implemented in a perfectly reciprocal manner, in the sense that some landowners may enjoy a more favorable or profitable regulation than others, the system of zoning laws in its entirety lies in top-down governance that promotes overall efficacy in the absence of consent.[142] As such, zoning and other statutory or regulatory mechanisms intended to regulate the governance of uses, while allowing the relevant private parties to enjoy the stream of benefits resulting from such regulated uses, are not considered prima facie as constitutionally invalid.[143]

142. *See, generally* Amnon Lehavi, *Zoning and Market Externalities*, 44 FORDHAM URB. L.J. 361, 370-73 (2017).

143. In the particular case of zoning, the general constitutional legitimacy of such statutory or

This is not to say that, in certain extreme cases, a generally valid regulatory mechanism might not amount to a "regulatory taking" as applied and would, therefore, be considered as an illegitimate exercise of the power. This is the case with zoning or other regulatory measures.[144] This doctrine could also apply, *mutatis mutandis*, to a decision to establish an *ex lege* trust when it can be clearly demonstrated at the outset, even before the trustee starts to act, that the trust is either not the most effective solution to resolve the property deadlock or that it will clearly sacrifice the legitimate interests of one (or more) co-owner turned into a co-beneficiary for the benefit of other co-beneficiaries in an unbalanced and disproportionate manner. Courts should refrain from ordering the establishment of a trust in such cases.[145] However, absent such extraordinary circumstances, the statutory mechanism authorizing these trusts and its judicial application should be considered as constitutionally legitimate and meeting the proportionality standard.

The jurisprudence of the European Court of Human Rights on Article 1 of the First Protocol of the European Convention on Human Rights—as well as principles introduced by other supranational courts and tribunals in interpreting property protection clauses[146]—may further assist, by way of analogy, in identifying the criteria under which the setting up of such a multi-beneficiary trust would be considered a valid exercise of a general statutory authority to do so.

Beyond the principles of lawfulness—by which the underlying applicable provisions are "sufficiently accessible, precise and foreseeable in their application" —and the requirement that such interference serves a "legitimate aim in the general interest," the validity of an underlying statute and its application in particular cases lie in the concept of proportionality or fair balance. As articulated by the court in the leading case of *Hutten-Czapska v. Poland*, "there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures designed to control the use of the individual's property."[147]

It is of particular importance for the potential application of the

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regulatory mechanisms has been validated by courts all over the world, including the landmark 1926 decision by the U.S. Supreme Court in *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 385-88 (1926).

144. For the thick U.S. case law on "regulatory takings" and other types of constitutionally invalid exercises of the power of land use regulation, see ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS 83-240 (4th ed., 2013).

145. I do not address here the jurisprudential and conceptual questions of whether a judicial decision could ever amount to a taking of property. *See* Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520 (2011); Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL'Y 91 (2011).

146. *See generally* LEHAVI, GLOBALIZING, *supra* note 135, at 74-89.

147. Hutten-Czapska v. Poland, App. No. 35014/97, ¶ 167 (Grand Chamber, Judgment, June 19, 2006).

principle of proportionality in the context of authorizing courts by statute to establish *ex lege* trusts to consider the following:

> In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective." It must look behind appearances and investigate the realities of the situation complained of.[148]

It is exactly this need to make sure that property rights are practical and effective—especially when the underlying goal of creating an *ex lege* trust is to promote principally the interests of the co-owners as a group rather than those of the general public or external parties—that justifies the enactment of statutory provisions authorizing courts, in appropriate cases, to set up a multi-beneficiary trust to resolve a property deadlock and to establish its basic terms and conditions.

Accordingly, the transformation of the proprietary interest from ownership or entitlement to that of a beneficiary calls to "look behind appearances" so as to realize the goal of establishing such an *ex lege* trust that serves the interests of the beneficiaries as a group in an impartial manner. The authorized court should be entrusted with the task of investigating "the realities of the situation" prior to deciding whether to exercise its discretion and order the establishment of the trust.

In so doing, the court should make sure that no other solution would be more appropriate, having given due regard to the different interests of the parties. If the court then concludes that a trustee should be appointed to govern the assets in an effective and truly impartial manner toward all beneficiaries, while being subject to subsequent review and further guidance by the court, then such an exercise of the statutory authority is constitutionally valid and is by no means a taking.

V. CONCLUSION

In operation for centuries, Anglo-American trust law has proven to be a pragmatic and innovative legal instrument for the governance of assets whenever conventional property models are ineffective or inappropriate. While traditionally, trust law has been prominently associated with the voluntary gratuitous trust, the trust has been employed over time to deal with many other scenarios. Usage of trust law spans from commercial arrangements allowing persons to collaborate in investment or other financial activities, such as the bond indenture, to a limited number of statutory trusts, by which a court-appointed trustee intervenes and actively manages or distributes property among claimants, such as in the

148. *Id.* at ¶168.

case of insolvency or intestacy. The thick body of norms developed in trust law, which can either complement or fill in the contractual rules on fiduciary governance of assets, can be utilized to provide solutions for types of property problems that cannot be readily resolved by other means.

Trust law offers a new institutional approach for dealing with property deadlocks among multiple stakeholders whenever the partition of the asset or estate among the stakeholders is either impracticable or otherwise suboptimal for the group. While other solutions, such as governance by direct majority vote or incorporation, are commonly used to allow for the effective governance of assets in the face of multiplicity of stakeholders and potential frictions, these cannot always be employed—especially when such internal conflicts do not allow for the consensual creation of a more effective mode of governance. At the same time, employing strong top-down coercion, such as by the power of eminent domain, embodies a harsh infringement of property rights. The creation of an open-ended form of statutory trust, authorizing a court to set up in appropriate cases a multi-beneficiary trust to resolve a property deadlock for indivisible assets, offers a new mechanism for unified asset governance, while also considering the diverse interests of the various stakeholders.