Lay Down Your Bundles

Reconsidering the Roots and Meaning of the "Bundle of Property Rights" Metaphor in Ostrom's Work

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Dear reader,

This is a *rough* draft (but no diamond). It is incomplete as some parts of it are still largely exploratory and need considerable editing (mostly shortening). Distributing it to anyone would therefore be very premature. Enjoy reading it, and do not hesitate to write me at goetzmann@univ-tours.fr if have any comment or suggestion.

If you wish to read to some of my more "stabilized" work on the topic, another paper of mine dwells on the relevance, for the commons, of the "patrimonial" framework I mention in this draft. The present draft is in fact an attempt at giving some historical "depth" to the topic I study in the following paper:

Goetzmann, 2021, "The Building Blocks of Social Trust: The Role of Customary Mechanisms and Property Relations for the Emergence of Social Trust in the Context of the Commons", *Philosophy of the Social Sciences*

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Introduction

> (…) nobody is sure where the terms ‘bundle of sticks’ and ‘bundle of rights’ came from (Johnson, 2007).

The “bundle of rights” metaphor may be illustrating in the most striking way how different fields can develop in parallel, in semi-ignorance of each other. For American legal scholars and some economists in particular, the metaphor conjures up endless technical and sometimes bitter debates on the limits of State power and shakes the *summa divisio* between rights *in rem* and *in personam* (Merrill, 1998). It is the synonym of an ideological battle around how should property rights be defined nation-wide. On the contrary, for some, in particular in the fields of law and economics, institutional and development economics, slicing up the institution of property into sticks is a mere heuristic tool to analyze organizations and governance schemes. Meanwhile, it is through its “ostromian” use that the metaphor has become familiar to many different academic fields worldwide, including philosophy, political science, or ecology. In these fields, the “bundle” metaphor is a powerful tool (some might say a cheap trick) to exorcize the so-called Blackstonian conception of property as the absolute *dominion* of an individual over a thing (Blackstone, 2016, ii).

In this paper, I aim at shaking the sense of naturalness that comes with the use of this metaphor in some of institutional and “ostromian” economics, not only by bringing elements of the legal debate to the discussion, but also by questioning assumptions that ostromians and legal scholars have in common. Elinor Ostrom and her colleagues were indeed not ignorant of the supposed origins of the metaphor: Charlotte Hess and her explicitly refer to the supposed origin of this notion of ownership (Ostrom and Hess, 2007): *The Distribution of Wealth,* published in 1893 by John Commons (Commons, 1893). This is a good approximation of what most American legal scholars believe. In other fields, knowledgeable scholars only go back as far as Tony

Honoré (Brennan and Jaworski, 2015; Schmidtz, 2013), who made the notion operational by stating precisely the types of rights, or "sticks", the bundle is supposed to contain (Honoré, 1987). Better informed works, mostly among legal scholars, trace the concept back to the book of a certain John Lewis, *A Treatise on the Law of Domain Eminent in the United States*, first published in 1888, even though Lewis saw it as common knowledge and visibly did not coin the expression (Lewis, 1888).

The use of the bundle metaphor by John Commons, John Lewis and later "legal realists" is sometimes seen as enabling justifications of heavy State interventionism (Klein and Robinson, 2011). The fact that Elinor Ostrom would embrace such a reference, while displaying skepticism about the ability of the State to solve governance problems, is therefore a little puzzling. The use of the metaphor has its roots in a debate over the scope of the power of the State, in particular its power of expropriating, performing the so-called takings covered by the 5th Amendment of the Constitution of the United States. It is by using this very metaphor that John Commons (Commons, 1893) is led to argue that individual property is a merely *residue*, once the rights and prerogatives of other individuals and the State have been removed. Moreover, Commons was visibly attractive to both Elinor and Vincent Ostrom, because of his position as one of the founding fathers of institutionalism, considering Commons' reputation, Vincent Ostrom's considerations that his work provided the building blocks of a decentralized view of sovereignty and institutions are also slightly surprising (Ostrom, 1976).

The first objective of this paper is thus to explore the considerable gap that lies, almost unacknowledged, between John Commons' and Ostrom and Hess' uses of the "bundle" metaphor and, more generally, with the Ostrom's polycentric framework. Its second goal is to uncover the indirect but meaningful connection between Ostrom and her colleagues' work and a strand of 19th century thinkers, such as Henry Sumner Maine and Émile de Laveleye. The fact that Maine presents us with an even earlier mention of property as a "bundle of rights" has not

gone completely unnoticed (Kantor et al., 2017, 4), but no one seems to have drawn any conclusion from it. I contend that this is a mistake, because the definition of property as a "bundle of rights" by Maine at the end of the 19th century appears in the context of the study, by him and other authors Ostrom and her colleagues were familiar with, of the so-called "village-communities". Maine's version of the "bundle of rights" adequately offers a model of property relations, that I call *patrimonial*, in which the members of a community all possess limited rights to a certain resource that is managed in common to ensure its sustainability. I therefore argue that this model is a better fit to understand the use of the bundle metaphor for the study of the commons and other forms of governance structures.

The paper goes as follows. Even though I agree with the fact that "bundle" metaphor does not underlie centralization and interventionism in itself, I contextualize John Commons' use of the "bundle" metaphor by showing that it belongs to tradition in which sovereignty is strictly unitary, which makes it incompatible with a de-centralized view of governance (1). To suggest an alternative genealogy of the "bundle metaphor", I show that there is a yet unseen connection between Ostrom's work on the commons and the study of "village-communities" in the 19th century (2). Finally, I put forward what I call the "patrimonial" model of property which appears prominently in the work of the Victorian jurist Henry Sumner Maine, to understand how relying on a patrimonial model of property relations is enlightening to understand the structure of the commons and, potentially, of other organizations and legal mechanisms (3).

1. The statist roots of Commons' view of sovereignty and property rights

1.1. Shifting the blame away from the metaphor itself

At first sight, the "bundle" metaphor looks rather neutral, as it merely underlines the plurality of rights that make up property, as this seems have been Honoré's intention in his classical essay on "Ownership" (Epstein, 2011). Following Penner (Penner, 1995), there would be no consistent "explanatory model" behind it. However, this is a flaw for Penner, who worries that the malleability of this conception of property, because it lacks any substrate, opens the way to all kinds of manipulations by governments. This does not mean, though, that the metaphor is *necessarily* a Trojan horse for State interventionism. For other legal scholars, the problem with the metaphor is more abstract, but deeper: by denying property any "core", it undermines what distinguishes property rights as *in rem* rights, to get them closer to rights *in personam*, such as contractual obligations, thereby undermining the notion that property may be a kind of "natural right", worthy of special protections from State intervention (Merrill and Smith, 2001).

The inherent flexibility of the "bundle" model is thus linked to potentially lesser protections for individual property rights against State regulations. Going further down this path, John Robinson and Daniel B. Klein (2011, 193) note that while it remains a vague notion, it directly connects two ideas: if property is a "bundle", it is a finite set of objects that are both separately identifiable and were assembled *intentionally*. In other words, property as a "bundle" appears a pure social construction, manufactured by the State, who can therefore withdraw the privileges it has granted. In this section, I wish to question that idea, by arguing that there is no necessary connection between the "bundle" metaphor and Statism. However, I maintain John Commons' version of the metaphor is aligned with a view of sovereignty that precludes any de-

centralization of power or authority as it is required to conceptualize a "polycentric" model of governance. While it is not necessarily a despotic model that gives the State any power to remodel "bundles" at will, it does rely on a unitary view of sovereignty which makes the State the sole source of coordination between individuals.

Here is the passage that serves as a reference for Ostrom and Hess:

> Property is, therefore, not a single absolute right, but a bundle of rights. The different rights which compose it may be distributed among individuals and society – some are public and some private, some definite, and there is one that is indefinite. Partial rights are definite. Full rights are the indefinite residuum. … The first definite right to be deducted from the total right of property is the public right of eminent domain. This is the definite right which belongs to the state in its organised capacity of purchasing any property whatsoever at its market value, whenever public safety, interest, or expediency requires. It is merely a definite restriction upon the unlimited control which belongs to the individual. (1893, 92)

In his reading of this passage, Epstein (Epstein, 2011) compellingly refuted the necessary connection between the "bundle" metaphor and unlimited State power. Epstein first concedes that Commons' language suggests that interpretation, because the use of the passive voice ("distributed among individuals") leads us to believe that the State is distributing the rights of the bundle.

There are however two reasons why this inference is wrong both about Commons' stance and the "bundle" metaphor in general. A first reason is that in the context of the law of "takings", or State expropriations, Commons' argument is more protective of individual property rights than American administrations and courts have been for most of the 20th and 21st centuries, as it states quite clearly that all parts of the bundle are property rights that deserve protection or

compensation ("at market value") if taken away. This means, for instance, that the value lost to zoning rules in a case like *Penn Central Transportation Company v. City of New York* (1978) is a property interest that deserves compensation, in contradiction to the ruling that still stands.

A second reason is that it is the "top-down" view that makes the State the very creator of property rights, rather than because of the "bundle" metaphor (Epstein, 2011, 228). According to Epstein, Roman law, which used a view of property rights similar to that of the "bundle", provides evidence that property rights can be seen as a bottom-up institution. This is exemplified by the partition between common and private property. Property is common not where it belongs to the community but, rather, when private ownership would cause trouble to all, reciprocally, and when all would benefit from open access. This justifies for instance a duty, for the authorities, to guarantee access to waterways and beaches, for instance, or prevent blocking rivers upstream. Meanwhile, Roman property law would have been based on a state-of-nature theory that grants individuals full dominion, in time and space, on a piece of land (Epstein, 2011, 229). The Romans therefore saw the law as validating pre-existing rights, founded on occupancy.

On the contrary, only a vision that is confident in centralized control, with an extended view of the kind of externalities and cooperation problems it should solve, could justify constant interventions like those that emerged in the United States, with zoning laws for instance. The "bundle" view is innocent of all charges and is even of great service to individuals if completely embraced: assuming that it originally contains all rights but makes not reference to some "essence" of property, the increased ability of private individuals to trade these rights (for instance, by using land as a security for a loan), increases mutual gains for all (Epstein, 2011, 2030). Meanwhile, the "bundle" view allows for the micro-management of property rights, enabling the State to enforce protections against nuisance or, for instance, grant easements, all without compensation, but requiring compensation when building is suddenly forbidden by law

(Epstein, 2011, 231). In conclusion, the "bundle" metaphor is just another way to describe property rights analytically, as this was done since at least Roman law. It's its uses, not the metaphor itself, that can be guilty of Statism.

Epstein's argument is confirmed by an even earlier mention of property as a "bundle of rights", also in the context of takings, by John Lewis. For John Lewis, the notion is so obvious that even "the dullest individual among the people knows and understands that his property if anything is a bundle of rights" (Lewis, 1888). This sharp sentence is the conclusion of a conceptual clarification that Lewis links to another defense of compensations for the loss of value due to takings (Sedgwick, 1882). Property, in the "vague" meaning it has in everyday speech, is attributed to objects of property rights, for example to a horse which is "my property". However, most human beings, even deprived of any legal knowledge, have an intuitive sense of what it means according to Lewis and Sedgwick: it is not the thing one owns, but rather all the rights and interests one has with respect to it, for instance, the right to the yield of one's orchard. Lewis' definition of property as a "bundle of rights" immediately follows this clarification and concludes a passage that mimics a kind of "social contract" moment:

> The sovereign people say to their agents and servants, the executive and legislative officers of the State: We delegate to you all of our sovereign powers, but you must not take our private property for public use without making us a just compensation therefor. (Lewis, 1888, 43).

By property, these citizens do not just mean the thing that belongs to them, but the multiple rights they have in things. The conclusion is that individuals deserve compensations for regulations that deprive their property of any value, because their property rights are not limited to the physical possession of something, but also extend for example to the "right of user" or "the right of disposition" (Lewis, 1888, 41). Therefore, it is clear that for all that one's property is under attack including when regulations fall short of seizing it but diminish or cancel its value

altogether. So, there is something intuitively pragmatic in the use of the metaphor, which can protect property rights as well as allow the modifications necessary to adapt to specific circumstances.

1.2. A missed opportunity for Commons' institutionalism?

Consequently, a close look at Commons and Lewis' argument in its context of origin does not support the exaggerated stance that the bundle metaphor is necessarily linked to State interventionism. Nevertheless, this does not reconcile its use by Ostrom and Hess with John Commons': even if Commons and Lewis, in the context of the legal debate around takings, used the metaphor in a way that was protective of individual property rights, their views are still anchored in a Hobbesian "top-down" view of the State and its relationship with individuals.

Vincent Ostrom (Ostrom, 1976) himself described the tension within Commons' work, between a framework that rightly emphasized the role of institutions in determining social outcomes and Commons' reliance on the "[Hobbesian] traditional theory of sovereign prerogatives", which makes the sovereign, or the State, the only one able to permit and/or design working rules and institutions (Ostrom, 1976, 849). Reformulating Hohfeld's analytical framework of rights, Commons argued that the "opportunity set" at the disposal of individuals is a condition of the structure of capabilities and constraints that give them the authority to act (or not) within a specific set of legal relationships. This structure of *authorized* relationships depends on a structure of *authoritative* relationships, which gives individuals and institutions the authority to determine, enforce and alter legal relationships (Ostrom, 1976, 845).

This framework is directly connected to the "bundle" metaphor, because all social interactions are structured by pattern of independencies that distribute "highly complex bundle[s] of powers and corresponding responsibilities" (Commons, 1959 [1924], 115, quoted in Ostrom, 1976, p. 848). The metaphor thus applies to more than just property rights and depends on a general

view of social interactions as structured by institutions. For V. Ostrom, the recognition, by Commons, of this double layer of structure of *authorized* relationships and of *authoritative* relationships, along with his acknowledgment of the role of unions and corporations as central institutions in the organization of capitalism, is proof that his framework was theoretically compatible with a de-centralized view of sovereignty. It would have sufficed, for V. Ostrom, that Commons had granted citizens the ability to granted *authoritative* powers to design structures of authorized relationship. There are indeed hints of this possibility in Commons (Commons, 1959 [1924], p. 106, "in this way, the citizens themselves become sovereign and lawgivers"). However, as V. Ostrom admits it, Commons still relies on the modern paradigm of sovereignty, with the state exercising full monopoly of the use of force and ultimate sovereignty, cloaked in full immunity against other powers (Ostrom, 1976, 849). Commons thus partakes in a tradition that ignores the possibility that "sovereignty resides with citizens in their exercise of prerogatives of constitutional choice" (Ostrom, 1976, 851).

Ostrom is thus quite charitable with Commons when he argues that a simple fusion of game and public choice theory with his institutionalism could provide the tools to analyze systems of working rules and their alternatives (Ostrom, 1976, 854), all the more so that Commons expressed his clear support for a Hobbesian-Austinian vertical view of sovereignty in other works. Hodgson (Hodgson, 2003) is less kind in that regard, noting Commons' lack of consideration for extra-legal organizations and spontaneous orders. However, I propose to go a step further and contend that Commons' view of sovereignty is incompatible with a de-centralized view of political power and institutional design.

1.3. Commons' view of sovereignty as incompatible with de-centralization

The series of papers entitled "A Sociological View of Sovereignty" (Commons, 1899a) offers the clearest view of Commons' theory of sovereignty. In it, the history of Western societies

shows the emergence and gradual absolutization of power and its coercive force. Any action to share that power, whether it is by distributing to different branches, institutions or parties, only reinforces the centralized State and its sovereignty for Commons. For him, all sovereignty boils down to coercion, which itself is reduced to the private power of individuals over property. The history of sovereignty for Commons is the history of the centralization of coercion (Commons, 1899b). It begins when humans are driven to appropriate goods and resources for themselves by their capacity to self-awareness, which entails a capacity to be aware of their needs, how to satisfy, and how others might try to do the same. A competition for the appropriation of resources ensues, which necessarily leads to the emergence of chiefs and leaders who acquire a monopoly in resources, in particular of land, and compete against each other, later replaced by absolute monarchs and modern states.

An interesting feature of Commons' history of sovereignty is that it can be viewed as a commentary and defense of John Austin's view of sovereignty (Commons, 1899c). Austin was criticized for defining law as a command, issued by a sovereign, backed by sanctions, and addressed to subjects that are in the habit of obeying to him. Henry Sumner Maine's critique of Austin (Maine, 1861) was particularly famous at the end of the 19th century, who believed it was inaccurate historically, and showed even limitations in the present, the power of the sovereign being far from absolute and controlled by institutions and at least constitutional customs. More importantly, for Maine, that conception of sovereignty, which he saw as inherited from Hobbes, was inconsistent with the history of human societies, in which legal pluralism was the norm, in particular within "village communities", and where sovereigns were deprived of direct regulatory control and of the very ability to enforce rules by sanction on populations (Sumner Maine, 1875). Nowadays, it is Hart's critique of Austin, which resumed where Maine stopped, that is more known, including Hart's contention that in modern societies,

law-making powers are in fact dispersed and not concentrated within the hands of one sovereign (Hart, 1958).

Meanwhile, Commons' direct answer to Maine and many others serves as a clarification and defense of Austin's view of sovereignty (Commons, 1899c). Coercion, as the result of the control of resources by an individual, is insufficient and characteristic of mere despotism. Two other elements are gradually added to sovereign power: "order" and "right" (Commons, 1900). First, the sovereign who is in control of large territories reinforced his power by the centralization of the production of order. While this process may look like a limitation of sovereign powers, as it is accompanied by transfers of private controls, from the hands of the sovereign to others', it in fact reinforces its control over his subjects (Commons, 1899c). The sovereign orders society by specializing in different branches to perform different functions. "Right" is the next step of this process, when the sovereign, under the appearance of accepting checks to its power via the distribution of rights to its subjects, becomes instead the source of all moral justification of the social order, enforced by its own agents (Commons, 1900). In addition, rights are granted to institutions that have already established a "partnership" (meaning, participation via allegiance) with the sovereign power. In other words, Commons' sovereign does not share power: it merely distributes it to its extensions and subjected partners.

1.4. Drawing lessons from Austin's *Province of Jurisprudence Determined*

As Commons and Lewis' definition of sovereignty seem to be directly connected to Austin's own theory, it appears relevant to explore this connection further, to fully understand why their use of the "bundle" metaphor is incompatible with a de-centralized view of governance. Lewis (1888), who used the metaphor before Commons in the same context of the discussion on takings, also takes Austin's discussion of the meanings of property as a starting point for his own definition of the concept and offers a clear view of the line of thinkers he connects his own

view of property as a bundle of rights. As seen above, Lewis' theory does not necessarily mean that the State can do anything it wants with the "bundle of rights". However, he argues that, clearly defined, property is "certain rights in things which pertain to persons and which are created and sanctioned by law", which means that State regulations frame and enforce property rights in their entirety, for the sake of the "general good" (1888, 41-42). In addition, when Lewis mentions the components of the "bundle" and how the State may regulate them, he refers abundantly to Bentham on top of Austin. Lewis links two propositions that he takes from Bentham: the analytical definition of the components of property (occupation, exclusion, disposition and transmission) as well as the proposition that "property is entirely the creature of the law". The law thus frames what property rights are entirely – both the nature and the scope of my interests – and I even owe it the ability to "enclose a field and give myself to its cultivation" (Lewis, 1888, 42, note 4).

However, "the law" is not the sovereign. That laws frame my rights does not mean that the composition of my "bundle" depends solely on the sovereign's goodwill. Nevertheless, under Austin's view of sovereignty, it does. The history of the English system of property, Austin's working paradigm, made the King the sole owner of all things and all subjects are all tenants with more or less secure rights. Nevertheless, Austin's unitary view of the sovereign as above all positive law radicalizes that perspective. It is very clear when he warns us that saying that the sovereign is the ultimate owner of all things within its territory is, in fact, an abuse of language. From a strictly legal point of view, the sovereign does not have a "*right* to all things withing its territory, or is absolutely or without restriction the *proprietor* or *dominus* thereof". In fact, it has "no *legal right* to any thing" and therefore is not the "legal owner or proprietor of any thing". This is because the sovereign is not at all "restrained by positive law" (Austin, 1863). If it had rights, it would mean that a sovereign above it would attribute them to it and its subjects. It would therefore not be the sovereign. We will however say that the sovereign has a

"*right* to all things within its territory", because of the limits of our language (Austin, 1863, 55). Within this unitary conception of sovereignty, all forms of property are a manifestation of the sovereign's will, whether by its explicit command, or because it allows them to continue to exist. In the same way, the sovereign merely allows its citizens to make use of what is in within its territory, whether it is for public or private property, as well as when it delegates power of governance to institutions such as municipalities (Austin, 1863). In the end, the sovereign is one, but the bundles are many and their compositions depend on its will for their existence.

Analyzing Commons' view of sovereignty as well as one of its main sources, Austin's legal theory, thus enables us to distinguish between two views. A first is the idea that property rights, in their specifications, depend on the law for their existence. Following this view, the "bundle" of property rights is a legal structure and therefore a social construct. This does not imply, though, that there can be no autonomy granted to sub-groups and institutions within a society in the way bundles of rights are designed and enforced. The state could delegate powers and authority to design structures of "authoritative" relationships and not just authorize uses, following V. Ostrom's commentary of Commons' legal theory (1976).

On the contrary, from a unitary view of sovereign so radical as the one defended by Commons and his predecessor Austin, sovereignty is absolutely indivisible and must be concentrated in the same hands or administration. Hence, for example, Austin's rejection of the very notion of customary law as autonomous regulation: custom is law only if "transmuted" into positive law by the sovereign or its judges (Austin, 1832). There can be no genuine sharing of governance with other institutions, including the Ostromian "commons", even within a polycentric model of governance, because power is merely delegated and will always be a mere extension of the sovereign's power, as expressed quite clearly in Commons' "Sociology View of Sovereignty" (Commons, 1899a). Coercion, for Commons, only knows specialization for separate functions, not division.

In other words, property rights come in "bundles" that are only modifiable by the sovereign because sovereignty itself cannot be unbundled. This conception still does not necessarily imply, however, that the sovereign exerts a despotic control over resources and that individual property rights are too strictly controlled. The sovereign acts within self-imposed boundaries, whether is it because of Lewis' notion of sovereign power being delegated by citizens (Lewis, 1888, 43), or Commons' understanding of the notion of "order" and "right" as framing (but not limiting) the exercise of coercion. This somewhat guarantees a sphere of individual freedom to property owners. Going back to Austin's definitions, "*property* or *dominion*", confer to individuals "a power or liberty or using or dealing with the subject [of property rights] which is not capable of exact circumscription or definition, which is merely limited, generally and indefinitely, by the some of the duties (relative and absolute) incumbent on the owner of proprietor" (Austin, 1863, 12). The rights that are property rights of property are not positively defined. On the contrary, for instance, easements are positively defined and therefore limited rights. However, this lack of definition and the indefinite character of that sphere of dominion is what allows individuals to use and dispose of their property freely as well as to exclude others from it, provided they do it within the boundaries of the duties that are imposed to the owner by the law, for instance, to respect the property of others (Austin, 1863, 19-20).

Connecting Commons to Austinian views on property rights sheds lights on the meaning of his use of the "bundle" metaphor and his definition of property as a residuum. Let us take a look at Commons schematization of the structure of property rights:

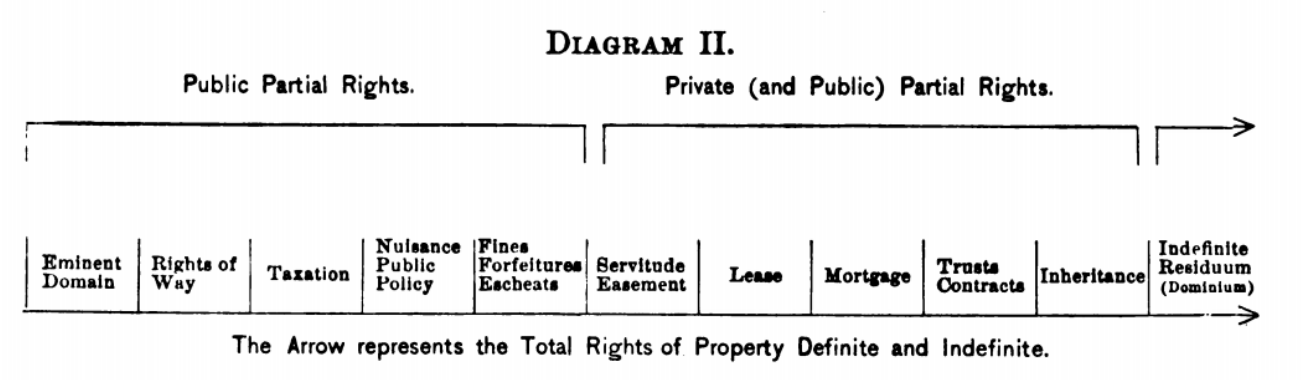

Fig. 1. The bundle of rights as a spectrum.
Source: J. Commons, *The Distribution of Wealth*, 93.

Property rights are a "bundle" in the sense that each individual owner possesses a set of rights that is made of an "indefinite residuum", within which the individual is free to use and dispose of his property, *minus* definite "public" rights, enforced by the state, such as rules against nuisance or eminent domain, and definite private and public rights, which correspond to the rights of other individuals. This scheme is based on a strong dichotomy between the State and individuals, the former being in charge of coordinating the rights of its citizens with each other, for the sake of the public good. The very social ontology of Commons' view of sovereignty, inherited from Austin who himself reframed Hobbes' concepts, thereby leaves little to no room for an intermediate level, whether it is institutions or the commons, between individuals and their sovereign, from whom all property rights flow. The sovereign's task is to make individual bundles compossible and compatible with each other, while keeping for itself "public" rights to solve coordination problems for individuals (e.g., infrastructures). It needs the attribute of force to keep "private self-interest" in check. Otherwise, untrustworthy individuals are "too immoral to promote the common good without compulsion" and to provide for the "*common* wants of society" (Commons, 1893). Consequently, the use of the "bundle" metaphor to study the commons must rely on entirely different grounds to be compatible with the framework in which the Ostroms and their colleagues operated.

2. A 19th century crossroad: an alternative path for the "bundle"

2.1. Maine's view of the "bundle": another point of origin?

It is now clear that Commons' framework therefore bears little resemblance to the de-centralized view of governance that seems to have animated the work of the Ostroms and their colleagues. Polycentricity is indeed quite incompatible with such a unitary view of sovereignty, especially that of John Commons, even more than Austin himself, or Lewis. The purpose of this section is now to suggest that another point of reference was available to Ostrom and Hess, a point of origin that they were at least acquainted with, and of which some of their colleagues were fully aware: Henry Sumner Maine's work, in which he proposes a patrimonial definition of property as a "bundle of rights *and duties*", presented by Maine as a direct translation of the expression *universitas juris*, the set of rights and duties passed on from *paterfamilias* to *paterfamilias* in ancient Rome (Maine, 1861, 178). This institution, Maine believed, was a remnant of the structure of relationships that organized small scale communities around a set of resources.

Interestingly, John Lewis alluded to this alternate genealogy, when he acknowledges, seemingly inspired by Maine's critique of Austin, that Austin's definition of sovereignty corresponds only to the modern era, in a somewhat less teleological account than Commons'. Property was therefore not "originally *created* by law". Instead, "property and the laws of property grew up together out of a primitive condition of things in which neither existed". To support his statement, Lewis refers to "Laveleye's Primitive Property, Morgan's Ancient Society, and Works by Sir Henry Maine" (Lewis, 1888, 41).

There are quite of few reasons to look to Maine to make a genealogy of the notion of uses of the "bundle" metaphor, in particular in English, at the very least to question its association with interventionist or collectivists view of property rights (Klein and Robinson, 2011). To defend this interpretation, Robinson and Klein (Klein and Robinson, 2011) use the time when the notion became popular: Google's NGram shows that uses of the expression "bundle of rights" soared at the turn of the 20th century, especially from 1880. They therefore link the emergence of this concept to critiques of the idea of property as the dominion of an individual over things and to the political attraction of collectivism as it fought a culture of free market. Commons is, indeed, part of that movement. There is, however, a large flaw in that account: Google's Ngram shows that the expression first appeared in the 1860s. The first occurrence of the term in English could even be Henry Sumner Maine's *Ancient Law*, according to Google's database, considering that the base is not complete.

One must not forget that *Ancient Law* was a bestseller of its time. Reprinted many times after its publication in 1861, Henry Sumner Maine's first book was not only popular and had a large audience during the second part of the 19th and the beginning of the 20th century, but it also made a strong impression on legal scholars. Along them are members of the American realist movement[1], but also French lawyers or Oxford scholars, including H. L. A. Hart, who read Maine but was also one of his successors as Professor of Jurisprudence in Oxford, a position first created for Maine. Soon considered a classic right after its publication, *Ancient Law* was also almost mandatory for those aspiring to become colonial officers in the British Empire (Dewey, 1991). John Stuart Mill was an avid reader of Maine and his correspondent (Mill, 1871).

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A little excursion into other languages also points to the importance of Maine's definition, at the very least for the English language. In French the translation of expression "bundle of rights" (*faisceau de droits*) clearly became popular around 1850-1860, also according to Google's Ngram. It is either associated to works on inheritance or is just a synonym for a set of rights and duties attached to any kind of legal position, including property. Among the first uses of the expression of "*faisceau de droits*" in French comes a translation of Maine's work, published in 1874 (Maine, 1874). Does this mean that Maine coined the term altogether? It is unlikely that he invented the idea, but possible that his use of the expression was at least catalyzer in the English language since Austin did not use the expression but preferred it the word "aggregate". Indeed, the very notion that property (or other legal institutions) is made of separate components that are assembled around a legal person is not novel but using the specific term "bundle" may be.

Is Maine nevertheless just translating a very old idea, dating back to earlier in his century and potentially all the way to Roman law at least, using a new word, and does this translation have no impact on the meaning and use of the expression? A search of the uses of the Italian translation of the notion, "*complesso di diritti*" provides a clearer picture as wells as important clues to understand the context of origin of the notion. Relevant uses of the Italian expression are first concentrated at the beginning of the 19th century and tend to come from law books that are either translations or commentaries of Austrian and German authors. In particular, the expression is used most frequently as a way to define the "*eredità*", from the latin *hereditas*, the institution that, from Roman law, designated the transmission of rights and duties from one person to the other during intestate successions. The other use, of the *complesso* as any kind of "bundle" of rights, not necessarily proprietary ones, increases as the 19th century goes on, suggesting that it became more and more popular and that it detached itself from its specific context of origin at the same time.

The French history of the notion confirms the Italian one: in French, the most significant reference dates from 1869, when paternal authority is described as a "bundle of rights" and is, along with property, a *universitas juris* (in French, *universalité*)[2]. It does not come from a translation of Maine, but rather from a book on K-S. Zachariae, a German jurist born in 1769, who produced influential work on Roman law and in particular, on inheritance law (Brocher, 1868). Occurrences of the expression in Spanish are also quite telling in that regard. Nowadays, the expression "bundle of rights" is translated by "*paquete de derechos*" and seems to have waited until the 1960s to emerge, probably as a direct translation from American scholarship in economics. However, another expression, more technical and of a legal origin, that of the "*universalidad de derechos*", became suddenly popular, starting from next to mention, in the 1840s. First mentions of it also deal with handbooks and commentaries on inheritance law, according to Google's Ngram.

Further archival and linguistic research would be needed to confirm any hypothesis but, at first glance, Maine's definition of property as a "bundle" of rights might have been one of the first translation, if not the first, of the idea of a *universitas juris* in English. John Austin also used the expression when he talked about inheritance, writing about succession as the transfer of "the university or aggregate of the party's rights" (Austin, 1863). Austin seems to be making different choices, by translating *universitas* into "university", and by using the notion of "aggregate", rather than this of a bundle.

This quick exploration also shows that there are two ways of using the metaphor in different languages: one that is a generic way of describing a set of rights and duties, and the other that is rooted in the highly specific context of the study of the Roman law of inheritance and how it translated to modern legal system. Works of scholars like Zachariae seem to have a played an

[2] Charles Brocher, "K-S. Zachariae. Sa vie et ses œuvres," *Revue historique de droit français et étranger* (Paris: Auguste Durand et Pedone-Lauriel, 1869): 570.

important role in Europe in discussions around this expression and institution. The German pandects of the turn of the 18th century could be a source of inspiration for the rest of Europe. Maine himself knew them and was quite familiar with the works of scholars like Savigny or Niebuhr (O'brien, 2005), the latter being responsible for a methodological turn in the history of the Roman law, at the occasion of the rediscovery of Gaius' *Institutes*. It is generally recognized that the idea of *universitas juris* does not belong to Roman law, but is instead a creation of medieval commentaries on it, which bounded the idea with both the notion of succession and inheritance and the legal person of corporations, municipalities and universities, called "universitas" as well. These legal entities, the *universitates* knew a regime of property that Gaius described as "common" as distinguished from "public" and "private" property, as well as *res nullius*. As we will see, Maine uses this exact mix of ideas to describe this patrimonial view of property he believes preceded any other form of property.

2.2. Multiple indirect connections

Before proceeding further to analyzing Maine's own definition of the bundle, I must stress that I do not argue that there is any direct or even indirect "influence" of Maine's work on the development of the works on the commons and on the use of the "bundle" metaphor within. The very idea of "influence" is too unclear to have any rigorous meaning, as it seems to navigate between the realms of the conscious of the unconscious. What I point to are rather repeated crossing points, through readings or discussions with scholars who read the works of Henry Sumner and Emile de Laveleye. More importantly, I believe that whether Maine's view of the "bundle" reached the Ostroms and their colleagues or not, it provides an alternative way of thinking about the bundle that fits the study of the commons and other structures of governance quite effectively. This is because Maine and Laveleye worked on objects that were not only similar but sometimes identical to now classical commons case studies. To understand them, they applied, just like Ostrom and Hess, an analytical framework for property rights passed on

to them by other scholars. They adapted this framework to the specificities of their object, thereby developing or rediscovering a patrimonial view of property structures and organizations which, as I argued elsewhere, is particularly relevant for the study of the commons (Goetzmann, 2021).

It is quite clear, however, that the use of the "bundle" metaphor by Elinor Ostrom, Charlotte Hess and Edella Schlager was not heavily theorized. It is not even mentioned in *Governing the commons* (Ostrom, 1990). It is famously mentioned in a paper co-authored with Edella Schlager (Schlager and Ostrom, 1992) and in a long paper compiling the many studies on the commons, co-authored with Charlotte Hess (Ostrom and Hess, 2007). Ostrom's use of the concept has sometimes been perceived a way to oppose an alternative to the notion, common in economics in the second part of the 20th century, that individuals must be granted exclusive rights to their property, including alienation rights, in order for the institution of property to play its full role in economic development (Orsi, 2014). This criticism would have been based on a reactivation of John Commons' use of the concept, as well as on its use by theoreticians of legal realism, like Hohfeld. Ostrom confirms this story, in a brief remark in her Nobel Prize lecture in 2009, saying that the use of the concept of a bundle of rights is inspired by John Commons (Ostrom, 2010, 419).

In a way, then, considering John Commons as the origin of the concept as it is used in studies on the commons is correct. Nonetheless, one must remember that the definition of property as a bundle of rights had been commonplace for most of the 20th century when Ostrom resorted to it and that her education with scholars of the economic school of property likely infused her work with this idea[3]. Also, the mere idea that property is not one right, but a plurality of rights is not novel, especially in common law systems. There is therefore a chance that Ostrom and

[3]

her colleagues only picked up a "weak" version of the concept of property as a bundle of rights that proved particularly useful to describe the commons. Indeed, Ostrom and her co-authors, Edella Schlager and Charlotte Hess, seem to have been primarily attracted to the combinatorial capacities of the bundle. Their use of the concept is essentially descriptive and has one purpose: it allows them to underline the diversity of ownership structures, made possible by the distribution of the various components of the bundle that are rights of access, use, management, exclusion and, finally, alienation (Ostrom and Hess, 2007).

Consequently, it is at least impossible to argue that there is a direct connection between their work and Maine's own definition of the bundle. However, arguing for a series of indirect connection points is plausible, because the connection is not so tenuous, as the village-communities of the 19th century are in fact oddly similar "commons" of the end of the 20th century. In addition, Ostrom and Hess (2007) do refer to Maine (Maine, 1861, 252) and another thinker of his time and Maine's correspondent, Émile de Laveleye (1891)[4]. They in fact start their paper with Maine's assertion that joint property was originally the only way property rights were structured, individual property emerging later, by gradual extraction from this framework. Laveleye devoted an entire book to property structures in village communities, which sometimes happen to match perfectly with the communities studied in works on the commons. For instance, the villages in the Swiss mountains, studied by Robert McC. Netting, were also described at length by Laveleye a century earlier. Ostrom and Hess might not have read Maine and Laveleye themselves, as their acquaintance with these authors seem to come mainly from Paolo Grossi's work (Grossi and Cochrane, 1981). Finally, in *Governing the Commons*, Ostrom mentions on several occasions a study by Robert Wade (Ostrom, 1990, 51 and 243), entitled *Village Republics: Economic Conditions for Collective Action in South India*, where Henry

[4] They mention Laveleye's book as follows: "Laveleye, Émile de (1985), *Primitive Property; Translated from the French of Emile de Laveleye*, ed. G. R. L. Marriott, Littleton, CO: F. B. Rothman (Reprint of 1878 edition)."

Sumner Maine's Indian "village-communities" are mentioned at the very beginning of the first chapter (Wade, 1989). Finally, Maine was on the minds of other members of the famous workshop in political theory and policy analysis, in particular of Minotti Chakravarty-Kaul who worked on Maine extensively, getting insights from his work on the recognition of customary property rights and customary forms of management[5]. These scholars did not focus on the "bundle" metaphor and its meaning, but the repeatedly emphasize the importance of Maine's work, in particular on the property structure of "village communities", in understanding the local governance of resources.

3. The "bundle of rights" as a structure of patrimonial property

3.1. Patrimony, the *universitas juris* and the "bundle of rights" in Maine's work

Maine links the idea of property as a bundle of rights to that of the *universitas juris* in chapter VI of *Ancient Law*. Just before this, chapter V analyzes the fundamental institution of the *patria potestas*, which allows Maine to conclude that all societies evolved from a stage where individual rights were defined by status, to one where free contractual relationship come first (Maine, 1861, 168-170). According to Maine's description, in ancient Roman law, women, children and slaves only had the rights that came with their status within the enlarged family group, which placed them under supervision of the *paterfamilias*. The evolution of Roman law would show, according to Maine, the gradual decomposition of this set of institutions, in parallel with the gradual individualization of rights, especially women's. This is what the transition from "status" to "contract" essentially means. This process, observable in Roman law, would be the continuation of a uniform movement for all "Indo-European" societies: the

5

individualization of property by the erosion of a patrimonial conception of property in which individuals have rights only within a group, the "village community," structured around a set of resources to manage in common.

Maine's analysis cannot, of course, be taken at face value, especially when it connects the Roman *patria potestas* to the prototypical set of institutions of the so-called "Indo-European" societies. Classics scholars are still debating the origins of the peculiar set of rules that the *patria potestas* represents. Crook proposes a classical critique of the "hard" view of *patria potestas* and is especially skeptical of the idea that Roman institutions descend from an alleged "Indo-European" origin. Strangely, however, Crook (1967) does not connect it to Henry Sumner Maine, but rather to his successors. Nonetheless, it is generally assumed that, as a matter of fact, the agrarian past of the Roman republic, consisting of self-sustaining farming communities, had a large influence on its family institutions (Dixon, 1992, 2016, 42).

Maine's first argument is to say that "in all indigenous societies," which represent ancient Indo-European societies but in contemporary times, "Testamentary privileges" do not exist (Maine, 1861, 177). The main argument is that the freedom to dispose of one's property that is encapsulated in the very concept of a will does not exist until the later stages of social evolution. This is evidence, to Maine, that the transfer of property by inheritance had nothing to do, originally, with a transfer of absolute property from one owner to the other. Instead, inheritance was the full transmission of a set of rights and duties to the new "manager" of a fund, belonging to the enlarged family, or the community, and to all its past and future generations.

This is how Maine incidentally connects the idea of the bundle of rights to the *universitas juris*: *"*the *universitas juris*; that is, a university (or bundle) of rights and duties." (Maine, 1861, 178). This simple statement is followed by a longer definition, meant to explain how it sheds light on the history of inheritance laws:

> A *universitas juris* is a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person. It is as it were, the legal clothing of some given individual. It is not formed by grouping together *any* rights and *any* duties. It can only be constituted by taking all the rights and all the duties of a particular person. The tie which so connects a number or rights of property, rights of way, rights to legacies, duties of specific performance, debts, obligations to compensate wrongs – which so connects all these legal privileges and duties together as to constitute them as a *universitas juris*, is the *fact* of their having attached to some individual capable of exercising them. Without this fact there is no university of rights and duties.

Thus, a *universitas juris* is a complete set of inseparable rights and duties, the connection of which comes from their relation to a specific individual. This has nothing to do with the conception of the "bundle" as a set of separable rights, re-arranged by the sovereign at will, that was criticized early. The *universitas juris* is transferred from one individual to another, which defines inheritance, called in this case a "universal succession" or "succession to a *universitas juris*." Maine insists on the preponderance of duties over rights in this context where "our duties may overbalance our rights" (Maine, 1861, 179). This way, to become a property owner through a transfer of *universitas juris* is to wear the "legal clothing" of another person, a description that is generally in accordance with recent scholarship (Jakab, 2016). However, this transfer does not make this individual the absolute master of his property, but rather the custodian of a *patrimony* that belongs to an enlarged family group. It justifies the fact that it is not possible for the "heir" to "override the claims of his kindred in blood" (Maine, 1861, 177). This nonetheless becomes possible at later stages of social evolution, as property is more and more individualized.

According to Maine, ancient Roman law preserves traces of its past, as the *universitas juris* could originally be transferred to a "group of persons," and not necessarily to one individual (Maine, 1861, 181). This is also the reason why, even later in the history of Roman law, testamentary freedom was strictly limited. Finally, the institution of the *patria potestas* is a good example of this: the father of the family is also its guardian, as he "owns" his slaves and all the property that belongs to his lineage. Thus, this patriarch has "extensive" rights, but also has an "equal amplitude of obligations." He is merely a "representative," a "Public officer" or a "trustee" for the "Family," this is comparable to a "Corporation." As such, the family was an institution that "never died" and whose best interests exceeded those of individual members (Maine, 1861, 184-185).

In his analysis of the history of inheritance laws, that provides a completely different model of property from that of property as an individual's dominion, Mikhaïl Xifaras reminds us that the distinction between an owner and his representative is "constitutive of patrimonial property." (Xifaras, 2004, 295). The *owner* and the *administrator* of the estate occupy two separate legal positions. The rights and duties of the latter are defined by this representative function. Both positions may be held by the same person, but in the case of Roman families or of the village-communities Maine is interested in, the owner (the family as a corporation) is clearly distinguished from its representative (the head of the family). This legal construction ensures the presence of a manager of collective resources, who has duties not only towards the present generation, but also towards future ones. The passing of property by inheritance is thereby accompanied by a set of constraints imposed on individuals, in order to ensure the structural sustainability of the patrimonial fund.

3.2. Beyond Roman law: village-communities and the patrimonial conception of property

The relationship between the previous reflections and primitive forms of wills, discussed in chapter VI of *Ancient Law*, is not obvious. In fact, Roman law is only a steppingstone for Maine, who then explores past and present Indian law as well as ancient Germanic law, in order to find proof that property was originally patrimonial.

If village communities are the main illustration of this patrimonial conception of property, what are they exactly? According to Maine,

> Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but the Community is more than a brotherhood of relatives and more than an association of partners. It is an organised society, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for internal government, for police, for the administration of justice, and for the apportionment of taxes and public duties. (Maine, 1861, 262)

If Maine is part of the debate that shook Europe during the second half of the 19th century about the origins of the institution of property, his position cannot be reduced to the dichotomy between individual and collective ownership. Rather, Maine considers that the village-community is a regime of "joint-ownership" (Maine, 1861, 259). It is an assembly of co-owners, who have individual rights but also duties. In its "pure" form, the village community is made up of members of the same extended family. Property thus belongs to the group. The head of the family is entrusted with the management of this estate. As such, his rights are close to those of an owner, but they are limited. He remains, however, nothing more than the sole heir, or the

"universal" successor of an inheritance that is a *common* fund, the management of which involves a distribution of roles within the community.

This last point is crucial: the village-community is structured by the imperative of managing the resources necessary for its survival and its development. The rules that organize the joint exploitation of these resources are meant to find a balance between their long-term preservation and their use and appropriation by individuals (Maine, 1871, 79). For example, if a community needs to maintain irrigation infrastructures, the cooperation of all individual members and families is essential, and rules must be designed to ensure a fair distribution of water between the plots. In these kinds of communities, rules have both a synchronic and a diachronic function: they must ensure, on the one hand, a balance between the rights of individuals to use and appropriate resources that belong to the common fund and, on the other hand, the sustainability of the exploitation of resources over time, beyond the lives of the current members of the collective.

This explains the importance of using structures of property relationships that articulate the set of rights individuals have to each other, conditionally on the preservation of resources. Within this frame, property obviously never takes the shape of the dominion of one individual over something. Moreover, the whole set of individual rights and duties that individuals have at one point in time is structured by a superior imperative: the interests of the resource itself, or rather the substantial link between the collective and the resources of its territory. This structure is the very minimal definition of patrimonial property as it can be deduced from Maine's writings. The community appears here as the trustee of a fund that it passes on to future generations.

How do these reflections contribute to a critique of the so-called Blackstonian conception of property? Considered from the point of view of inheritance, property is nothing like the absolute control of the individual over what belongs to him. As a matter of fact, at least in civil law countries, as of today, inheritance laws contradict some of the most basic tenets of the model

of property as an individual dominion, as it imposes *personal* duties on owners. Therefore, "the owner of a patrimony is not its master," since his rights are limited by the very function of inheritance laws: to guarantee the continuity of the family[6]. Also, the distinction between real and personal rights is very weak in this context, since the patrimony that is passed on to heirs contains the owner's property but also his debts. One therefore inherits the obligations of the testator, since his property is composed of both assets and liabilities, indiscriminately *bundled* together. From this perspective, property is not a *jus in re*, a right *in* a thing, but mostly a *jus ad rem*, a right *to* a thing, establishing direct obligations towards third parties, just like contracts do.

This explains why the *universitas juris* is such an important concept in this context: it designates the complete set of rights and duties of one legal person. Therefore, since a patrimony represents "the entire property of one person, considered as a whole," it is a "structure of legal norms" and "the typical expression of a surprising species of legal beings – the *universitas juris* (…)." (Xifaras, 2004, 201-202). As Ernst Kantorowicz puts it, "the *universitas* thrives on succession; it is defined by the successiveness of its members" (Kantorowicz, 1997, 308). It is thereby essential to the continuity of sovereignty within a community.

Thus, for Maine, modern inheritance laws are the remnants of a once dominant patrimonial conception of property. Conversely, individual property is a product of the gradual individualization of rights. The Roman institution of *patria potestas* lies somehow halfway through this process. It is from this point in legal history that the rights of individuals will become separated from their status within the family unit on the one hand, and that property will gradually become individual. An interesting reversal takes place here: while, from a contemporary point of view, inheritance laws appear as a disturbing exception to the dominant

[6] Xifaras, *La Propriété*, 277-279: "le propriétaire du patrimoine n'en est pas le maître."

model of property as individual dominion, Maine presents the latter as the result of the gradual decomposition of the patrimonial conception of property.

The following chapters of *Ancient Law* then discuss the works of Blackstone, Hobbes and Savigny, with the aim of identifying all the processes by which the gradual individualization of property would have taken place. *Usucapion*, the right to acquire a title to property by the uninterrupted possession of it for a specific period, as well as other instruments, are the main agencies of the separation of individual rights from the common patrimony of the family or the community (Maine, 1861, 284, 290sq). The evolution of contract law is emblematic of this transformation. Maine sees it as a gradual simplification that expands the number of goods that can be acquired and owned individually, and over which individuals gain direct control without supervision of their extended family.

Maine's interpretation of the origin of primogeniture also confirms his previous reflections: originally, the direct male descendant inherited not so much property as responsibilities to members of his lineage. Inheritance thus represented a transfer of "sovereignty," making him the "new chief" of the family by passing on the "representation of the household" to a new person, in charge of ensuring the continuity of the lineage (Maine, 1861, 194-195). If the eldest son did inherit the right to the "absolute disposal" of the property of his agnatic group, he remained the mere manager of its resources. This clearly does not make him the "true owner" of these resources, in the modern sense that implies "uncontrolled power over property." This specific way of understanding property rights is not compatible with the position that the eldest son occupied, as the manager of collective assets, since he was bound by strong "correlative duties" and the "liabilities" that came with this status. He therefore saw "*political*" and not merely "*civil*" duties bestowed upon him (Maine, 1861, 238-239). Meanwhile, co-heirs and co-owners retain rights to the common fund, as Maine claims it can be observed in British-dominated Bengal. This confirms what the study of ancient Roman law merely suggested: at

one point of social evolution, an individual might have been able to dispose freely of his property, in order to bequeath it, only if it did not conflict with the "overriding claims of the family". These rights were so restrictive that they could impose a ban on alienating a portion of the family property (Maine, 1861, 197-198). Then, "members of the community do not own their property *and* their family, but rather own their property *through* their family" (Maine, 1861, 208-209).

3.4. Patrimonial property: Mikhaïl Xifaras' framework

Mikhaïl Xifaras, in his essay on property, provided a detailed analysis of the evolution of property law within the French civil law system, after Napoleon's Civil Code was promulgated in 1804. His demonstration, digging deep into the commentaries of jurists of the 19th century, first aims to shed light on the way they gave its conceptual structure to the idea of absolute property. Then, it shows that alternate conceptions of property, that existed before but were also given a new shape in the 19th century, persisted and still coexist today with the model of property as dominion, while offering countermodels to it. These two main models are patrimonial property and intellectual property. A comparison of Xifaras' description of patrimonial property with the reconstruction of Maine's argument that was presented above leads to the following conclusions: a patrimony is structured around a purpose that determines the distribution of individual rights and duties within the group that preserves and manages it. This structure transcends the opposition between individual and collective ownership, while the necessary balance between preservation and management leads to a fluid boundary between what is a commodity and what is not.

Mikhaïl Xifaras' analysis of the patrimonial conception of property is very similar to that of Maine, while making an essential and clarifying addition to it: the patrimony transcends the existence of those who are its representatives or administrators for the sake of a superior end,

the purpose around which it is organized. A patrimony is thus constituted by the attribution of a set of resources to a specific end. It is "a will that is reified into an ensemble of goods," goods that are put together only because they are allocated to the same *purpose*. This explains why the rights of the administrator of the patrimony have nothing to do with "the exercise of an absolute and subjective right, determined by the sole will of its holder." The scope of his rights corresponds to the "end" that constituted them (Xifaras, 2004, 289-301). This end is twofold: preservation and management. The need to manage the fund authorizes the transfer, exchange and even the investment of certain parts of the patrimony, provided that it is consistent or that it promotes its preservation. In the meantime, some parts of the patrimony might be declared absolutely untouchable and inalienable.

In common law systems, legal trusts represent one of the closest institutions to that description. They are tools that are used to convey property and assets provided some conditions are fulfilled. A trustor (the original owner of the property) transfers management of the property to a trustee who acts in the interests of a beneficiary. Once a trust is constituted, neither the beneficiary nor the trustee can be considered as the full owners of trust property, which may be used under strict conditions.

Within the frame of patrimonial property, one cannot strictly oppose collective and individual property. Individuals who are co-owners of a patrimony have rights and duties as individuals. They are also assigned functions in this capacity. For Maine, the assembly of co-owners of the village-community is not only led by a manager: many individuals are assigned specific functions inside the community. The resemblance to Mikhaïl Xifaras's description of the structure of patrimonial property is striking: this structure is, for him "a machinery to attribute statuses, rights and powers." (Xifaras, 2004, 330) Meanwhile, Maine sees little distinction between the private and the public obligations of community members (Maine, 1861, 265 and 260).

For Mikhaïl Xifaras, the rights of the "administrators" and of the "beneficiaries" are directly corelated to the function they perform in the preservation and the management of the patrimonial fund Therefore, their rights are "neither rights as claims *to* something nor rights as freedoms *from* something, but rights *for* [the patrimonial fund]." The scope of these rights depends on the structuring purpose of the fund (Xifaras, 2004, 332). Collective ownership is therefore not the appropriate category for this institutional frame. In village-communities, individuals are allowed to appropriate resources, sometimes to a great extent, provided they respect specific conditions. Mikhaïl Xifaras believes that the distinction between someone's property and common or collective property is not relevant here, as individual rights to appropriation are themselves structured by collective goals (Xifaras, 2004, 337). As it will appear clear below, this is extremely relevant to include the commons studied by Elinor Ostrom within the category of patrimonial conceptions of property.

In this context, not only are rights far more personal than real, but it even seems that their existence depends on a right that the patrimony, has over them. This patrimony is of course a social construction and its rules are not strictly determined by the *nature* of things. However, and this is evident for the village-communities Maine is interested in, the imperative of managing the resources that constitute this patrimony requires taking their physical nature into account, as it is a determining factor in the way they can be exploited. Rules to manage these resources cannot set this physical component apart. According to Mikhaïl Xifaras, since the relationship between the patrimony and its end directly connects rules to the nature of things, then, "the distinction between *is* and *ought*" is blurred (Xifaras, 2004, 335-336).

Another usually strict distinction that loses its sharpness is the one between commodities and non-commodities. Preserving the integrity of the patrimony might require acts of management such as the destruction or sale of certain assets, while other assets might be considered as absolutely inalienable and non-transferable, because they are essential to the very existence of

the patrimony. The balance between preservation and management imperatives calls for a flexible conception of what can be sold and what may not, based on the purpose that defines the patrimony. Therefore, according to Mikhaïl Xifaras, "patrimonial property abolishes the division between commercial and non-commercial goods by nature, in order to put all goods on a continuous spectrum, from the most transferable to the least." (Xifaras, 2004, 338). Goods can thereby either be fully inalienable, or on the contrary be commodities without any restriction, or have a mixed status. For example, it may be possible to enjoy the use of certain goods, to sell the secondary products that come from them, without being able to sell these primary goods. Maine's analysis fits perfectly with this framework, particularly when it shows how, in the most primitive societies, the imperative of preserving a common and vital patrimony makes any form of alienation almost impossible, while later in the evolution of societies, the main prohibition concerns only the sale of land to foreigners[7]. Later on, the only requirement may be the consent of the other members of the community[8].

3.5. Making sense of the otromian bundle

For a minimal understanding how the patrimonial framework can be applied to the ostromian commons, but with history of the "bundle" metaphor, see Goetzmann, 2021, "The Building Blocks of Social Trust: The Role of Customary Mechanisms and Property Relations for the Emergence of Social Trust in the Context of the Commons", in particular, part 4.2.

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The important differences between Ostrom and Hess' schematization of the "bundle" and Commons' can now be better understood. The ostromian "bundle" is also quite different from Honoré's list of rights, as the collective management of resources, constituted as a patrimony

[7] Maine, *Ancient Law*, 277.
[8] Maine, *Ancient Law*, 262-264.

directly shapes the *structure* of this set of inseparable rights. Here is how Schlager and Ostrom illustrate it:

TABLE 1
BUNDLES OF RIGHTS ASSOCIATED WITH POSITIONS

	Owner	Proprietor	Claimant	Authorized User
Access and Withdrawal	X	X	X	X
Management	X	X	X	
Exclusion	X	X		
Alienation	X			

Fig. 2. The bundle of rights as a structure.
Source: E. Schlager and E. Ostrom, 1992, 252.

In a way, the structure of the "bundle of rights" in Commons shares objectives with the one that is found in the work of Ostrom and her colleagues on the commons. John Commons sees the bundle as structured by the imperative of balancing individuals interests on the one hand and to ensure the provision of collective goods that individuals will not fund on their own on the other hand. This task is performed by the State for John Commons, while social groups manage to find this balance on their own in the Ostromian commons. Both theories are defined by the need to overcome collective action problems.

Nevertheless, in the end, Commons maintains the idea that property is the real of absolute control an individual can exert on a thing. This dominion is not fully absolute, as it is limited, from the outside, by other individual rights and by the work of the State in providing public goods. It remains absolute within these boundaries, just as two individuals can do anything they want on their property, separated by a fence, to the maintenance of which they both must contribute. Commons has, in fact, a rather negative view of cooperation, focused on nuisance, and on large cooperation problems that are way beyond individual management capabilities.

Meanwhile, according to Ostrom and Hess's use of the bundle of rights, property structures do not only balance individual interests, but they ensure their use of resources is compatible with

their sustainable exploitation. This implies that the collective can intervene directly on the way individuals use what is their own. The very content of the rules that regulate individual appropriation is determined by the imperatives that the management of the fund imposes on the group (remember, on the contrary, how Austin, and therefore Commons, describe the domain of individual property as free of any positive duties). To use Mikhaïl Xifaras's conceptual frame, one can say that the patrimony was constituted according to a specific purpose to which the rules and the roles that are attributed to individuals are subordinate.

In the end, the structure of rights in the commons is hierarchical. Each level implies superior rights and no right is independent from the others (Ostrom and Hess, 2007, 12-13). Exclusion rights, meaning being able to decide who may or may not have access to resources, are fundamental and have priority over management rights, that determine how those who may *access* the resources can *use* them. This is provides an interesting response to fears that the "bundle" metaphor deprives property rights of a solid bedrock, which could be the right to exclude (Merrill, 1998). If ostromian bundles must vary and need to subordinate the lower levels to collective design structures (including, one level above, the "constitutional" level), they only vary to adapt the structure of property rights so that there is no "mismatch" between the structure of rules and the demands of resource management (Cowen and Delmotte, 2020; Yandle, 2007).

In return, management rights are dependent on the higher level of decision that exclusion rights imply. Below the level of management rights, one can find use rights. What about alienation rights? In Ostrom and Hess's explanations, an owner possesses all rights *including* that of alienation. Nonetheless, not a single individual is an owner in that sense in the commons. Someone's rights to alienate a piece of land within an area of collective management will be subject to constraints, at least to obtain the permission of the group to sell, just like the joint proprietors of Maine's village community. This kind of constraints is fundamental to the

commons, as it is to any patrimony, since it is necessary to maintain their structural integrity and ensure obedience to lower level rules. No one owns the commons, in the same way that there is no owner to a patrimony, but only managers and users or, in the language of legal trusts, trustees and beneficiaries (Goetzmann, 2021).