

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

---

## F. W. MAITLAND: STATE, TRUST AND CORPORATION

The essays collected in *State, Trust and Corporation* contain the reflections of England's greatest legal historian on the legal, historical and philosophical origins of the idea of the state. All written in the first years of the twentieth century, Maitland's essays are classics both of historical writing and of political theory. They contain a series of profound insights into the way the character of the state has been shaped by the non-political associations that exist alongside it, and their themes are of continuing relevance today.

This is the first new edition of these essays for sixty years, and the first of any kind to contain full translations, glossary and expository introduction. It has been designed to make Maitland's writings fully accessible to the non-specialist, and to make available to anyone interested in the idea of the state some of the most important modern writings in English on that subject.

DAVID RUNCIMAN is University Lecturer in Political Theory at the University of Cambridge.

MAGNUS RYAN is Lecturer in Late Medieval Studies at the Warburg Institute, and a Fellow of All Souls College, Oxford.

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

---

CAMBRIDGE TEXTS IN THE  
HISTORY OF POLITICAL THOUGHT

*Series editors*

RAYMOND GEUSS, *Reader in Philosophy, University of Cambridge*

QUENTIN SKINNER, *Regius Professor of Modern History in the  
University of Cambridge*

Cambridge Texts in the History of Political Thought is now firmly established as the major student textbook series in political theory. It aims to make available to students all the most important texts in the history of Western political thought, from ancient Greece to the early twentieth century. All the familiar classic texts will be included, but the series seeks at the same time to enlarge the conventional canon by incorporating an extensive range of less well-known works, many of them never before available in a modern English edition. Wherever possible, texts are published in complete and unabridged form, and translations are specially commissioned for the series. Each volume contains a critical introduction together with chronologies, biographical sketches, a guide to further reading and any necessary glossaries and textual apparatus. When completed, the series will aim to offer an outline of the entire evolution of Western political thought.

*For a list of titles published in the series, please see end of book*

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

F. W. MAITLAND

---

---

*State, Trust and  
Corporation*

EDITED BY

DAVID RUNCIMAN

*Faculty of Social and Political Sciences, University of Cambridge*

AND

MAGNUS RYAN

*The Warburg Institute, University of London and All Souls College,  
University of Oxford*



**CAMBRIDGE**  
UNIVERSITY PRESS

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

---

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS  
The Edinburgh Building, Cambridge, CB2 2RU, UK  
40 West 20th Street, New York, NY 10011-4211, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
Ruiz de Alarcón 13, 28014 Madrid, Spain  
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© in the selection and editorial matter Cambridge University Press 2003

This book is in copyright. Subject to statutory exception  
and to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without  
the written permission of Cambridge University Press.

First published 2003

Printed in the United Kingdom at the University Press, Cambridge

*Typeface* Ehrhardt 9.5/12 pt.    *System* L<sup>A</sup>T<sub>E</sub>X 2<sub>ε</sub> [TB]

*A catalogue record for this book is available from the British Library*

ISBN 0 521 82010 3 hardback  
ISBN 0 521 52630 2 paperback

## Contents

<i>Acknowledgements</i>	page vii
<i>Editors' introduction</i>	ix
Life and work	ix
Gierke	xi
Corporation sole	xiv
Unincorporate body	xix
State, trust and corporation	xxiv
Significance	xxvi
<i>Note on the text</i>	xxx
<i>Bibliographical notes</i>	xxxii
Maitland's sources and abbreviations	xxxii
The publishing history of the essays	xxxiv
Other works by Maitland	xxxvi
Works about Maitland	xxxvii
<i>Biographical notes</i>	xl
<i>Glossary of technical terms</i>	xlvi
<i>Preface</i>	i
Extract from Maitland's Introduction to Gierke	i

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

*Contents*

---

<i>The Essays</i>	7
1. The Corporation Sole	9
2. The Crown as Corporation	32
3. The Unincorporate Body	52
4. Moral Personality and Legal Personality	62
5. Trust and Corporation	75
<i>Index</i>	131

## Acknowledgements

For their help on a variety of specific matters the editors wish to thank Paul Brand, George Garnett, Birke Häcker, John Hudson, Kent Lerch, Scott Mandelbrote, Richard Nolan, Benjamin Thompson, Anne Thomson and John Watts. They also wish to thank Raymond Guess and Quentin Skinner for their support and editorial advice. At Cambridge University Press they wish to thank Susan Beer for her help in correcting the text, and Richard Fisher for overseeing this project from beginning to end.

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

## Editors' introduction

### Life and work

F. W. Maitland (1850–1906) was a legal historian who began and ended his intellectual career writing about some of the enduring problems of modern political thought – What is freedom? What is equality? What is the state? His first publication, printed privately in 1875, was an extended essay entitled ‘A historical sketch of liberty and equality as ideals of English political philosophy from the time of Hobbes to the time of Coleridge’. This sketch takes as its starting point the basic question, ‘What is it that governments ought to do?’, only to conclude that such questions are ‘not one[s] which can be decided by a bare appeal to first principles, but require much economic and historical discussion’.<sup>1</sup> Among his final publications, written nearly thirty years later, are the series of shorter essays collected in this book, each of which addresses itself less directly but with equal force to the question of what it is that states, and by extension the governments of states, actually are. In between these excursions into political theory, Maitland produced the work on which his fame has come to rest, the historical investigations into the foundations and workings of English law and of English life which have gained him the reputation as perhaps the greatest of all modern historians of England. This work and that reputation have tended to overshadow what preceded it and what followed it. In the case of the early historical sketch this is perhaps fair. But the later essays are different, not least for the fact that they flow out of the historical interests that drove Maitland for most of his life, above all his

<sup>1</sup> F. W. Maitland, *Collected papers*, ed. H. A. L. Fisher (Cambridge: Cambridge University Press, 1911), vol. 1, p. 161.



Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

---

*Editors' introduction*

---

interest in what made English law and English legal institutions work. As a result, the essays contain some detailed and fairly technical discussions of a legal or historical kind, and it is one of the purposes of this edition to make those discussions accessible to the non-specialist whose primary interest is in political thought. But they also contain a series of reflections on the historical and legal origins of the concept of the state, and its historical and legal relation to other kinds of human association, which, as Maitland himself recognised, take legal history right to the heart of political thought, just as they remind us that the origins of much political thought lie in legal history. These five essays, written between 1900 and 1904, not only address the question of what the state actually is. They also make it abundantly clear why that question is not merely a question about the state, and why it cannot simply be answered in accordance with the ideals of English political philosophy.

Maitland's 'Historical sketch' was originally written as a dissertation to be submitted for a Fellowship in Moral and Mental Science at Trinity College, Cambridge. It was printed privately after the Fellows rejected it, awarding the Fellowship instead to James Ward, a psychologist. Following this rebuff, Maitland gave up his early undergraduate ambitions to pursue an academic career and moved from Cambridge to London, where he was called to the bar in 1876. There he worked as a barrister with limited success for nearly a decade, specialising in conveyancing cases, until, in 1884, the chance came to return to Cambridge as a Reader in English Law. By this time Maitland's interests had turned from the history of ideas to the history of legal actions, and he had started to make use of the vast and largely untapped resources of the Public Record Office, publishing in 1884 the *Pleas of the Crown for the County of Gloucester, 1221* ('a slim and outwardly insignificant volume', as his friend and biographer H. A. L. Fisher describes it; 'but it marks an epoch in the history of history').<sup>2</sup> So began perhaps the most remarkable burst of sustained productivity ever seen from an English historian, as Maitland published articles on and editions of anything and everything he found to interest him in the early documents of English legal history, as anything and everything did, ranging from the monumental one-offs of Bracton and Domesday book to the constant and evolving record of medieval England to be found in its Year Books and Parliament Rolls. In 1888 Maitland was appointed Downing

<sup>2</sup> H. A. L. Fisher, *Frederick William Maitland: a biographical sketch* (Cambridge: Cambridge University Press, 1910), p. 25.

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

Professor of English Law at Cambridge and in 1895 he published, with Sir Frederick Pollock, his best-known work, *The history of English law up to the time of Edward I*. Ill health, which plagued him throughout his life, was the reason he gave for refusing the Regius Professorship of Modern History, which was offered to him following the death of Lord Acton in 1902. But it did not prevent him writing, publishing, teaching and administering the early history of English law up until his death, in 1906, at the age of fifty-six.

## Gierke

Two factors combined towards the end of his life to draw some of Maitland's attention from the history of law to the history of certain philosophical and political concepts with which the law is entwined. The first was his growing interest in one particular anomaly of English law, the idea of the corporation sole,<sup>3</sup> which he believed was responsible for some of the anomalies in the English conception of the state. The second was his encounter with the work of the German jurist and legal historian Otto von Gierke, whose English editor and translator Maitland became. Gierke's massive *Das deutsche Genossenschaftsrecht*, which appeared in four volumes between 1868 and 1913, was an attempt to describe and comprehend the whole history of group life in Germany, as that in turn related to legal, political and philosophical understandings of the forms of human association. The size and subject matter of the enterprise made it effectively untranslatable as a whole (not least because it was unfinished at the time of Maitland's death), and Maitland chose to publish in English simply a short extract from the third of Gierke's volumes, which dealt with medieval conceptions of representation, group personality and the state. For this edition, which appeared in 1900, Maitland then wrote a relatively brief introduction,<sup>4</sup> in which he sought to explain why Gierke's endeavour – to make sense of the ways in which lawyers, politicians

<sup>3</sup> The idea of the 'corporation sole' is anomalous because it allows for the attribution of corporate personality to legal entities which would otherwise be identified as single (or 'sole') individuals (for example, in the classic case, a parish parson). This is in contrast to the more familiar 'corporation aggregate', which allows for the ascription of corporate personality to groups (or 'aggregations') of individuals. Maitland's interest in this distinction originally stemmed from his work on Bracton, where 'his keen eye had detected, as early as 1891, "the nascent law about corporations aggregate and corporations sole"' (see Fisher, *Frederick William Maitland*, p. 75).

<sup>4</sup> Part of which is included here as a Preface to this collection of essays.

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

and philosophers have sought to make sense of the identity of groups – though quintessentially German, was of real interest for English audiences too.

The first step he took in making this case came in his translation of the title. What was in German *Die publicistischen Lehren des Mittelalters* becomes in English *The political theories of the Middle Age*.<sup>5</sup> An English audience needed to understand that questions of public law are also questions of political theory. But in calling public law political theory Maitland was also indicating to his readers that political speculation makes no sense apart from the juristic speculation that underpins it. In England that connection had been broken – there were simply not enough ‘juristic speculators, of whom there are none or next to none in this country’.<sup>6</sup> Thus there was no ‘publicistic’ doctrine in England, and nothing to bridge the gap between the practical concerns of the private lawyers and the grand ideals of the moral philosophers, in whom England continued to abound. Maitland’s introduction to Gierke served as an initial attempt to bridge that gap, and the tool he chose was the theory of the corporation (*Korporationslehre*). His argument was, in outline at least, a simple one. Corporations are, like states, organised and durable groups of human beings, and though we may try to organise them in different ways, the way we organise the one has a lasting impact on how we choose to organise the other. This had been lost sight of in England, because in England there lacked the conceptual framework to see the connection between the legal activities of groups and the philosophical doctrines of politics. But Gierke makes that connection clear, and in doing so he helps to make clear what we are missing.

Thus Maitland’s first, and perhaps most difficult task, as he saw it, was simply to translate for an English audience words, concepts and arguments for which there was no English equivalent.<sup>7</sup> But in trying to make clear for his readers how things stood in Germany he also saw the value of helping them to understand how things looked in England from a German

<sup>5</sup> ‘Now turning to translate Gierke’s chapt. on “Publicistic Doctrine of M. A.” – O. G. has given consent – will make lectures (if I return) and possibly book – but what to do with “Publicistic?”’ (Letter to Frederick Pollock, 4 Dec. 1899, *Letters of F. W. Maitland*, ed. C. H. S. Fifoot (London: Selden Society, 1965), p. 253).

<sup>6</sup> O. von Gierke, *Political theories of the Middle Age*, ed. F. W. Maitland (Cambridge: Cambridge University Press, 1900), p. ix.

<sup>7</sup> This including the overarching concept of Gierke’s whole enterprise – *Die Genossenschaft* – which translates into English variously as ‘fellowship’ or ‘co-operative’, but is only comprehensible in the light of the German forms of ‘folk-law’ from which it evolves and the Roman forms of both public and private law against which it is a reaction.

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

perspective. 'We Englishmen', who, as he puts it elsewhere, 'never clean our slates',<sup>8</sup> were rarely afforded the vantage point from which to judge whether the law by which they lived made sense as a set of ideas, not least because they were too busily and successfully living by it. But a German, who believed that it was not possible to live by law unless it cohered intellectually, could not fail to be both puzzled and intrigued by some of the governing concepts of English law, particularly those that related to the life of groups, up to and including the continuous life of that group we call the state. England, like Germany and other European countries, had received the Roman doctrine of *persona ficta*<sup>9</sup> as the technical mechanism by which groups might be afforded a continuous life – that is, a life independent of the mortal lives of those individuals who are its members or officers or representatives at any given moment. But England, unlike Germany and other European countries, had sought to bypass some of the more restrictive aspects of that doctrine – most notably, the presupposition that continuing group life depends on the approval of the state, on whom all legal fictions must depend – by running it alongside a series of competing legal techniques for promoting corporate identity. Some of these were, to continental eyes, not simply puzzling but straightforwardly paradoxical. How could there be, as there undoubtedly was under the English law of trusts, such a thing as an 'unincorporate body' – a contradiction in terms when one thinks that a body is inherently 'corporate' even if it is not necessarily 'corporeal'?<sup>10</sup> How could there be, as there undoubtedly was in both ecclesiastical and what passed for English public law, such a thing as a 'corporation sole', that is, something that called itself a corporation but was identified solely with one, named individual?<sup>11</sup> Here we have enduring groups that are not corporations and corporations that are not groups at all. Alongside the puzzlement, as Maitland gratefully conceded, went some envy, for who would not envy a legal system that seemed unembarrassed by questions of consistency when more pressing questions, both of civil freedom and of practical convenience, were at stake? But still it remained to be asked whether freedom or convenience were in the end

<sup>8</sup> See below, 'Moral personality and legal personality', p. 67.

<sup>9</sup> Otherwise known, by Maitland among others, as the 'Fiction theory'.

<sup>10</sup> 'Suppose that a Frenchman saw it, what would he say? "Unincorporate body: inanimate soul!"' [body: *corpus* (Lat.); soul: *anima* (Lat.)]. (See below, 'Moral personality and legal personality', p. 62.)

<sup>11</sup> This entity is to be distinguished from the so-called 'one-man corporation', a much later, business invention designed to screen individuals from personal liability, which Maitland also discusses (see endnote viii to the Preface, below).

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

---

*Editors' introduction*

---

best served by laws that it was difficult, if not impossible, to understand. So Maitland, when he had completed his translation of Gierke, set out to see whether they could be understood, which meant first of all trying to understand where they came from.

## Corporation sole

Making sense of the idea of the corporation sole meant dealing with two distinct though related questions. First, it was necessary to discover what application the concept had, which involved understanding why it had come into being in the first place; but second, it was necessary to ask what forms of law the use of this concept had excluded. Law, in ruling some things in, is always ruling some things out (though it was by implication the English genius to stretch the terms of this proposition as far as they would go). Even English law could not conjure up terms of art that were infinitely adaptable. That the corporation sole was a term of art, contrived to meet a particular practical problem rather than deduced from a set of general juristic precepts, could not be doubted. Nor could it be doubted that the application of this contrivance was rather limited. But what was surprising was how much, nonetheless, was ruled in, and how much ruled out.

The origins of the corporation sole Maitland traced to a particular era and a particular problem. The era was the sixteenth century, and coincides with what Maitland calls 'a disintegrating process . . . within the ecclesiastical groups',<sup>12</sup> when enduring corporate entities (corporations 'aggregate', which were, notwithstanding the misleading terminology, more than the sum of their parts) were fracturing under political, social and legal pressure. However, the particular problem was not one of groups but of individuals; or rather, it was a problem of one individual, the parish parson, and of one thing, the parish church. Was this thing, a church, plausibly either the subject or the object of property rights? The second question – of objectivity – was the more pressing one, as it concerned something that was unavoidable as a cause of legal dispute, namely 'an exploitable and enjoyable mass of wealth'.<sup>13</sup> But it could not be addressed without considering the other question, and the possibility that the ownership of this wealth does not attach to any named individuals but to the

<sup>12</sup> See below, 'Corporation sole', p. 9.

<sup>13</sup> See below, 'Corporation sole', p. 9.

---

*Editors' introduction*

---

church itself. The law could probably have coped with this outcome, but the named individuals involved, including not only the parson but also the patron who nominates him and the bishop who appoints him, could not. It placed exploitation and enjoyment at too great a remove. Instead, an idea that had been creeping towards the light during the fifteenth century was finally pressed into service, and the parson was deemed the owner, not in his own right, but as a kind of corporation, called a 'corporation sole'.

What this meant, in practice, was that the parson could enjoy and exploit what wealth there was but could not alienate it. But what it meant in theory was that the church belonged to something that was both more than the parson but somewhat less than a true corporation. That it was more than the parson was shown by the fact that full ownership, to do with as he pleased, did not belong to any one parson at any given time; that it was less than a corporation was shown by the fact that when the parson died, ownership did not reside in anybody or anything else, but went into abeyance.<sup>14</sup> Essentially, the corporation sole was a negative idea. It placed ultimate ownership beyond anyone. It was a 'subjectless right, a fee simple in the clouds'.<sup>15</sup> It was, in short, an absurdity, which served the practical purpose of many absurdities by standing in for an answer to a question for which no satisfactory answer was forthcoming. The image Maitland chose to describe what this entailed was an organic one: the corporation sole, he wrote, was a 'juristic abortion',<sup>16</sup> something brought to life only to have all life snuffed out from it, because it was not convenient to allow it, as must be allowed all true corporations, a life of its own.

Why, though, should absurdity matter, if convenience was served? Parsons, though numerous, were not the most important persons in the realm, and parish churches, though valuable, were not priceless in legal or any other terms. Yet it mattered because, even in the man-made environment of law, life is precious, and energies are limited, and one life, even un-lived, is not simply transformable into another. More prosaically,

<sup>14</sup> It is, as Maitland insisted, one of the characteristics of all 'true' corporations that they endure as legal entities even when their 'heads', or 'members', or both, cease to exist; it is also characteristic of such bodies that their heads or members can transact with them, that is, that there is something distinct from both head and members for them to transact with. Neither was true of the corporation sole, which dissolved when detached from its only member, and whose only member could not transact with it, being at any given moment identifiable with it, such that the parson would be transacting with himself.

<sup>15</sup> See below, 'Corporation sole', p. 9.

<sup>16</sup> See below, 'Corporation sole', p. 9.

*Editors' introduction*

the idea of the corporation sole is 'prejudicial', and prejudicial to the idea of corporations as fictions in particular. Maitland was careful not to implicate himself too deeply in the great German controversy that set up 'realism' in permanent opposition to the idea of the *persona ficta*, and argued for group personality in broadly ontological terms ('as to philosophy', Maitland wrote, 'that is no affair of mine'<sup>17</sup>).<sup>18</sup> But he was conscious that the idea of the corporation sole gave legal fictions a bad name. If corporations were fictitious persons they were at least fictions we should take seriously, or, as Maitland himself put it, 'fictions we needs must feign'.<sup>19</sup> But the corporation sole was a frivolous idea, which implied that the personification of things other than natural persons was somehow a less than serious matter. It was not so much that absurdity bred absurdity, but that it accustoms us to absurdity, and all that that entails. Finally, however, the idea of the corporation sole was serious because it encouraged something less than seriousness about another office than parson. Although the class of corporations sole was slow to spread ('[which] seems to me', Maitland wrote, 'some proof that the idea was sterile and unprofitable'),<sup>20</sup> it was found serviceable by lawyers in describing at least one other person, or type of person: the Crown.

To think of the Crown as a corporation sole, whose personality is neither equivalent to the actual person of the king nor detachable from it, is, Maitland says, 'clumsy'.<sup>21</sup> It is in some ways less clumsy than the use of the concept in application to a parson. The central difficulty, that of 'abeyance' when one holder of the office dies, is unlikely to arise in this case: when a parson dies there may be some delay before another is appointed, but when a king dies there is considerable incentive to allow no delay, whatever the legal niceties (hence: 'The King is dead; long live the King'). Nor is it necessarily more clumsy than other, more famous doctrines: it is no more ridiculous to make two persons of one body than it is to make two bodies of one person.<sup>22</sup> But where it is clumsy, it is, Maitland suggests, seriously inconvenient. It makes a 'mess' of the idea of the civil service (by allowing it to be confused with 'personal' service of the

<sup>17</sup> See below, 'Moral personality and legal personality', p. 62.

<sup>18</sup> This was the doctrine of which, as Maitland said, 'Dr Otto Gierke, of Berlin, has been . . . principal upholder' (see below, 'Corporation sole', p. 10, n. 4).

<sup>19</sup> See below, 'Moral personality and legal personality', p. 62.

<sup>20</sup> See below, 'Crown as corporation', p. 32.

<sup>21</sup> See below, 'Corporation sole', p. 9.

<sup>22</sup> See Ernst H. Kantorowicz, *The King's two bodies: a study in medieval political theology* (Princeton: Princeton University Press, 1957).

---

*Editors' introduction*

---

king); it cannot cope with the idea of a national debt (whose security is not aided by the suggestion that the money might be owed by the king); it even introduces confusion into the postal service (by encouraging the view that the Postmaster-General is somehow freeholder of countless post offices). It also gets things out of proportion, for just as it implies that a single man is owner of what rightly belongs to the state, so it also suggests that affairs of state encompass personal pastimes ('it is hard to defend the use of the word unless the Crown is to give garden parties').<sup>23</sup> The problem with absurd legal constructions is not simply that serious concerns may be trivialised, but also that trivial matters may be taken too seriously, which is just as time-consuming. 'So long as the State is not seen to be a person [in its own right], we must either make an unwarrantably free use of the King's name, or we must be forever stopping holes through which a criminal might glide.'<sup>24</sup>

There is nothing, to Maitland's eyes, particularly sinister about this, though the Crown first came to be identified as a corporation sole at a sinister time, during the reign of Henry VIII. In most important respects, as touching on the fundamental questions of politics, the British state had long been afforded its own identity as a corporation aggregate, distinct from the persons of any individuals who might make it up at any given moment. The British state had a secure national debt, which had been owed for some time by the British 'Publick', and the British public had been relatively secure since the end of the seventeenth century in the rights that it had taken from the Crown. The problems, such as they were, were problems of convenience and not of freedom. But precisely because the idea of the Crown as a corporation sole remained tied up in the domain of private law, it illustrated the gap that existed in England between legal and political conceptions of the state. For lawyers, the Crown was a kind of stopgap, and it served to block off any broader understanding of the relationship between legal questions of ownership and political questions of right. That there was such a relation was obvious, since the ability of the state to protect itself and its people's freedoms depended on their ability as a public to own what the state owed. But the fact that the Crown was still understood as a corporation sole implied that there was some distinction to be drawn between matters of basic political principle and mere questions of law. This was unsustainable. It was not simply that it was not clear on what

<sup>23</sup> See below, 'Crown as corporation', p. 41, n. 31.

<sup>24</sup> See below, 'Crown as corporation', p. 32.



Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

basis this distinction could conceivably rest – it was impossible, after all, to argue that the corporation sole was useful in matters of law, since it had shown itself to be so singularly useless. It was also far from clear where to draw the line. Maitland devotes considerable attention to the problems that the British Crown was experiencing at the turn of the twentieth century in understanding its relationship with its own colonies. That they were its ‘own’, and had begun their life as pieces of property, meant that there was a legal argument for seeing them still as the property of the Crown, which was itself seen still as the corporate personality of Her Majesty the Queen. This was convoluted, unworkable and anachronistic. It was also ironic. It meant that in what was obviously a political relationship the supposedly dominant partner was still conceived as an essentially private entity, and therefore restricted by the conventions of private law; while the colony itself, which had begun life as a chartered corporation created by the Crown, was able to use that identity as a corporation aggregate to generate a distinct identity for itself as ‘“one body corporate and politic in fact and name”’.<sup>25</sup> The thing that was owned was better placed than the thing that supposedly owned it to make the connection between corporate and political personality. This was embarrassing.

And all this, as Maitland puts it, because English law had allowed ‘the foolish parson [to] lead it astray’.<sup>26</sup> But English law would not have been so easy to lead astray if so much of the domain of public law had not remained uncharted territory. In mapping some of it out, Maitland suggests the obvious solution to the incongruous position of the Crown as a kind of glorified parish priest, and that is to follow the example of the colonies and allow that in all matters, public and private, the British state is best understood as a corporate body in its own right. It might be painful, but it would not be dangerous. ‘There is nothing in this idea that is incompatible with hereditary kingship. “The king and his subjects together compose the corporation, and he is incorporated with them and they with him, and he is the head and they are the members.”’<sup>27</sup> It might also be liberating, at least with regard to time spent in the company of lawyers.<sup>28</sup> However, English law does not make it so simple. If it were just a straight choice between corporate bodiliness and a fragmentary individualism, the ‘true’

<sup>25</sup> See below, ‘Crown as corporation’, p. 32.

<sup>26</sup> See below, ‘Crown as corporation’, p. 32.

<sup>27</sup> See below, ‘Crown as corporation’, p. 32.

<sup>28</sup> ‘This is the language of statesmanship, of the statute book, of daily life. But then comes the lawyer with theories in his head . . .’ (See below, ‘Crown as corporation’, p. 32.)

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

corporation aggregate has all the advantages over 'this mere ghost of a fiction',<sup>29</sup> the corporation sole. But English law offers another option, which has advantages of its own: bodiliness without incorporation, the 'unincorporate body'. To make sense of this option, and the possibility that it might be the appropriate vehicle for unifying the legal and political identity of the state, Maitland found it necessary to enter another part of the English legal terrain, the swampy regions of the law of trusts.

### Unincorporate body

The story of the second great anomaly of English law as it relates to the life of groups is in some ways the opposite of the first. Whereas the corporation sole was a narrow and useless idea that somehow found its way to encompass the grandest political institution of all, the unincorporate body was a broad and extremely useful idea that could encompass everything (the Stock Exchange, the Catholic Church, the Jockey Club, charitable activities, family life, business ventures, trades unions, government agencies) except, finally, the state itself. Both ideas had their origins in highly contingent circumstances, and just as the corporation sole needed lawyers to kill it, so the unincorporate body needed lawyers, with their 'wonderful conjuring tricks',<sup>30</sup> to bring it to life.<sup>31</sup> But once alive, this new way of thinking about group identity soon 'found the line of least resistance'<sup>32</sup> and started to grow. And the more successfully it grew, the less pressing was the need to explain exactly how this new conception related to the existing thickets of law through which it was pushing. The idea of the 'unincorporate body' exemplified the English assumption that what works must make sense, rather than that something must make sense if it is to work.

In seeking to make sense of how this idea in fact works, Maitland was also in some ways attempting the opposite of what he sought to achieve in his introduction to Gierke. There he was trying to make German conceptions

<sup>29</sup> See below, 'Corporation sole', p. 28.

<sup>30</sup> Gierke, *Political theories of the Middle Age*, p. xxvii.

<sup>31</sup> Though the gift of life went both ways: 'If the Court of Chancery saved the Trust, the Trust saved the Court of Chancery.' (See below, 'Trust and corporation', p. 84.) Maitland was also very aware that one of the reasons lawyers were so eager to utilise this device was that the Inns of Court to which they belonged could, and did, organise themselves around the idea of 'unincorporate bodiliness', that is, trusts allowed them to have an identity which was enduring but which did not depend on incorporation by the Crown.

<sup>32</sup> See below, 'Trust and corporation', p. 75.

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

of the group intelligible to English readers; here he is trying to make English law intelligible to Germans.<sup>33</sup> “I do not understand your trust,” writes a ‘very learned German’ of Maitland’s acquaintance.<sup>34</sup> The problem is that the ownership conferred by the law of trusts does not seem to belong either to persons or to things, and German legal theory recognises ownership of no other kind. Yet this is precisely what allows non-persons such as ‘unincorporate bodies’ to be the beneficiaries of trusteeship. Ownership does not belong to persons because trusteeship allows ownership in ‘strict law’ to rest with one set of persons (the trustees) and ownership in ‘equity’ to rest with another group entirely (the beneficiaries);<sup>35</sup> it does not belong to things because trusteeship allows the things owned to vary and to be variously invested without the rights of ownership having to alter (hence the trust ‘fund’). Instead, the law of trust rests on the idea of ‘good conscience’. If men can be trusted to act as owners in law for those who have an equitable claim on the thing owned, and if those with whom they deal can be trusted to see the matter in the same light,<sup>36</sup> then it is possible to provide an enduring legal identity for all manner of people and things that do not otherwise fit into the typology of *ius in personam* and *ius in rem*. Indeed, as it turned out, almost anyone or anything could be the beneficiary of a trust, and it became the vehicle of what Maitland calls ‘social experimentation’ as lawyers sought to use this branch of law

<sup>33</sup> The essay translated here as ‘Trust and corporation’ was originally published in German in *Grünhut’s Zeitschrift für das Privat- und öffentliche Recht* Bd. xxxii.

<sup>34</sup> See below, ‘Unincorporate body’, p. 53.

<sup>35</sup> These may be named persons or individuals – and originally would have been such – but the law of trusts was extended as it was applied to include ‘purposes’ as substitutes for such persons, which proved particularly useful in setting up charities under the protections of trusteeship.

<sup>36</sup> This, though, created a problem when trustees had dealings with corporations, who did not, as ‘fictions’, have consciences at all, whether good or bad (it was indeed precisely to avoid the imputation of ‘consciencelessness’ in this sense that many groups chose to organise themselves as around the law of trusts, so that they should not be seen to be dependent on the state for such moral life as they had). In the end, during the second half of the nineteenth century, as trustees had increasingly to deal with the rapidly growing number of corporations that had been created in the aftermath of the 1862 Companies Act, it was decided for the purposes of the trust law to allow ‘consciences’ to such corporations. Maitland discusses this curious and complicated process in ‘The unincorporate body’. There he implies that the story is essentially a progressive one, and evidence of a gradual emancipation from that ‘speculative theory of corporations to which we do lip-service’ i.e. the theory of the *persona ficta*. (See below, ‘Unincorporate body’, p. xix.) But another way of seeing it is as an essentially circular story, as a body of law that originated to allow some escape from the restrictions of this ‘speculative’ theory of fictitious persons is required in the end to fall back on fictions of its own.

*Editors' introduction*

to protect and preserve all manner of social forms,<sup>37</sup> including all manner of groups that were unable or unwilling to be seen as corporations. 'The trust deed might be long; the lawyer's bill might be longer; new trustees would be wanted from time to time; and now and again an awkward obstacle would require ingenious evasion; but the organised group could live and prosper, and be all the more autonomous because it fell under no solemn legal rubric.'<sup>38</sup>

The advantages of this way of organising group life were plain enough. It meant that it was possible for groups to arrange their own internal affairs in any way that they chose, so long as what they chose could be agreed on and set down in a deed of trust, and suitable persons could be found to act as trustees. An examination of the organisational principles governing religious, political and other bodies that existed in unincorporate form in England did indeed reveal 'almost every conceivable type of organisation from centralised and absolute monarchy to decentralised democracy and the autonomy of the independent congregation'.<sup>39</sup> In contrast to the *persona ficta* of classic corporation theory, whose identity as given by the state is also decided upon by the state, the unincorporate body could choose its form without having to rely upon permission from above. Indeed, having come into being, it could also evolve, 'slowly and silently chang[ing] its shape many times before it is compelled to explain its constitution to a public tribunal'.<sup>40</sup> There was in this system of self-government born of self-fashioning an inbuilt reticence about taking the affairs of the group before the courts.<sup>41</sup> In a way, the English law of trusts bypassed the perennial dilemma of political pluralism – how to protect social entities against the state without encroaching on the state, and thereby making them more than social entities – by organising the life of groups around a principle which in each case made sense only in its own, and not in more broadly political, terms. The state had chartered corporations during its early life because it had recognised in corporations something of itself,

<sup>37</sup> Among them, as Maitland describes it, the ability of a woman to own property after marriage. 'Some trustees are to be owners. We are only going to speak of duties. What is to prevent us, if we use words enough, from binding them to pay the income of a fund into the very hands of the wife and to take her written receipt for it? But the wedge was in, and could be driven home.' (See below, 'Trust and corporation', p. 75.)

<sup>38</sup> Gierke, *Political theories of the Middle Age*, p. xxxi.

<sup>39</sup> See below, 'Trust and corporation', p. 75.

<sup>40</sup> See below, 'Trust and corporation', p. 75.

<sup>41</sup> 'Disputes there will be; but the disputants will be very unwilling to call in the policeman.' (See below, 'Trust and corporation', p. 75.)

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

and had been correspondingly fearful;<sup>42</sup> but it had allowed the trust to develop unhindered because each trust was *sui generis*, and in that sense no threat – ‘though the usual trusts might fall under a few great headings, still all the details (which had to be punctually observed) were to be found in lengthy documents; and a large liberty of constructing unusual trusts was both conceded in law and exercised in fact’.<sup>43</sup> The plurality of political forms of unincorporate bodies that were themselves sometimes political, sometimes religious, and sometimes something else entirely, testified to the success of the experiment.

However, Maitland was aware that ‘all this has its dark side’.<sup>44</sup> The unincorporate body was the product of privilege, though it stood in contrast to those chartered corporations whose *privilegia* of self-government were bestowed directly by the state. Trusts existed behind a wall ‘that was erected in the interests of the richest and most powerful class of Englishmen’,<sup>45</sup> and though those interests included a desire to bestow charity as well as to hold money and goods within the family, both charitable and family trusts were ways of retaining control over wealth just as they were means of redistributing it. It was also true that the law of trusts, in treating each unincorporate body on its own terms, thereby made no categorical distinctions between the purposes for which such bodies might be established. There was nothing to distinguish the Catholic Church in this sense from a football club, apart from whatever was distinct about their particular deeds of trust. The implications ran both ways. On the one hand, something grand and serious and historic, with compelling claims over its individual members, was seemingly being trivialised and ‘privatised’; on the other, that same body was being made to feel comfortable, perhaps ‘too comfortable’ in Maitland’s words,<sup>46</sup> about what took place behind the wall of the trust, away from the glare of the state. Nor did the contrast between unincorporate and corporate bodies run only one way. Part of

<sup>42</sup> In Hobbes’s classic formulation: ‘Another infirmity of a Common-wealth, is . . . the great number of Corporations, which are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man’ (T. Hobbes, *Leviathan*, ed. R. Tuck (Cambridge: Cambridge University Press, [1651] 1996), p. 230). In his introduction to Gierke, Maitland has an imaginary German commentator on English *Korporationslehre* remark: ‘“That great ‘trust’ concept of yours stood you in good stead when the days were evil: when your Hobbes, for example, was instituting an unsavoury comparison between corporations and *ascarides* [worms]”’ (Gierke, *Political theories of the Middle Age*, p. xxxiii).

<sup>43</sup> See below, ‘Trust and corporation’, p. 75.

<sup>44</sup> See below, ‘Trust and corporation’, p. 75.

<sup>45</sup> See below, ‘Trust and corporation’, p. 75.

<sup>46</sup> See below, ‘Trust and corporation’, p. 75.

---

*Editors' introduction*

---

Maitland's purpose in writing his account of the English law of trusts was to explain the background to a notorious recent case relating to one prominent class of unincorporate bodies, the trade union.<sup>47</sup> Corporations were liable for the actions of their agents, but unincorporate bodies, because in law technically the property of the trustees, were not. In 1900 the Amalgamated Society of Railway Servants (ASRS) was sued by the Taff Vale railway company for damages following a strike. Because the ASRS was an unincorporate body, the courts, up to the Court of Appeal, held that the agents were personally liable and that the funds of the union were therefore not to be touched. But in 1901 the House of Lords overturned this verdict and ordered the ASRS to pay more than £42,000 in damages. This was highly inconvenient for the union, and not in itself much of an advertisement for the liberating effects of incorporation. But it involved a recognition that questions of identity cannot in the end be detached from questions of responsibility, and groups, if they are to have a life of their own, must be willing to be held responsible for what their agents do.

Finally, there was the matter of the state itself. The history of the English law of trusts represents an avoidance of and not an answer to the question of whether groups can be organised on principles wholly distinct from the organisation of the state. It remained to be asked why, if clubs and churches, unions and even organs of local government could live and prosper behind the wall of trusteeship, the state should not do likewise. Maitland does not really answer this question. He acknowledges that the Crown can be understood as both the beneficiary of trusts and also as a trustee acting on behalf of other beneficiaries, among them 'the Publick'. But though it does not much matter for these purposes whether the Crown is a corporation sole – it is the whole point of the law of trusts that neither trustee nor beneficiary needs be compromised by the law of corporations – the relationship of trusteeship cannot serve as a general guide to the political identity of the public or of anyone else. This is because it cannot serve as a general guide to anything – trusts are, by their nature, nothing more than the documents in which they are set down. In the absence of such documents, the trust that exists between political bodies is, as Maitland admits, nothing more than 'a metaphor'.<sup>48</sup> What he does not go on to say is that a metaphorical trust is, really, no trust at all.

<sup>47</sup> The essay 'The unincorporate body' was written 'to assign to this Taff Vale case its place in a long story' (see below, 'The unincorporate body', p. 52).

<sup>48</sup> See below, 'Trust and corporation', p. 75.

*Editors' introduction*

State, trust and corporation

Founding the state on a metaphorical trust is like founding the state on a hypothetical contract. Both are forms of relation that depend upon the terms of the specific relation established in each case. To ask whether the state makes sense as a trust is a purely speculative question, since trusts only make sense when they work in law, and always make sense when they work in law. The question is therefore whether the state is a trust in law, and the answer is that it was only haphazardly and infrequently one, and then only when the state was identified with the Crown. It was perhaps possible to find themes and strands which connect the various instances of the Crown's status as trustee or beneficiary in various cases, but, as Maitland says, 'to classify trusts is like classifying contracts'.<sup>49</sup> Seeking to abstract from actual trusts or contracts to an idea of trust or contract is a speculative enterprise of the kind that English political philosophers specialised in: speculation detached rather than drawn from the workings of the law itself, thereby ignoring 'certain peculiarities of the legal system in which they live'.<sup>50</sup> From his earliest work in the history of ideas Maitland had been deeply sceptical of the possibility of deriving a moral basis for the state from the legal idea of contract, not least because 'for centuries the law has abhorred a perpetuity'.<sup>51</sup> The point about contracts is that they are specific to time and place, and the same is true of trusts: the law of trusteeship proved almost limitlessly flexible except in one respect – trusts cannot be established by law in perpetuity. These are not, and cannot be, timeless ideals of political philosophy.

It is, however, a separate question to ask what difference it makes to think as though they were. 'We may remember', Maitland writes 'that the State did not fall to pieces when philosophers and jurists declared it was the outcome of a contract'.<sup>52</sup> To hypothesise or to poeticise legal relationships is not necessarily dangerous, if that is all you are doing. It is also revealing of what you wish you were doing, and Maitland suggests that 'to a student of *Staatswissenschaft* legal metaphors should be of great interest, especially when they have become the commonplaces of political debate'.<sup>53</sup> Nevertheless, the result is to close the state off in a speculative

<sup>49</sup> See below, 'Trust and corporation', p. 75.

<sup>50</sup> See below, 'Moral personality and legal personality', p. 62.

<sup>51</sup> Maitland, *Collected papers*, vol. 1, p. 65.

<sup>52</sup> See below, 'Trust and corporation', p. 75.

<sup>53</sup> See below, 'Trust and corporation', p. 75.

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

realm of its own, in which lip-service is paid to the language of law but the connection with the life of the law, or any other kind of life, is broken. There are attractions to this: it takes a lot of the heat out of political theory, and just as it spares political philosophers too much attention to the detailed consequences of their theories, so it spares groups within the state from the detailed attentions of the political philosophers.<sup>54</sup> But it is not a sustainable theory because it is not a working theory, and if the theory is required to do any real work there is the chance it will either break down or start to do some real damage.

In the only essay of those collected in this volume written for an avowedly non-specialist audience (the members of Newnham College, Cambridge), Maitland goes further than in any of the others in setting out what he thinks a sustainable theory might be. Still, he does not go very far. The national contrast he draws in 'Moral personality and legal personality' is not with Germany, but with France – 'a country where people take their legal theories seriously',<sup>55</sup> and where groups had suffered at the hands of an excessively rigid and technical theory of incorporation. In this respect, England had all the advantages. But because in France the theories had been so seriously applied, it was clearer there what was missing, whereas, as he puts it elsewhere in relation to England, 'the inadequacy of our theories was seldom brought to the light of day'.<sup>56</sup> What was missing was an acknowledgment that many groups were 'right-and-duty-bearing units' regardless of whether they were so recognised by the state, and therefore likely to suffer if the state failed to recognise them. Furthermore, if this was true of groups within the state, then it must be true of the state as well, which bore greater rights and duties than most. Maitland calls these 'moral' facts though he professes to be unconcerned as to their broader philosophical status, whether as truths or merely necessary fictions. That is a question for philosophers. But, Maitland suggests, if these groups have a life of their own then lawyers at least must recognise it, which means recognising that the life of the law cannot be divorced altogether from philosophical speculation, just as philosophical speculation is mere speculation when divorced from the life of the law. *Staatslehre* and

<sup>54</sup> Hobbes is an exception to this (see Hobbes, *Leviathan*, chapter XXII, 'Of SYSTEMES Subject, Political and Private'). But it was one of the consistent themes of Maitland's writings that the theories of Thomas Hobbes had never been taken all that seriously in England.

<sup>55</sup> See below, 'Moral personality and legal personality', p. 62.

<sup>56</sup> See below, 'Trust and corporation', p. 75.



Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

*Korporationslehre* cannot exist apart from each other, because they inhabit the same world.

## Significance

Despite the reticence of some of Maitland's conclusions and the specialist nature of the historical accounts on which those conclusions were based, the writing that contained them proved enormously influential, albeit for a relatively short period of time. A group of English political theorists, who came collectively to be known as the political pluralists, found in Maitland, and via Maitland in Gierke, support for the case they wished to make against the excessive claims that were being made on behalf of the state in the early years of the last century. Both the excessive individualism of conventional juristic theory in England – exemplified by the theory of sovereignty associated with John Austin – and the excessive statism of more recent political philosophy – identified by the turn of the century with Bernard Bosanquet's *The philosophical theory of the State* (1899) – were challenged by Maitland's account of the complex interrelationship between states and other groups. Many of the pluralists were, like Maitland, historians (they included J. N. Figgis, Ernest Barker, G. D. H. Cole and Harold Laski) but they were not legal historians; nor did they for the most part share his scruples about straying from the world of history into the more speculative regions of political philosophy. As a result, many of the subtleties of Maitland's account were lost in the assault on the overmighty state, and political pluralism became, in its various forms, a somewhat wishful and excessively 'moralised' doctrine. It also became increasingly detached from the practical political world which it sought both to describe and reform, and in the aftermath of the First World War it was repudiated by many of its adherents, who found it unable to cope with the new realities of political life. Certainly political pluralism was a philosophy which shared little of Maitland's fascination with the interconnectedness of legal practicalities and political understanding, and in some ways exemplified what he called 'our specifically English addiction to ethics'.<sup>57</sup>

Of course, because Maitland's work is historical, it has also been subject to revision and updating by other historians working from other sources or reworking the sources that Maitland used, although in contrast to some

<sup>57</sup> See below, 'Moral personality and legal personality', p. 62.

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

of Maitland's other writing, there has been little sustained criticism of the historical substance of these particular essays.<sup>58</sup> It is true, however, that many of the legal problems Maitland writes about were soon to become things of the past. Already at the time he was writing, as the essays suggest, the pressures being placed upon some of the anomalies of English law could not be sustained, and practical solutions were being found which served to rationalise and harmonise the law as it related to corporate and unincorporate bodies. This process continued throughout the twentieth century, so that it would be hard to say now that any great political or philosophical principles hang on the distinction between the law of trusts and the law of corporations, though very many practical questions of course still depend on it. The idea of the 'corporation sole' no longer impedes our understanding of the legal responsibilities of the Crown, because those responsibilities have long since been parcelled out among various government agencies, each of which is subject to a vast and increasingly complex range of legal provisions. The law, in other words, has moved on and, in adapting itself to the massively complex requirements of modern corporate life, has become too complex to be easily reconciled with speculative theories at all.

Yet despite their apparent datedness in these two respects, Maitland's essays are still relevant to our understanding of the state and its relation to the groups that exist alongside it. Very many of the themes he discusses have a clear and continuing resonance. Almost everything Maitland alludes to in these highly allusive essays<sup>59</sup> has some connection with current political concerns. He writes about the growth of the giant American corporation under the protection of the law of trusts (in this respect, as in that of the political identity of the former colonies, America seems to point the way to the future in these essays); he writes about the inadequacy of abstract theories of sovereignty; he writes about the dilemmas of colonialism, and federalism, and empire; he describes the tensions between English

<sup>58</sup> Some of the reservations that legal historians have come to have about Maitland's other work are alluded to in the address given by S. F. C. Milsom to mark the unveiling of a memorial tablet for Maitland in Westminster Abbey in 2001 (see S. F. C. Milsom, 'Maitland', *Cambridge Law Journal* (60, 2001), 265–70). This ongoing critical engagement stands in contrast to the treatment of the essays Maitland wrote on early modern and modern history of state, trust and corporation. As George Garnett notes of the essays on the Crown republished here, historians have 'largely ignored [them] since they were written' (G. Garnett, 'The origins of the Crown', in *The history of English law: centenary essays on Pollock and Maitland*, ed. J. Hudson (Oxford, 1996) p. 172).

<sup>59</sup> 'Undoubtedly over-allusive, not from ostentation but from absorption', as H. A. L. Fisher puts it (Fisher, *Frederick William Maitland*, p. 106).

Cambridge University Press  
 0521820103 - State, Trust and Corporation  
 F. W. Maitland  
 Frontmatter  
[More information](#)

---

*Editors' introduction*

---

and European systems of law, and the possible coming together of these; he raises the problems of national government, and local government, and self-government; he describes some of the conditions of social diversity and religious toleration; he isolates many of the difficulties of what would now be called 'corporate governance'; he identifies the gap between legal and moral notions of trust; he maps the relation between the public and the private sphere. Almost none of this is explicit, but all of it is there.

However, the deepest resonance of Maitland's writings arises not from the issues he addresses but from the way he addresses them. This is partly, but not wholly, a question of style. There is, underlying everything that he writes, a historian's sense of irony, and the certainty that nothing plays itself out historically in exactly the fashion that was intended. Notwithstanding various attempts by the pluralists and others to claim Maitland as the exponent of a particular political philosophical creed,<sup>60</sup> he is a dismantler of creeds and a chronicler of the relationship between contingency and necessity. Rather than a doctrine of 'real group personality' or anything else, Maitland presents us with a series of choices, and not simple choices between truth and fiction, but choices between different kinds of truth or different kinds of fiction. There is nothing relativist about this, because behind it all lies a clear conception that what lasts legally and politically is what works, and what works is not just a question of opinion. But what works is not always straightforward, and things can work in different ways. There are convenient legal theories that do their work now but store up trouble for the future, just as there are inconvenient theories that point the way forward towards something better. It is a luxury to live under a legal system that does not need to cohere, but luxury is not the same as security. Likewise, to allow a gap to open up between political and legal conceptions of the state is not simply a mark of failure but also evidence of a kind of success. There is something to be said for what Maitland calls 'muddling along' with 'sound instincts . . . towards convenient conclusions'.<sup>61</sup> But with it comes a narrowing of horizons, and a corresponding uncertainty about what exists over the horizon, except for the sky. What he describes therefore is not a solution or a doctrine but a predicament – the predicament of group life, or of living under laws. The account he gives of that predicament is essentially historical, and it is highly contingent: the subjects of these essays are determined by historical circumstance,

<sup>60</sup> For example, 'Moral personality and legal personality' is included in R. Scruton (ed.), *Conservative texts* (Basingstoke: Macmillan, 1991).

<sup>61</sup> See below, 'Moral personality and legal personality', p. 62.

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

---

*Editors' introduction*

---

and have no universal application. But just because the predicament is historical, and just because these essays are essays in the history of legal and political thought, they show us what the history of legal and political thought contributes to the understanding of our predicament.<sup>62</sup>

<sup>62</sup> Cf. Quentin Skinner in 'A reply to my critics': 'Suppose we have the patience to go back to the start of our own history and find out in detail how it developed. This will not only enable us to illuminate the changing applications of some of our key concepts; it will also enable us to uncover the points at which they may have become confused or misunderstood in a way that marked their subsequent history. And if we can do this . . . we can hope not merely to illuminate but to dissolve some of our current philosophical perplexities' (J. Tully (ed.), *Meaning and context: Quentin Skinner and his critics* (Cambridge: Polity Press, 1988), p. 288). To dissolve philosophical perplexities is not the same as solving the problems that produced them.

## Note on the text

The essays reproduced here are taken from the 1911 edition of Maitland's *Collected papers* published by Cambridge University Press. We have tried to remain as faithful as possible to this edition, and have included Maitland's footnotes as they appear in the original, with their idiosyncratic and not always consistent scheme of referencing. (Some suggestions for how to interpret these references are given in the bibliographical note that follows.) However, we have corrected a small number of typographical errors that appear in the 1911 edition, updated some of the spelling and punctuation, and removed footnotes that were added by the editor of the 1911 edition, H. A. L. Fisher.

We have reproduced the essays in the order of their appearance in the 1911 edition. They do not need to be read in this order, and readers wanting to start with the most accessible should begin with 'Moral personality and legal personality'. However, 'The corporation sole' and 'The Crown as corporation' are essentially two parts of a single essay and need to be read in sequence. With the exception of 'Moral personality and legal personality', these essays were written for a fairly specialist audience of lawyers and legal historians, and even 'Moral personality and legal personality' makes some fairly heavy demands for a talk originally given to a largely undergraduate audience. (The *Newnham College Letter* of 1904 contains the following report on the occasion: 'The Henry Sidgwick Memorial Lecture was delivered this year by Professor Maitland on October 22nd. The subject was *Moral and Legal Personality* and Professor Maitland gave a very brilliant and interesting lecture, though most of the very considerable audience found the task of following him in this difficult and intricate subject a severe intellectual exercise.') In

Cambridge University Press  
0521820103 - State, Trust and Corporation  
F. W. Maitland  
Frontmatter  
[More information](#)

---

*Note on the text*

---

the case of ‘Trust and corporation’ Maitland’s audience was originally German, and the essay reflects this in its allusions and its extensive use of German terms. All the essays as they appeared in 1911 contain a number of words, phrases and longer passages of text in German, Latin, French and Anglo-Norman left untranslated by Maitland. Where possible, we have given English versions of these. In the case of longer passages, we have replaced the original with a direct translation. For shorter phrases and single words, where there is a reasonably straightforward English equivalent we have given this alongside the original. Words and phrases for which there is no direct translation (particularly terms of German and Roman law) are included as entries in their own right in the glossary of technical terms.

Much of the appeal (and some of the frustration) of Maitland’s essays lies in their style, which is allusive, ironic and knowing. We have tried not to interrupt this too much, while offering as much help as we can to the reader who may not be familiar with the things Maitland is alluding to. In the case of the translation of foreign words and phrases, it has sometimes been necessary to use the English and original terms interchangeably. This is particularly true of ‘Trust and corporation’, in which Maitland often uses a German term in place of the English to make clear the particular areas and forms of law he is writing about. We have retained these German terms and provided translations at their first appearance in the text. But for stylistic reasons we have not always given a translation for every subsequent appearance of the term, particularly when it appears often in the same relatively brief passage of the text. We have also sought to do justice to one of Maitland’s most important themes: the lexical translatability but conceptual and historical incommensurability of German and English legal terms. For example, *Zweckvermögen*, which we have translated as ‘special purpose fund’, is sometimes used by Maitland to refer to the formal character that a certain type of trust would have under German law, but which it cannot have precisely because it is not under German law. In other words, there are some terms in ‘Trust and corporation’ for which it is possible to provide an English equivalent but which Maitland wishes to imply are effectively untranslatable.

Our translations are included in the text in square brackets. The original text also includes a small number of translations by Maitland, which appear either within round brackets or in unbracketed quotation marks.