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Property Law and Collective Self-Government

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Article abstract

The property interests of Indigenous communities exhibit distinctive patterns that recur across different countries and in relation to widely differing Indigenous cultures, including in the United States, Canada, Australia, and New Zealand. The principal recurring patterns include alienation restraints, group governance powers as an incident of land tenure, distinctive rules of co-ownership favouring collective governance, and unique collective and individual estates in land. This paper argues that these distinctive doctrinal features can be explained in large part by the functional challenges associated with using property interests in land as a basis for collective self-government. One of the central challenges relates to differences in the optimal scale of various uses that may be pursued on a land base. While uses like housing or farming might best be pursued using individual land titles over relatively small parcels, the collective interest of a group in self-government could require an extensive, contiguous land base occupied by a critical mass of members. The use of land as a locus for a distinctive, self-governing culture is thus an activity that is optimally pursued on a larger scale than would be optimal for most other uses which may be pursued simultaneously. The tension this creates, emerging out of the attempt to manage what the author calls a “cultural semicommons,” is mediated by a distinctive set of institutions. Understanding this functional basis for Indigenous land tenure in common law countries is an important starting point in considering proposals for reform.

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PROPERTY LAW AND COLLECTIVE SELF-GOVERNMENT

*Malcolm Lavoie**

The property interests of Indigenous communities exhibit distinctive patterns that recur across different countries and in relation to widely differing Indigenous cultures, including in the United States, Canada, Australia, and New Zealand. The principal recurring patterns include alienation restraints, group governance powers as an incident of land tenure, distinctive rules of co-ownership favouring collective governance, and unique collective and individual estates in land. This paper argues that these distinctive doctrinal features can be explained in large part by the functional challenges associated with using property interests in land as a basis for collective self-government. One of the central challenges relates to differences in the optimal scale of various uses that may be pursued on a land base. While uses like housing or farming might best be pursued using individual land titles over relatively small parcels, the collective interest of a group in self-government could require an extensive, contiguous land base occupied by a critical mass of members. The use of land as a locus for a distinctive, self-governing culture is thus an activity that is optimally pursued on a larger scale than would be optimal for most other uses which may be pursued simultaneously. The tension this creates, emerging out of the attempt to manage what the author calls a "cultural semicommons," is mediated by a distinctive set of institutions. Understanding this functional basis for Indigenous land tenure in common law countries is an important starting point in considering proposals for reform.

Les intérêts de propriété des communautés autochtones présentent des modèles particuliers qui reviennent dans plusieurs pays et auprès de cultures autochtones très différentes, notamment aux États-Unis, au Canada, en Australie et en Nouvelle-Zélande. Les modèles qui reviennent le plus souvent incluent : des contraintes à l'aliénation, des pouvoirs de gouvernance de groupe découlant de régimes fonciers, des règles particulières de copropriété favorisant une gouvernance collective ainsi que des domaines fonciers collectifs et individuels uniques. Cet article suggère que ces aspects particuliers doctrinaux peuvent être expliqués en grande partie par les défis fonctionnels associés à l'usage des intérêts de propriété foncière comme base d'une auto-gouvernance collective. Un de ces défis centraux a trait aux variations des territoires optimaux selon les différents usages qui peuvent être faits d'un territoire. Bien que les utilisations telles que le logement ou l'agriculture puissent être poursuivies par des titres de propriété individuels sur des parcelles relativement petites, l'intérêt collective d'un groupe quant à l'autogouvernance pourrait requérir l'occupation par une masse critique de membres d'un territoire vaste et contigu. L'utilisation du territoire en tant que point central d'une culture distincte et s'autogouvernant est ainsi une activité qui se poursuit de façon optimale sur une plus large échelle qu'elle ne serait optimal pour la majorité des autres usages qui peuvent être poursuivis simultanément. Bien comprendre cette base fonctionnelle en ce qui a trait au mode de possession du territoire autochtone est un point de départ important lors de la considération de propositions de réformes.

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Introduction

Common law property systems are committed to certain basic principles: the categories of estates in land are closed,[1] the alienation of land interests cannot be unduly restrained,[2] and parties that find themselves in undivided co-ownership can unilaterally exit the arrangement.[3] Yet within common law countries, there are also specialized property regimes covering significant tracts of territory in which these and other seemingly foundational principles of property law do not apply. Most such regimes relate to the land interests of Indigenous groups.[4] These special regimes are based on settler-state statutes, common law Aboriginal rights and title, and in some cases, laws enacted pursuant to Indigenous self-government authority. They allow for unique interests held by Indigenous groups and their members that defy traditional estates in land. The alienation of both collective and individual interests is usually restrained in various ways. Collective governance powers are maintained by Indigenous groups over parcels held by individual members. And rules of co-ownership differ starkly from the common law, channeling parties towards collective governance regimes rather than individualization of title.

One standard explanation for these differences is that the Indigenous groups in question have unique commitments in relation to land, and the distinctive rules of property law that relate to Indigenous peoples reflect these commitments.[5] For Indigenous peoples, land is often not just an alienable commodity, but rather a source of spiritual and cultural meaning.[6]

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1 See *Keppell v Bailey* (1834), 2 My & K 17 at 1049, 39 ER 1042 (Ch) [*Keppell*]; Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at 56–57 [Ziff, *Property Law* 6th ed]; Thomas W Merrill & Henry E Smith, "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle" (2000) 110:1 Yale LJ 1 at 12–14.

2 See *Quia Emptores Terrarum 1290* (UK), 18 Edw 1, c 1; *Hood v Oglander* (1865), 34 Beav 513 (RC Eng) at 522, 55 ER 733; The Right Honourable Sir Robert Megarry & Sir William Wade, *The Law of Real Property*, 8th ed by Charles Harpum, Stuart Bridge & Martin Dixon (London: Sweet & Maxwell, 2012) at 67–68; Ziff, *Property Law* 6th ed, *supra* note 1 at 264–66.

3 See *In Re Wilks*, [1891] 3 Ch 59 at 61, 7 TLR 538 [*In Re Wilks*]; Megarry & Wade, *supra* note 2 at 513; Ziff, *Property Law* 6th ed, *supra* note 1 at 344–53.

4 See Part II, *below*, for further discussion on this topic.

5 This approach forms part of the reasoning of the Supreme Court of Canada in its leading Aboriginal title cases: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 1088–91, 153 DLR (4th) 193 [*Delgamuukw*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 67 [*Tsilhqot'in*].

6 See Kristen A Carpenter, Sonia K Katyal & Angela R Riley, "In Defense of Property" (2009) 118:6 Yale LJ 1022 at 1112–14; Kristen A Carpenter, "Real Property and Peoplehood" (2008) 27:2 Stan Envtl LJ 313; Kenneth H Bobroff, "Indian Law in Property: *Johnson v M'Intosh* and Beyond" (2001) 37:2 Tulsa L Rev 521 at 536–37. On the connection to the land within one particular Indigenous legal tradition, see e.g. Richard Over-

Alternatively, the concept of Indigenous sovereignty may dictate these and other features of the law of Indigenous peoples since, for instance, sovereign powers over territory are not normally bought and sold.[7] While these arguments do shed some light on these issues, they do not provide a complete explanation for the distinctive attributes of the property interests of Indigenous groups. The purpose of this article is to offer a new approach to understanding these distinctive features. This proposed theory is rooted in the functional challenges associated with using property interests as a platform for delineating the collective territorial powers of Indigenous groups.

Where property interests are used to delineate a sphere of jurisdiction for a self-governing community, considerations are raised that differ from the ones property law normally addresses. As one prominent First Nations leader put it: "[t]he land tenure discussion in our communities has ... not been just about what is needed to make the land more marketable or provide security of tenure, but how to do so while maintaining a community and collective rights."[8] The tension between these kinds of competing considerations, I argue, is reflected in doctrinal features that exhibit distinctive patterns that recur across different countries, including in the United States, Canada, Australia, and New Zealand. Moreover, similar patterns are seen in non-Indigenous contexts where special property regimes serve to facilitate collective self-government, as with *kibbutzim* in Israel.[9] Alienation restrictions, unique collective and individual estates in land, group governance powers as an incident of land tenure, and distinctive rules of co-ownership favouring collective governance are among the principal recurring patterns.

There has been a great deal of literature published in recent decades on the nature of the interest that Indigenous and other minority groups have in collective self-government. The literature includes arguments

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stall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22 at 25–47.

7 See Nell Jessup Newton et al, eds, *Cohen's Handbook of Federal Indian Law* (New Providence, NJ: LexisNexis, 2012) at 11–12, citing Francisci de Victoria, *De Indis et de Ivre Belli Relectiones*, ed by Ernest Nys (Washington: Carnegie Institution, 1917) at 55–100; Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47:3 McGill LJ 473 at 490–96 [McNeil, "Self-Government"]; James Youngblood Henderson, "Mikmaw Tenure in Atlantic Canada" (1995) 18:2 Dal LJ 196 at 216–36.

8 Jody Wilson-Raybould, "First Nations Want Property Rights, but on Our Own Terms", *The Globe and Mail* (10 August 2012) <www.theglobeandmail.com> [perma.cc/Z843-H4RJ].

9 See Amnon Lehavi, "How Property Can Create, Maintain, or Destroy Community" (2009) 10:1 Theor Inq L 43 at 54–56.

based on promoting individual autonomy and freedom of association, maintaining distinctive cultures valued by members, and correcting for the wrongful past denial of Indigenous sovereignty.[10] Yet there has been comparatively little written on how, specifically, the territorial authority of Indigenous groups should be delineated within the broader state legal system. One of the striking features of this area of law is that property interests are used to determine the boundaries of self-governing political communities. Indigenous self-government powers tend to be reflected within the broader legal system through property interests, sometimes with supplementary regulatory powers linked to title. However, linking collective self-government powers to property interests within the settler-state legal system gives rise to a distinct set of challenges.

The principal challenge relates to differences in the optimal scale of different activities that may be pursued on a land base. While uses like housing, commerce, or farming are best pursued using individual land titles over relatively small parcels, the collective interest of the group in self-government will often require an extensive, physically contiguous land base occupied by a critical mass of members. The use of land as a locus for a distinctive, self-governing culture is thus an activity that is optimally pursued on a larger scale than would be optimal for most other uses.

Pursuing two different sets of activities, at different scales, with respect to the same resource, gives rise to what in property theory is termed a "semicommons".[11] The management of a semicommons can require a set of institutions that are distinct from those that would be suited to either "private" or "common" property because of the tensions that can exist between the small-scale and large-scale activities. In the case of Indigenous land tenure, the small-scale activities include uses such as housing, commerce and farming. The large-scale use, though, is distinctive: I will argue that the groups in question aim to use their land base as a locus for a distinctive, self-governing culture. The tension between small-scale and

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[10] See e.g. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 75–106; Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011) at 76–80; Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (New York: Oxford University Press, 2003) at 93–103; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 116–19; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 103–27; Douglas Sanderson, "Redressing the Right Wrong: The Argument from Corrective Justice" (2012) 62:1 UTLJ 93.

[11] On the concept of a property semicommons, see generally Henry E Smith, "Semicommon Property Rights and Scattering in the Open Fields" (2000) 29:1 J Leg Stud 131 [Smith, "Semicommon Property Rights"].

large-scale uses stems from this collective cultural interest in the land base as a whole, and so can be understood in terms of what I label a "cultural semicommons".

This tension between smaller-scale and larger-scale activities pursued on the same land base is managed through distinctive institutions that are at odds with the ordinary rules of the common law. These include alienation restrictions that prevent individual members from transferring their interests to non-members and thus diminishing the group's land base. Individual members also often come to hold interests in land that reserve certain powers for the group, in recognition of the group's need to exercise authority over the land base as a whole. Group governance powers are sometimes maintained through the distinctive co-ownership regimes that apply within Indigenous communities. Finally, there is a significant degree of openness to unique estates in land that reflect the distinctive trade-offs associated with governing a cultural semicommons.

This article will proceed in three Parts. In the first Part, I will explore the nature of the problems posed by using property interests as a means of delineating the collective territorial powers of self-governing minority groups. These include tensions between the optimal scale for various individual uses of land versus the optimal scale for collective self-government. These functional challenges in turn provide a way of understanding the special regimes that govern property interests when they are used as a platform for minority-group self-government.

The second Part will seek to outline how certain doctrinal developments respond to the challenges associated with using property interests for self-government. The focus of this Part will be on the distinctive land tenure rules relating to Indigenous groups in the United States, Canada, Australia, and New Zealand. Four doctrinal developments common among these regimes will be addressed: alienation restraints, group powers over member-held lands, default governance-oriented rules relating to co-ownership, and unique interests in land. This Part will argue that each of these doctrinal trends can be explained primarily by the functional imperatives of seeking to use property in land as a basis for self-government. This article addresses broad doctrinal patterns that recur in widely differing institutional contexts. This form of analysis necessarily requires one to abstract to some degree from the particularities of any given legal system or set of factual circumstances. My hope is that this approach allows for an improved theoretical understanding of the general doctrinal patterns, without missing too much of the fine-grained detail that would form part of an intensive study of any one system.

The third Part will then offer various alternative theories and arguments for discussion. These will include the argument that these doctrinal features primarily reflect principles of the particular cultures and tradi-

tions of Indigenous groups, including their connection to the land, or that they are simply a reflection of the general principle of Indigenous sovereignty. In addition, this Part will address other explanations for the content of these doctrinal features, including the claim that they are paternalistic holdovers that serve the interests of the government bureaucrats who administer them.

This article seeks primarily to argue that the recurring doctrinal patterns in question serve a function in providing for Indigenous self-government in the circumstances in which Indigenous groups find themselves.[12] The article does not seek to argue that these doctrinal features necessarily emerged historically or were in every case consciously designed for this purpose. The origins of these features are complex and multi-faceted. To give one example, the restraints on the alienation of land discussed in this paper can be traced to: Indigenous legal traditions,[13] colonial-era policies,[14] common law judicial decisions,[15] settler-state statutes,[16] and formal legislation enacted by Indigenous groups exercising self-government authority.[17] There is no single purpose that can

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[12] The arguments presented in this article are primarily theoretical in nature. Wherever possible, empirical claims are supported by examples or existing empirical scholarship. However, empirical evidence is not always available and it is necessary to rely on inferences drawn from available information. I try to flag instances where an inference relates to a testable hypothesis for which no empirical evidence is available. It is the author's sincere hope that the theoretical claims made in this paper are ultimately put to the test by empirical scholarship to the extent possible.

[13] Under a number of Indigenous legal traditions, land was historically viewed as inalienable, except under special circumstances: see e.g. Overstall, *supra* note 6 at 40–44; Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009) at 9 [unpublished]; Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge, Mass: Harvard University Press, 2007) at 50–54 [Banner, *Possessing the Pacific*].

[14] See Stuart Banner, *How the Indians Lost Their Land: Law and power on the Frontier* (Cambridge, Mass; Harvard University Press, 2005) at 92–93 [Banner, *Lost Their Land*]; Eric Kades, "The Dark Side of Efficiency: *Johnson v M'Intosh* and the Expropriation of American Indian Lands" (2002) 148 U Pa L Rev 1065 at 1110–18, 1156–75.

[15] See e.g. *Johnson & Graham's Lessee v McIntosh* (1823), 21 US (8 Wheat) 543 at 573, 584–85 [*McIntosh*]; *Nireaha Tamaki v Baker*, [1901] UKPC 18, [1901] AC 561 at 576–80 [*Nireaha*]; *Mabo v Queensland (No 2)*, [1992] HCA 23, 175 CLR 1 at 105–06, 176–78 [*Mabo*]; *Delgamuukw*, *supra* note 5 at 1081–82; *Tsilhqot'in*, *supra* note 5 at para 74.

[16] See e.g. *Regulation of Trade and Intercourse with the Indian Tribes*, 25 USC § 177 (2012); *Indian Act*, RSC 1985, c I-5, s 37 [*Indian Act*]; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), 1976/191, s 23 [*Aboriginal Land Rights (NE) Act*]; *Te Ture Whenua Maori Act 1993* (NZ), 1993/4, s 145 [*Te Ture Whenua Maori Act*].

[17] See e.g. *Chemawawin Cree Nation Land Code* (2010), ss 12.1, 30.1, 34.1 [*Chemawawin Cree Nation Code*]. For an overview of alienation restraints adopted by Indigenous groups under custom land codes, see Malcolm Lavoie & Moira Lavoie, "Land Regime

explain the emergence of restraints on alienation as an historical matter. In traditional Gitxsan law, for instance, the inalienability of land (except under special circumstances) was understood as being based on a chief's *daxgyet*: his initial encounter with the land and ongoing duty of respect.[18] Colonial authorities imposed restraints on alienation for a variety of self-serving purposes, including those relating to military strategy and low-cost land acquisition.[19] In the twentieth century, restraints were maintained by settler-state authorities for a variety of other reasons, including possibly misplaced humanitarian motives and the idealization of the perceived communal way of life of Indigenous people.[20] Indigenous groups exercising self-government authority today similarly adopt alienation restraints for a variety of different reasons, including notably the desire to maintain a land base subject to collective authority.[21] Indeed, despite their multi-faceted origins, alienation restraints are today sometimes maintained with the support of Indigenous communities, indicating that these restraints may serve some purpose from the perspective of these communities.[22]

The doctrines studied in this article are based on both settler-state law and Indigenous law, and often combinations of both. A number of settler-state statutes and common law doctrines are canvassed, but the features discussed below are also present in Indigenous legal traditions and modern formal Indigenous legislation enacted pursuant to self-government powers.[23] Moreover, it is not always possible to draw a clean distinction as to sources, as where common law Aboriginal title is based on tenure under Indigenous law,[24] or where a settler-state statute recognizes Indigenous self-government authority subject to mandatory restrictions on land tenure adopted at the request of the Indigenous groups in question.[25] Howev-

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Choice in Close-Knit Communities: The Case of the First Nations Land Management Act" (2017) 54:2 Osgoode Hall LJ 559 at 597–600.

18 See Overstall, *supra* note 6 at 25, 40–44.

19 See Banner, *Lost their Land*, *supra* note 14 at 85–95; Kades, *supra* note 14 at 1110–18, 1156–75.

20 See Terry L Anderson, *Sovereign Nations or Reservations? An Economic History of American Indians* (San Francisco: Pacific Research Institute for Public Policy, 1995) at 139–45; Banner, *Lost Their Land*, *supra* note 14 at 288–89.

21 See Lavoie & Lavoie, *supra* note 17 at 574–82, 585–95.

22 See Newton et al, *supra* note 7 at 1039.

23 See e.g. *ibid* at 597–600; *Chemawawin Cree Nation Code*, *supra* note 17, ss 12.1, 30.1, 34.1; Overstall, *supra* note 6 at 44–47.

24 See *Delgamuukw*, *supra* note 5 at 1082–84; *Mabo*, *supra* note 15 at 58–63.

25 In these cases, the restriction in question is formally part of a settler-state statute but can also be understood as being akin to a constitutional enactment of the Indigenous group. See, for example, the prohibition on transferring fee simple title to First Nations

er, despite the fact that the doctrines come from a multiplicity of sources and were initially adopted for differing reasons, I argue that it is nevertheless possible to highlight the function they can serve today in providing a platform for Indigenous self-government. In some cases, including with respect to property regimes adopted by Indigenous groups themselves in recent decades, there are reasons to believe that these features may have been consciously designed with this self-government function in mind.[26] However, in other cases, it seems more likely that the regimes were initially designed for other purposes but have come to serve this function over time.[27]

In this area of law, it is important to acknowledge that institutions operate in the shadow of historical injustices. For instance, it may be that rules of land tenure have to serve a self-government function under present circumstances because more robust territorial self-government powers have not been recognized. To identify how a legal regime operates under a particular set of circumstances is not necessarily to justify the regime or those circumstances. There are many valid criticisms that can be levelled at these property systems, including the simple fact that, in many cases, they were imposed by governments on Indigenous groups with little regard for the laws, traditions, values, and circumstances of particular communities. Nevertheless, these property regimes do serve a present-day function, in light of the link between property rights and Indigenous territorial governance powers. Understanding the functional basis for Indigenous land tenure in common law countries is a necessary starting point in considering proposals for reform.

I. The Challenges of Property as Self-Government

This article argues that several of the distinctive features of Indigenous land rights in common law countries serve the function of providing a platform for the collective self-government of Indigenous communities. The situation is somewhat anomalous, in that property rights—normally seen to fall within the domain of private law—are used to fulfill a function normally associated with public law, namely delineating the governance jurisdiction of a political community. However anomalous it may seem,

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land found in the *First Nations Land Management Act*, SC 1999, c 24, s 26 [*FNLMA*]. That Act is in turn based on the *Framework Agreement on First Nations Land Management*, 12 February 1996, online: <labrc.com> [perma.cc/FC9L-F49E], which was entered into between the federal Crown and thirteen First Nations.

26 With respect to land codes adopted by First Nations under the *FNLMA*, *ibid*, see Lavoie & Lavoie, *supra* note 17 at 574–82, 585–95.

27 See Malcolm Lavoie, "Why Restrain Alienation of Indigenous Lands?" (2016) 49:3 UBC L Rev 997 at 1005–30, 1034–40 [Lavoie, "Restrain Alienation"].

Indigenous property interests serve this function throughout common law settler countries.

For instance, under United States (US) law Native American tribes exercise a degree of limited or residual sovereignty, but the exercise of sovereign powers is strongly linked to legal or beneficial title to land. Tribes have only limited and uncertain regulatory powers with respect to land held in fee simple by non-members of the tribe within reservation boundaries.[28] Similarly, First Nation band governments operating under the Canadian *Indian Act* exercise regulatory powers akin to those of a municipal government, but only on Crown land set aside for the use and benefit of the band.[29] In both of these cases, the Indigenous regulatory authority is a complementary set of powers that is dependent on the group's (or its members') legal or beneficial title to land. It is also relatively common for property-based powers to be the sole or principal way an Indigenous group's collective territorial authority is conceptualized. For instance, in both Australia and New Zealand, the statutory regimes that relate to Indigenous communities provide for unique collective property interests without also providing for complementary regulatory authority that goes beyond the powers of a property owner.[30] Moreover, at common law, the collective powers of an Indigenous group in its traditional territory are recognized principally under the doctrine of Aboriginal title, a unique estate in land.[31]

Property is thus a significant mechanism for conceptualizing the interface between the authority of Indigenous groups and the authority of the wider settler society. Property interests are employed either on their own or in combination with supplementary regulatory powers that are tied to property, as a means of defining the collective authority of Indigenous groups. Indeed, linking Indigenous authority to a property interest in land

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28 See *Montana v United States*, 450 US 544 at 565–66 (1981) [*Montana*]; *Strate v A-1 Contractors*, 520 US 438 at 445–46 (1997) [*Strate*]; *Plains Commerce Bank v Long Family Land & Cattle Co, Inc*, 554 US 316 at 327–30 (2008) [*Plains Commerce*]; Newton et al, *supra* note 7 at 600–01.

29 See *Indian Act*, *supra* note 16, ss 38, 81(1).

30 See *Te Ture Whenua Maori Act*, *supra* note 16; *Aboriginal Land Rights (NE) Act*, *supra* note 16; *Aboriginal Land Act 1991* (Qld), 1991 [*Aboriginal Land Act*]; *Aboriginal Land Rights Act 1983* (NSW), 1983/42, s 38 [*Aboriginal Land Rights Act*]; *Maralinga Tjarutja Land Rights Act, 1984* (SA) 1984/3, ss 5(1)–5(2) [*Maralinga Tjarutja Land Rights Act*]); *Pitjantjatjara Land Rights Act, 1981* (SA) 1981/20, s 6 [*Pitjantjatjara Land Rights Act*].

31 See e.g. *McIntosh*, *supra* note 15; *United States v Paine Lumber Co*, 206 US 467 (1907) at 473–74 [*Paine Lumber*]; *R v Symonds*, [1847] NZPCC 387 (PC) at 391 [*Symonds*]; *Nireaha*, *supra* note 15 at 561; *Mabo*, *supra* note 15 at 58–63; *Calder v Attorney General of British Columbia*, [1973] SCR 313 at 320–24, 34 DLR (3rd) [*Calder*]; *Delgamuukw*, *supra* note 5 at 1083–84; *Tsilhqot'in*, *supra* note 5 at paras 10–15.

is seemingly the most widely used principle of jurisdictional delineation in common law countries. However, using property in land as a basis for self-government gives rise to a distinct set of challenges that modern property law does not often encounter outside of the context of Indigenous groups.

One of the principal challenges stems from combining land interests for small-scale activities like housing, commerce, or farming, with a larger-scale territorial governance interest. Though the problem is seldom conceived in this way, it involves activities being pursued on different scales with respect to the same resource, giving rise to a phenomenon known in property theory as a semicommons.[32] Indeed, the problem of collective territorial control by cultural minority groups can be conceptualized as a kind of cultural semicommons. Activities like maintaining a distinctive culture in the face of assimilationist pressure or governing a minority community according to distinctive values are optimally pursued on a relatively large scale. To succeed, one would seem to need a critical mass of members located in relatively close proximity, ideally in an area where they constitute a local majority. Under such circumstances, the formal laws and informal norms of the community can more readily reflect the distinctive values and culture of the group. At the very least, this requires enough land to house such a community. In addition, the distinctive culture of the group may be in some way oriented towards activities on the land like hunting, fishing, or land-based ceremonies. If this is the case, then the optimal scale of the activity is such that it could require a significant land base.[33]

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[32] See Smith, "Semicommon Property Rights", *supra* note 11 at 138–44; Lee Anne Fennell, "Commons, Anticommons, Semicommons", in Kenneth Ayotte & Henry E Smith, eds, *Research Handbook on the Economics of Property Law* (Cheltenham, UK: Edward Elgar, 2011) 35 at 46–50.

[33] Many Indigenous cultures are in fact strongly oriented towards land-based activities. This tendency is reflected in judicial decisions, oral traditions, and first-person accounts. For instance, the test for the recognition of an Aboriginal right under *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, requires that the activity in question be integral to the distinctive culture of the Aboriginal group. This standard has been met in many recorded decisions with respect to asserted hunting and fishing rights, indicating that these activities were found to be integral to the distinctive cultures of the groups in question: see e.g. *R v Gladstone*, [1996] 2 SCR 723 at 743–48, 137 DLR (4th) 648; *Lax Kw'alaams Indian Band v Canada (AG)*, 2011 SCC 56 at paras 15–26, 73; *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 1240–41, 1265, aff'd on this point in *William v British Columbia*, 2012 BCCA 285 at para 287, varied on other grounds by *Tsilhqot'in*, *supra* note 5 at paras 24–32; *Ahousaht Indian Band and Nation v Canada (AG)*, 2009 BCSC 1494 at paras 373–84 varied by *Ahousaht Indian Band and Nation v Canada (AG)*, 2011 BCCA 237 at paras 60–69. For a partially auto-ethnographic account of Hul'qumi'num culture and laws, including as they relate to land-based activities, see Sarah Noël Morales, Snuw'uyulh*: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD

While collective cultural uses of land are best pursued on a large land base, many of the other, non-culturally-specific uses to which members may wish to simultaneously put the land are optimally pursued on smaller-size plots of land. Housing and farming are perhaps the clearest examples of activities that are normally seen to be best pursued on a relatively small scale.[34] Uses such as these would often lead a group to grant subsidiary land interests to individuals and families within the larger land base of the group. It is the act of simultaneously pursuing individual uses like this while also pursuing collective cultural uses with the same land that yields a form of semicommons. Actions taken at the individual level can have significant impacts on the collective activity and vice versa.[35] For instance, if individual members have the power to sell their interests in small-scale parcels to non-members, doing so would impose costs on the collective cultural project.[36] Selling to a non-member would reduce the member-held land base over which the rules and values of the group hold sway. It would bring non-members into the community, reducing the viability of the community as a site of a distinctive way of life in light of assimilationist pressure from the majority culture. If land sales resulted in a "checkerboard" pattern of land-holding, with members and non-members interspersed throughout the land base, collective territorial governance could ultimately become impractical.[37] These could be thought of as costs imposed on the membership as a whole that an individual member would not fully account for in deciding to transfer an interest to a non-member.

Individuals might also put their land to uses that would be incompatible with the group's cultural values or that would imperil the viability of cultural practices on surrounding land. One extreme example might be strip mining the land.[38] However, there are also actions the group might take in the name of the community's interests that could negatively impact on individual uses. The group might, for example, authorize hunting or other cultural practices on a member's land while it is under cultiva-

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Dissertation, University of Victoria, 2014) [unpublished] at 53–57 [perma.cc/99D2-UGUM]. On the Secwépemc connection to the land and how it informs laws relating to land and resource use, see generally Jessica Asch et al, *Secwépemc: Land and Resources Law Research Project* (2017), online (pdf): *University of Victoria Indigenous Law Research Unit* <www.uvic.ca> [perma.cc/ZJP2-E2GQ].

34 See e.g. Robert C Ellickson, "Property in Land" (1993) 102:6 Yale LJ 1315 at 1322–32 [Ellickson, "Property in Land"].

35 See Smith, "Semicommon Property Rights", *supra* note 11 at 138.

36 See Lavoie, "Restrain Alienation", *supra* note 27 at 1035–38.

37 See *ibid.*

38 See *Delgamuukw*, *supra* note 5 at 1089.

tion, or insist that certain cultural practices be followed within the privacy of a member's home. These are the sorts of impacts that the delineation of property interests and governance powers can help resolve.

To better understand what is distinctive about cultural semicommons arrangements, it should be noted that the same kinds of issues would not arise for a thoroughly collectivist community. A property interest held by the group as a whole could provide a way for a closed, collectivist group to follow a distinct way of life, as exemplified by groups like the Hutterites.[39] Such communities use their internal principles and institutions to direct activities throughout their land base, ultimately relying on the threat of exclusion for enforcement.[40] However, where a community seeks to combine small-scale individual land interests with some residual control or restrictions that reflect the collective cultural interests of the community as a whole,[41] there are interactions between the property interests of different scales that can require some kind of institutional response.

It should also be emphasized that the foregoing analysis is not necessarily predicated on any specific cultural commitments that a particular group may have, such as a strong connection to the land. Rather, the structural issues that arise are simply the result of using property as a basis for setting the interface between a majority and minority culture in a context where the minority wishes to exercise some form of territorial self-government while also granting small-scale land interests. Crucially, since this function is not normally a preoccupation of the common law of real property, its rules and institutions are not well adapted to this. I argue that this functional imperative can help explain much of the content of the special regimes governing the property interests of Indigenous communities in common law countries.

The focus here and elsewhere in this article is on the formal laws and institutions surrounding land tenure, including Indigenous law.[42] Despite

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39 See Ellickson, "Property in Land", *supra* note 34 at 1344–47, citing Karl A Peter, *The Dynamics of Hutterite Society: An Analytical Approach* (Edmonton: University of Alberta Press, 1987).

40 See *ibid* at 1344–50.

41 See Part II, *below*, for further discussion on the topic.

42 Here I take the term "Indigenous law" to refer to laws adopted by Indigenous communities themselves, in contrast to state law enacted in relation to Indigenous communities. I take "formal law" to refer to law that is communicated in a manner that requires lower levels of background knowledge on the part of the intended audience. Formal law can be contrasted with customary law, which will tend to require higher levels of background knowledge. See Henry E Smith, "The Language of Property: Form, Context, and Audience" (2003) 55:4 Stan L Rev 1105 at 1148–57; Henry E Smith, "Community and Custom in Property" (2009) 10:1 Theor Inq L 5 at 13–15. Formal Indigenous law is thus law that has been adopted by an Indigenous community and that has been communi-

the fact that these regimes relate mostly to what might be termed "close-knit" groups, often with rich systems of informal norms internal to their communities, the formal law will tend to loom large in relation to the interface between members of the community and non-members and between the community as a whole and the state. Questions like whether a member can transfer a land interest to a non-member, or whether the state's institutions should recognize and enforce collective governance powers with respect to member-held land, involve interactions not just among members of the group, but with outsiders as well. On these matters, which relate to strangers not embedded in a network of relationships and trust, informal norms are less likely to be sufficient and formal rules are more likely to be needed.[43]

The combination of small-scale productive uses of land and large-scale collective cultural and self-government uses presents a unique set of institutional issues stemming from the fact that each use can impact the other: decisions made by individual interest holders can impact the collective cultural and self-government project and collective decisions can impact individual interest holders. In what follows, I argue that several of the distinctive recurring features of Indigenous property systems can each be understood as a means of addressing the challenges associated with governing a cultural semicommons.

II. The Contours of Property as Self-Government

The cultural semicommons can help explain at least four of the distinctive features of the property interests of Indigenous groups in common law countries: alienation restraints, residual group governance powers over member-held lands, default governance regimes for property under co-ownership, and unique estates in land. While the doctrinal details vary

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cated in a way that does not require significant amounts of background knowledge. Formal law of this nature can readily be understood by non-members of the community who may not have background knowledge regarding the Indigenous community in question. The clearest examples of formal Indigenous law today are laws that have been adopted through a legislative process. Land codes adopted under the *FNLMA*, *supra* note 25, or laws enacted pursuant to self-government or comprehensive land claims agreements, for instance, are generally structured so that they can be readily communicated to non-members of the community. See e.g. *Lheidli T'enneh Band Land Code*, 2000, online (pdf): *Lheidli T'enneh First Nation* <lheidli.ca> [perma.cc/RW98-PDEY]; *Nisga'a Land Act*, NLGSR 2000/10, online (pdf): *Nisga'a Lisims Government* <nisgaanation.ca> [perma.cc/2C8R-EWW5] [*Nisga'a Land Act*]; *Nisga'a Land Title Act*, NLGSR 2010/06, s 125(2), online (pdf): *Nisga'a Lisims Government* <nisgaanation.ca> [perma.cc/EM9H-J9BV] [*Nisga'a Land Title Act*].

43 See Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, Mass: Harvard University Press, 1991) at 177–78.

from one regime to the next, sometimes reflecting different perceptions of the associated value trade-offs, in each case the functional imperatives of managing a cultural semicommons can help explain the shape of the doctrine.

A. Alienation Restraints

Almost all specialized property regimes relating to Indigenous groups in common law countries employ alienation restraints of some kind. The few exceptions to this norm tend to be under regimes like that of the Nisga'a Nation in British Columbia, where the collective authority of the group is delineated on a model of divided territorial sovereignty akin to federalism, with territorial jurisdiction defined in a manner that is independent of land tenure.[44] However, while alienation restraints are pervasive in Aboriginal property regimes in these countries, the specific content of these restrictions varies widely along a spectrum from relatively mild restrictions like a right of first refusal for certain parties, up to very rigid restrictions like the one that applies to tribal lands under US federal law, requiring a special act of Congress for a conveyance of such lands.[45] The alienation restraints that characterize Indigenous property systems would not be permitted by the ordinary rules of the common law, which prevent parties from imposing either direct or indirect restraints on the alienation of land interests.[46]

There are essentially two broad categories of alienation restrictions found in these regimes, and the explanations for each differ.[47] The first category relates to restraints on alienation of the land holdings of individual members within the broader territory of the community.[48] The second category relates to restrictions on the alienation of land by the Indigenous group as a whole.[49] The key to understanding restrictions on the land holdings of individual members is that the interests of an individual member in making alienation decisions may diverge from the interests of the group as a whole. In the absence of restrictions, members seeking to maximize the returns on transactions might elect to sell interests to nonmembers. Such a decision could have negative ripple effects on other

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44 See *Nisga'a Final Agreement*, 4 April 1999, c 3, art 5, online (pdf): <www.nnkn.ca/files/u28/nis-eng.pdf> [perma.cc/9RMK-SV8G] [*Nisga'a Final Agreement*].

45 See 25 USC § 177 (2012), § 1; Newton et al, *supra* note 7 at 1035.

46 See Megarry & Wade, *supra* note 2 at 67–68; Ziff, *Property Law* 6th ed, *supra* note 1 at 264–67.

47 For a fuller discussion, see Lavoie, "Restrain Alienation", *supra* note 27 at 1030–49.

48 See *ibid* at 1035, 1037–38.

49 See *ibid* at 1036, 1038–40.

members of the group, which can be thought of as a form of externality.[50] Non-members who acquire land interests in the community could change its character, such that it no longer effectively serves as a locus for a distinctive minority culture. Further, by breaking up the contiguous land base of the group, a sale to a non-member could make self-government by the group according to its distinctive values more difficult, using either formal or informal means of self-government.[51] If a cultural semicommons governance regime aims to facilitate two forms of activity over the same land base—individual and collective—transactions that give rise to a "checkerboard" pattern of landholding serve to undermine the latter, culturally oriented activity. Accordingly, restraints on alienation of member-held land can be understood as a means of reconciling the individual and collective interests in a cultural semicommons.

Different considerations can explain alienation restrictions on land held by the group as a whole. Unless internal safeguards are in place, it may be that a decision to alienate land does not reflect the true, considered wishes of the members.[52] It is possible, for instance, that a decision to alienate serves only the interests of a well-organized interest group within the community and not the membership as a whole, or that it reflects only a relatively fleeting consensus in favour of alienation. Given the difficulties involved in reassembling a land base after it has been sold, checks on alienation decisions could be explained as a means of reflecting the gravity of such a decision for a group interested in preserving a capacity for territorial self-government. It is possible that in the absence of such checks on alienation, the group leadership might be unduly swayed by short-term considerations and fail to consider the long-term effects on collective autonomy. The interests of future generations of the group may also be implicated, since a decision by present-day members to alienate part of the land base could affect the group's capacity to sustain its distinctive culture and way of life long into the future.[53] An outright prohibition on alienation likely cannot be justified on this approach; however, these considerations may provide a basis for mechanisms that ensure a sufficient consensus in favour of alienation exists within the community.[54] Re-

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50 See *ibid* at 1037. See also *Mashpee Tribe v Town of Mashpee*, 447 F Supp 940 at 946 (Dist Ct Mass 1978).

51 See Lavoie, "Restrain Alienation", *supra* note 27 at 1035, 1037. The link between alienation restraints and the preservation of Indigenous self-determination has also occasionally been made in the jurisprudence. See e.g. *Mountain States Tel v Santana Ana* (1985), 472 US 237 at 278–79, Brennan J, dissenting.

52 See Lavoie, "Restrain Alienation", *supra* note 27 at 1036–40.

53 The interests of future generations are sometimes linked in the jurisprudence to alienation restraints: see *Tsilhqot'in*, *supra* note 5 at para 74.

54 See Lavoie, "Restrain Alienation", *supra* note 27 at 1036–40.

straints on the alienation of group-held interests can thus help to ensure that the collective cultural and self-government interests of the group are not undermined by the transfer of interests.

However, restraints on alienation aimed at preserving the ongoing collective interest in a cultural semicommons involve trade-offs with other interests that the group and its members may value. The costs associated with alienation restraints have motivated a number of critiques of these restrictions.[55] The most significant potential costs associated with alienation restrictions are likely to be economic. Under the right institutional conditions, alienable land interests are an important tool for economic development.[56] In theoretical terms, alienability allows interests in land to be more readily transferred to higher-value uses. Alienation restrictions give rise, almost by definition, to transaction costs that impede mutually beneficial transactions involving land interests.[57] Restrictions of this kind also impede access to credit, since title holders are generally unable to grant an enforceable security interest in land to an entity to whom transfer would otherwise be restricted. These restrictions can thus give rise to a problem of "dead capital" in Indigenous communities, and while efforts are often made to provide substitute means of access to credit, these are unlikely to be perfect substitutes.[58] Empirical studies have supported these theoretical claims regarding the negative economic effects of alienation restraints.[59]

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55 See e.g. Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queens University Press, 2010) at 123–36; Anderson, *supra* note 20 at 111–34, 167–68; Fred S McChesney, "Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets" (1990) 19:2 J Leg Stud 297 at 327–34. For an overview of the criticisms, see Lavoie, "Restrain Alienation", *supra* note 27 at 1030–34.

56 On the institutional preconditions for the successful use of land markets for economic development, as well as some of the trade-offs associated with doing so, see Jamie Baxter & Michael Trebilcock, "'Formalizing' Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform" (2009) 7:2 Indigenous LJ 45 at 63–66; Sari Graben, "Lessons for Indigenous Property Reform: From Membership to Ownership on Nisga'a Lands" (2014) 47:2 UBC L Rev 399 at 426–30.

57 See Richard A Epstein, "Why Restrain Alienation?" (1985) 85:5 Colum L Rev 970 at 972 (setting out arguments in favour of freely alienable property interests generally).

58 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000) at 39–67. See Flanagan, Alcantara & Le Dressay, *supra* note 55 at 123–36.

59 See Flanagan, Alcantara & Le Dressay, *supra* note 55 at 135–36; Terry L Anderson & Dean Lueck, "Land Tenure and Agricultural Productivity on Indian Reservations" (1992) 35:2 JL & Econ 427 at 448–49. See also Fiscal Realities Economists, "The Economic and Fiscal Impacts of Market Reforms and Land Titling for First Nations: Executive Summary" (2007) at 1, online (pdf): *Fiscal Realities* <www.fiscalrealities.com> [perma.cc/Y82L-JGUE]; Anderson, *supra* note 20 at 111–34; Terry L Anderson & Dom-

In addition to economic efficiency concerns, alienation restrictions also infringe on individual autonomy. The power to transfer a land interest freely is important; it increases the set of choices available to an individual interest holder.[60] Alienability enhances one's ability to use an interest in land to pursue individual goals by choosing who the next owner will be and, within applicable constraints, what powers the owner will have. It provides a greater ability to use the land to raise capital for one's chosen projects or to sell for the market price and use those funds to leave the community. The more significant the restraint on alienation, the greater the burden on individual autonomy.

Well-designed alienation restrictions reflecting cultural semicommons considerations would aim to make the associated value trade-offs in a way that accords with a group's circumstances and values. For instance, a group with a larger land base might be less concerned about land loss than one with a more limited land base. Other relevant factors could include the remoteness of the community, the market value of the land, and the group's vulnerability to cultural assimilation.[61] As noted above, a spectrum of possible restrictions is available for making the relevant value trade-offs. The mildest form of restraint on alienation found in these regimes is a right of first refusal in favour of designated members of the community or the group as a whole. These are often employed alongside other protections. For instance, on "Maori freehold land", which constitutes the bulk of the land base held by Maori, one of the required steps prior to the sale of title to a party outside the "Preferred Class of Alienees" is that an offer be made to members of that class.[62] This restriction is in addition to a separate requirement that owners representing seventy-five per cent of the interests in the land support the transaction and that the transaction receive approval from the Maori Land Court.[63] The Preferred Class of Alienees is defined to include children of the owners, blood relations associated with the land in accordance with Maori custom, and other beneficial owners and former owners of the land who are members of the *hapu*, or clan, associated with the land.[64] A right of first refusal is also employed in US law where individuals holding federal trust or restricted

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inic P Parker, "Economic Development Lessons From and For North American Indian Economies" (2009) 53:1 Aust J Agric & Resource Econ 105 at 119–22.

60 See Lavoie, "Restrain Alienation", *supra* note 27 at 1030–31.

61 For an overview of some of the trade-offs associated with alienation restraints, and how the circumstances of a given community can affect how they are assessed, see Lavoie & Lavoie, *supra* note 17 at 574–82.

62 *Te Ture Whenua Maori Act*, *supra* note 16, s 147A.

63 See *ibid*, ss 150A, 150B, 150C.

64 See *ibid*, s 4.

fee title under an allotment seek to have the land converted to unrestricted (alienable) fee simple title. In addition to requiring the approval of the United States Secretary of the Interior, the process for converting to unrestricted fee also requires that the land first be offered for sale to the tribe.[65]

A statutory right of first refusal is also employed in non-Indigenous cultural semicommons contexts. For instance, under the specialized property rules applicable to Israeli *kibbutzim*, there are two distinct forms of land tenure. Under a traditional *kibbutz*, the land is held and administered by group in a collectivist fashion.[66] However, the more recently developed "renewing" *kibbutzim* allow members to hold individual interests in their homes.[67] These individual interests, though, are subject to a right of first refusal on the part of the *kibbutz* at the market price, should a member decide to sell their home.[68] The cultural commitments of a renewing *kibbutz* are obviously quite different from those of Indigenous groups.[69] Yet some of the same functional considerations apply, in the sense that they are cultural minorities attempting to govern their communities according to distinct values. Alienation to non-members threatens this capacity, which is seemingly what explains the need for a right of first refusal on the part of the group as a whole when a member decides to sell an individual land interest.

The next form that alienation restraints take is a requirement for approval of transactions by some outside oversight body. These are perhaps the most widely employed means of restraining alienation of Indigenous land in common law countries. Under US law, the conveyance of tribal land requires special Congressional authorization.[70] The transfer of indi-

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65 See 25 USC § 2216(f) (2012); *Anderson & Middleton Co v Salazar*, 2009 US Lexis 67999 (WD Wash 2009); Newton et al, *supra* note 7 at 1083.

66 See Lehavi, *supra* note 9 at 54–55.

67 See *ibid* at 55.

68 See *ibid* at 54–56.

69 Rights of first refusal are also employed in other non-Indigenous contexts involving culturally significant interests in land, including in relation to rural heirship property in the Southern United States. See *Uniform Partition of Heirs Property Act* § 9 (2010) [*Uniform Partition Act*]. On the nature of the problem that the *Uniform Partition Act* sought to address, see Thomas W Mitchell, "From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partition Sales of Tenancies in Common" (2001) 95:2 Nw UL Rev 505 at 505–23.

70 The conveyance of tribal lands is prohibited by 25 USC § 177 (2012). Since Congressional legislation prohibits any further treaties with Indian tribes, no general executive power exists to authorize the sale of tribal lands, or to receive surrendered land from tribes). See 25 USC § 71 (2012). Recent practices imply, consistent with the legislation, that a special act of Congress is required for the conveyance of tribal lands (see Newton

vidual trust or restricted fee title to another eligible "Indian" person, or its conversion to alienable fee title, requires the approval of the Secretary.[71] Leases normally also require Secretarial approval.[72] Under the Canadian *Indian Act*, which governs reserve land transactions in most First Nations communities, conveyance of a fee simple interest in reserve land first requires surrender of the land to the Crown, which then acts as an intermediary for the band, putting the relevant Minister in a position to exercise discretionary powers in the interest of the First Nation, including potentially refusing to accept the surrender.[73] Leases under the *Indian Act* similarly require "designation", or a time-limited surrender to the Crown.[74] The transfer of a Certificate of Possession, an individual perpetual possessory interest tenable only by members of a band, requires the approval of the Minister.[75]

In New Zealand, sales and leases of Maori freehold land lasting longer than fifty-two years are subject to the discretionary approval of the Maori Land Court, a body appointed by the New Zealand Minister for Maori Affairs.[76] In addition, Maori reservation land may not be sold, though it may be leased for a limited period for certain purposes, with the approval of the court.[77] Australian statutory land regimes similarly subject transactions to discretionary oversight and approval. Under the statutory land rights regime in the Northern Territory, regional land councils have been established to enter into leases and other transactions on behalf of traditional owners in a particular area.[78] Transfer of title requires the approval of the relevant minister.[79] Other Australian jurisdictions employ similar systems of oversight and approval by land councils for transactions in relation to Indigenous land held under statutes.[80]

In addition to these statutory oversight mechanisms, the common law doctrine of Aboriginal title also effectively provides for outside oversight of

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et al, *supra* note 7 at 1035). The special statutes authorizing tribal land sales are listed at 25 CFR § 152.21 (2018).

71 See 25 USC § 2208 (2012).

72 See *ibid* § 2218.

73 See *Indian Act*, *supra* note 16, ss 20, 37(1), 39.

74 *Ibid*, ss 37(2), 38(2).

75 See *ibid*, s 24.

76 See *Te Ture Whenua Maori Act*, *supra* note 16, ss 4, 150A–50C, 151–52.

77 See *ibid*, ss 338(11)–338(12).

78 See *Aboriginal Land Rights (NE) Act*, *supra* note 16, ss 19, 23.

79 See *ibid*, s 19(4).

80 See e.g. *Aboriginal Land Rights Act*, *supra* note 30, ss 40(1), 42D, 42E.

land transactions.[81] At common law, land held under Aboriginal title cannot be transferred directly to any party other than the government.[82] Accordingly, for a transaction to take place, land must first be surrendered to the government, which can act on behalf of the Indigenous group. This requirement puts the government in an oversight role since it can decline to accept the surrender or to enter into the transaction on the terms desired by the Indigenous group, subject to its fiduciary obligations.[83]

Finally, in addition to external oversight mechanisms, land transactions involving Indigenous lands can be made subject to internal community approval requirements designed to demonstrate a level of support for the transaction. Land surrenders and designations under the Canadian *Indian Act* must be supported by a majority of members in a community vote that meets certain quorum thresholds.[84] The Canadian First Nations that have adopted custom land codes under the *First Nations Land Management Act* (*FNLMA*) have created their own internal approval requirements for the granting and transfer of leases and member possessory interests.[85] Sales of Maori freehold land must be supported by individuals representing seventy-five per cent of the interests in the land in question, while long-term leases must be supported by a bare majority.[86] In the US, leases of trust allotments require the approval of a statutory percentage of co-owners that varies based on the number of co-owners.[87]

Both discretionary outside approval requirements and internal community vote requirements can vary in their stringency, possibly reflecting

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81 The common law no longer applies in the United States on this point in light of the more rigid statutory prohibition on alienation that applies to all tribal land, including land held under Aboriginal title (see 25 USC § 177 (2012)).

82 See e.g. *McIntosh*, *supra* note 15 at 584–85; *Paine Lumber*, *supra* note 31 at 472–74; *Symonds*, *supra* note 31 at 389; *Nireaha*, *supra* note 15 at 576–79; *Mabo*, *supra* note 15 at 60; *Calder*, *supra* note 31 at 320–22, 377–85, 390; *Delgamuukw*, *supra* note 5 at 1081–82; *Tsilhqot'in*, *supra* note 5 at para 74.

83 Where a government enters into a land transaction on behalf of an Indigenous group, it may be found to be under a fiduciary duty to the group, though the law varies among common law jurisdictions (see e.g. *Guerin v The Queen*, [1984] 2 SCR 335 at 355–60, 13 DLR (4th) 321).

84 See *Indian Act*, *supra* note 16, s 39.

85 See *FNLMA*, *supra* note 25, ss 6–16. A summary of the internal approval requirements under the land codes adopted pursuant to this Act is provided in Lavoie & Lavoie, *supra* note 17 at 597–600.

86 See *Te Ture Whenua Maori Act*, *supra* note 16, ss 150A, 150B, 150C.

87 See 25 USC § 2218 (2012). The threshold varies from a bare majority in cases of twenty or more owners up to ninety per cent for cases of five or fewer, though other legislation may provide for different thresholds on specific lands; see Newton et al, *supra* note 7 at 1087.

different perceptions of the trade-offs involved. For instance, likely the most stringent outside approval requirement in common law countries is the requirement for a special act of Congress for the conveyance of tribal lands in the US, a requirement that results from the combination of the rigid restriction on alienation in federal law and the absence of any executive authority to waive the requirement or receive surrender of lands.[88] By contrast, rules that require the approval of a cabinet minister, tribunal, or council are seemingly less restrictive, and may result in lower costs associated with transactions. Similarly, internal approval requirements vary from a bare majority requirement,[89] to majority requirements alongside participation thresholds,[90] to super-majority[91] or unanimity[92] requirements. The more stringent the threshold, the more difficult and costly it would be to engage in land transactions, though of course these costs must be weighed against the benefits associated with preserving collective control over a land base.

Under these regimes, leases are generally subject to restrictions, though these are usually more permissive than restrictions that relate to outright transfer of title, particularly for shorter-term leases. Given the generally less restrictive rules that apply to leasehold transactions, leases are important tools for economic development in Indigenous communities in common law countries. Under the cultural semicommons paradigm, it should not be surprising that leases are so important, given that they allow the community to grant a time-limited interest to a party, subject to contractual restrictions and a reversionary interest that reflects the community's collective cultural interest in the land in question.

Among the doctrinal tools available for restraining alienation, rights of first refusal are likely the least costly in terms of both individual autonomy and economic efficiency considerations. A member wishing to sell is able to realize the full value of the land, even if the member is not free to determine precisely who will own the land next. Rights of first refusal are

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88 See 25 USC § 177 (2012); 25 USC § 71 (2012); Newton et al, *supra* note 7 at 1035.

89 A number of First Nations with custom land codes under the *FNLMA*, *supra* note 25, ss 6–16, require approval by majority vote of the membership for the granting of leasehold interests in community lands. See Lavoie & Lavoie, *supra* note 17 at 597–600. Long-term leases of Maori freehold lands require the support of a majority of the interest-holders, see *Te Ture Whenua Maori Act*, *supra* note 16, ss 150A(1)(b), 150B(1)(b), 150C(1)(b).

90 See *Indian Act*, *supra* note 16, s 39.

91 See *Te Ture Whenua Maori Act*, *supra* note 16, ss 150A(1)(a), 150B(1)(a), 150C(1)(a).

92 See 25 USC § 2218(b)(1)(A) (2012) (requiring a ninety per cent approval threshold in cases of five owners or fewer, which effectively requires unanimity in cases in which the owners hold equal interests).

also flexible in their application. In each case of a potential sale, the group must determine the value it places on keeping a particular tract of land in the community. Moreover, rights of first refusal require the group to confront and quantify the cost it may be imposing on a member by preventing the member from transferring an interest. If the group places a high value on retaining a given tract of land in the community, one might expect that it would be willing to pay enough to compensate a member for the foregone returns the member might have received from selling outside the group.

Accordingly, it is possible that rights of first refusal are underutilized means of reflecting the collective interest in a cultural semicommons. That said, there are possible arguments for more robust alienation restrictions. It may be that the group does not have the financial capacity to pay the market value in order to keep land in the community. In such cases, the group might be outbid even if members had a very strong desire to purchase the land. Possible short-sightedness by group leadership and the difficulty of reversing land loss are other possible arguments in favour of stronger restrictions. The group might elect not to purchase a given tract of land only to later realize the significance of the effects its loss had on the group's collective governance capacities. At that stage the land might be difficult or impossible to reacquire, particularly if it has been subdivided.

Certain types of alienation restrictions in the legal systems under study do seem to go beyond anything that can be justified by cultural semicommons considerations. It is possible that these restrictions reflect other legitimate concerns, or alternatively that they are holdovers from past eras of Aboriginal policy, when considerations like outright paternalism towards Indigenous groups held sway. For example, under both the Canadian *Indian Act* and US statutory law, sales of member interests from one member of a group to another member of the same group are subject to discretionary approval by the Minister or Secretary.[93] Given that transactions of this nature do not involve the transfer of land to nonmembers, such transactions do not involve any inherent threat to the community's capacity to control its land base. It is possible that restrictions of this nature reflect other legitimate concerns, like avoiding undue ownership concentration of land interests in the community.[94] However, such concerns are not as readily generalizable across Indigenous groups. The presence of such restrictions in legislation applicable to

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93 See *ibid* § 2208; *Indian Act*, *supra* note 16, s 24.

94 See Lavoie, "Restrain Alienation", *supra* note 27 at 1052.

a diverse set of Indigenous groups might accordingly be called into question.[95]

One might similarly question the persistence of restrictions on alienation that depend on the discretionary approval of institutions outside of the Indigenous community, such as a Cabinet minister or specialized tribunal. While external entities may make decisions referencing the views and circumstances of the community in question, decisions about land transactions would more appropriately be made within the affected community itself and by its own processes. Indeed, where communities have designed their own rules governing land transactions, they have tended to rely on internal approval requirements for land transactions rather than external oversight.[96] While institutional capacity may be a concern in some communities, it seems the pronounced role for external non-Indigenous oversight may be another holdover from the colonial past.

B. Governance Powers as an Incident of Ownership

The next distinctive doctrinal feature of cultural semicommons regimes is the linking of group governance powers to land title. While regulatory powers are not typically treated as incidents of ownership, a striking aspect of the law of Indigenous peoples is the tendency to link such powers to property in land. This tendency to turn what would normally be conceptualized as a public law question of regulatory jurisdiction into an incident of property in land has been heavily criticized;[97] however, it is a natural consequence of relying on property rights as a platform for self-government. After explaining how regimes linking land tenure and regulatory powers work, I will consider some of the criticisms levelled at them. I will then try to show how this link between land tenure and regulatory powers can potentially serve a legitimate function in reconciling collective self-government with individual land interests, at least in certain contexts.

US federal law provides a prominent, though notoriously complex, example of a regime that predicates regulatory authority on property in land. Native American tribes are generally presumed to have retained their sovereignty unless tribal authority has been ceded through treaties or extinguished through Congressional legislation, or unless the exercise of sovereignty over a particular matter is somehow inconsistent with the

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95 See *ibid* at 1051–52.

96 See Lavoie & Lavoie, *supra* note 17 at 597–600.

97 See e.g. Joseph William Singer, "Sovereignty and Property" (1991) 86:1 Nw UL Rev 1 at 55–56 [Singer, "Sovereignty"].

status of the tribe.[98] However, the legacy of the allotment of tribal lands in the late nineteenth and early twentieth centuries has given rise to difficult questions regarding tribal authority. Over the past several decades, the United States Supreme Court has generally answered these questions in a manner that disfavours tribal regulatory powers over "non-Indians" and over "non-Indian" lands, even when these lands are within the boundaries of a reservation.[99] Tribes retain only very limited regulatory authority over non-member fee lands inside a reservation. Under the line of cases starting with *Montana v. United States*, tribes may regulate activities in relation to such land only where a consensual relationship exists between the non-member and the tribe, or where the activity in question threatens the political integrity, economic security, or health or welfare of the tribe.[100] Tribal jurisdiction under this test has been interpreted restrictively; indeed, tribal jurisdiction in relation to non-member fee lands within a reservation is now quite exceptional.

By contrast, tribes retain a broad sphere of residual civil jurisdiction in relation to tribal and member-owned lands that are held in some form of federal trust or are subject to alienation restraints.[101] Tribal governments retain presumptive civil jurisdiction on these lands, except where federal law has provided otherwise.[102] Tribes have limited criminal jurisdiction in relation to "Indian" defendants for crimes committed in "Indian country", a term which includes all lands within the bounds of a reservation, regardless of land tenure.[103] The result is a regime that predicates civil jurisdiction over most matters on the form of land tenure and the identity of the owner, while defining criminal jurisdiction in terms of the identity of the defendant for crimes that take place within the reservation boundaries.

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98 See *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 at 17, 38, 44 (1831); *United States v Wheeler*, 435 US 313 at 322–23 (1978); *Oliphant v Suquamish Indian Tribe*, 435 US 191 at 208 (1978) [*Oliphant*]; Newton et al, *supra* note 7 at 208.

99 See *Oliphant*, *supra* note 98 at 208; *Montana*, *supra* note 28 at 565–66.

100 See *Montana*, *supra* note 28 at 565–66; *Strate*, *supra* note 28 at 445–46, 453, 456; *Plains Commerce*, *supra* note 28 at 327–30; Newton et al, *supra* note 7 at 600–01.

101 See Newton et al, *supra* note 7 at 222–23, 230–35. See e.g. *Fisher v Dist Court*, 424 US 382 at 389 (1976).

102 For example, the statute popularly knowns as "Public Law 280" subjects "Indian" persons and lands to state jurisdiction over a number of matters in the states to which it applies. Act of 15 August 1953, Pub L No 83-280, 67 Stat 588 (codified as amended at 18 USC § 1162, 25 USC §§ 1321–26, 28 USC § 1360 (2012)).

103 See *Oliphant*, *supra* note 98 at 206–12; 25 USC § 1301(2) (2012); *United States v Lara*, 541 US 193 at 200 (2004).

A link between land tenure and Indigenous regulatory powers is similarly found in the Canadian *Indian Act*.[104] First Nations exercise limited civil regulatory powers under this legislation, akin to those of a municipality.[105] Importantly, a First Nation's jurisdiction only extends to "reserve" lands, which are lands to which the Crown holds legal title and the band holds a beneficial interest.[106] Lands in which a member holds a Certificate of Possession, or permanent possessory interest, remain reserve lands, as do lands subject to a lease. However, lands that have been permanently alienated, or "surrendered", cease to be reserve lands.[107] A band's regulatory jurisdiction in relation to such lands is thus permanently severed. The direct link between land tenure and jurisdiction is also retained for bands operating under the *FNLMA*.[108] Similarly, a Canadian First Nation holding land under Aboriginal title would lose its collective powers over that land upon surrender of the land to the Crown, subject to any terms to the contrary in an associated treaty. On a conventional understanding, only Canadian First Nations operating under special land claims or self-government agreements can exercise regulatory jurisdiction recognized by the Canadian state that is not predicated on land tenure. The Nisga'a Nation is a prominent example of a First Nation currently operating under such a framework.[109]

In Australia and New Zealand, the formal state recognition of Indigenous territorial governance authority is based on title to land.[110] Indeed, it may be fair to say that in these countries, the state legal system does not generally recognize Indigenous groups' power to enforce their laws other than in their capacity as property owners.[111] Of course, this approach implies a direct link between land tenure and self-government powers. In-

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104 See *Indian Act*, *supra* note 16.

105 See *ibid*, s 81.

106 *Ibid*, s 2(1).

107 *Ibid*, s 38(1).

108 See *FNLMA*, *supra* note 25, s 5.

109 See *Nisga'a Final Agreement*, *supra* note 44, c 3, arts 5, 32–125.

110 See *Te Ture Whenua Maori Act*, *supra* note 16; *Aboriginal Land Rights (NE) Act*, *supra* note 16; *Aboriginal Land Act*, *supra* note 30; *Aboriginal Land Rights Act*, *supra* note 30, s 36; *Maralinga Tjarutja Land Rights Act*, *supra* note 30; *Pitjantjatjara Land Rights Act*, *supra* note 30; *Mabo*, *supra* note 15 at para 61.

111 See *Members of the Yorta Yorta Aboriginal Community v Victoria*, [2002] HCA 58 at paras 33–44 [*Yorta Yorta*]. The orthodox view in New Zealand is that the territorial rights retained by Maori after the Crown assertion of sovereignty are customary property interests, rather than sovereign powers: see *Ngati Apa v Attorney-General*, [2003] NZCA 117 at paras 14–48, 139–42. But see Kent McNeil, "Indigenous Territorial Rights in the Common Law" in Michele Graziadei & Lionel Smith, eds, *Comparative Property Law: Global Perspectives* (Cheltenham, UK: Edward Elgar, 2017) 412 at 417–22.

digenous groups only have collective territorial governance powers in relation to areas in which they hold an interest in land, either under Aboriginal title or a statutory regime. The absence of title of some form implies an absence of a formal collective governance power, at least in the eyes of the state legal system. By contrast, in areas in which a group holds some form of title, it may retain certain powers even if, for instance, it grants a subsidiary interest to a member. These powers may stem from the customs and practices of the group in relation to Aboriginal title land,[112] or they may have been retained by the group as part of the initial grant or as a feature of a statutory regime.[113]

The link between Indigenous land tenure and Indigenous governance powers that is a central feature of the law of Indigenous peoples in common law countries is also one of the most widely criticized aspects of this area of law. The criticisms come from a surprisingly wide range of perspectives. Perhaps most prominently, scholars have argued that tying Indigenous jurisdiction to land tenure amounts to a denial of Indigenous sovereignty.[114] This charge is most commonly made in the US, where the legal system's recognition of Indigenous sovereignty has traditionally been more robust than in Commonwealth countries. Scholars have argued, for instance, that drawing a link between land tenure and sovereignty is anomalous, since in most other areas of law, these are seen to be distinct matters.[115] The regulatory jurisdiction of a city or a state does not depend on the identity of the owner of a given piece of land. Where US jurisprudence has blended questions of property and sovereignty, for instance, it is possible to wonder whether the courts are bending the rules simply to disfavour tribes.[116]

Writers adopting an economic lens have also criticized the link between property and sovereignty. It is seen as a factor contributing to the unmanageable complexity associated with reservation land tenure in the United States in light of the effects of allotment, which resulted in many tracts of land held by non-Aboriginal people in fee within the bounds of reservations.[117] Exercising jurisdiction over a "checkerboard" in which the

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[112] See *Mabo*, *supra* note 15 at 58–63; *Yorta Yorta*, *supra* note 111 at para 33.

[113] See e.g. *Te Ture Whenua Maori Act*, *supra* note 16, s 172.

[114] See e.g. Singer, "Sovereignty", *supra* note 97 at 1–8.

[115] See e.g. *ibid* at 39; Russel Lawrence Barsh & James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980) at 177.

[116] See Singer, "Sovereignty", *supra* note 97 at 5–6.

[117] See Jessica A Shoemaker, "Complexity's Shadow: American Indian Property, Sovereignty, and the Future" (2017) 115:4 Mich L Rev 487 at 498–503 [Shoemaker, "Complexity's Shadow"].

jurisdiction of the tribe varies from parcel to parcel based on the identity of the landholder can be costly and impractical. Moreover, the problem of fractionation of land interests among many different co-owners has given rise to the nightmarish category of "emulsified" property, which is property for which the jurisdiction varies among the co-owners of the same tract of land.[118] For instance, some co-owners may hold title in fee and be subject to state jurisdiction while other co-owners may hold their interest under federal trust subject to tribal and federal jurisdiction. All of this creates information and transaction costs for parties interested in using land or engaging in transactions, while also increasing the costs associated with administering a regulatory regime.[119]

The link between land tenure and regulatory power may also be criticized because it provides part of the motivation for maintaining strict restraints on the alienation of land, which give rise to economic inefficiencies. As argued above, an important justification for alienation restraints is the maintenance of collective Indigenous control over a land base. If a group's regulatory jurisdiction were assured over a defined territory, regardless of the identity of the title holders, groups would presumably be more open to allowing markets in land to develop. Under such conditions these markets would pose less of a threat to collective control. And indeed, the few Indigenous groups that do allow for the transfer of fee simple interests to non-members, such as the Nisga'a Nation in British Columbia, do so within the context of a regime that ensures a robust regulatory jurisdiction even over lands held by non-members in fee simple.[120] As a result, proposals to reform Indigenous land tenure to allow for freely alienable interests tend also to account for the collective interest in the land by de-linking land tenure from jurisdiction and providing Indigenous groups with significant regulatory powers over a fixed territory.[121]

These criticisms of the link between land tenure and governance powers are persuasive and in certain contexts may be decisive. The jurisdictional complexity associated with many allotted reservations in the United States, for instance, is essentially indefensible. However, under certain circumstances, regimes that link property and regulatory authority may be appropriate and reasonably adapted to reconciling the interests of self-governing minority groups and the interests of the broader majority society within which the groups are situated.

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118 Jessica A Shoemaker, "Emulsified Property" (2016) 43:4 Pepp L Rev 945.

119 See Shoemaker, "Complexity's Shadow", *supra* note 117 at 509–12.

120 See *Nisga'a Final Agreement*, *supra* note 44, c 3, art 5.

121 See e.g. Flanagan, Alcantara & Le Dressay, *supra* note 55 at 160–81; Lavoie, "Restrain Alienation", *supra* note 27 at 1054–59; Fiscal Realities Economists, *supra* note 59 at 2.

Recall that cultural semicommons regimes delineate territorial authority and thereby provide a mechanism for self-government by a minority group whose culture and values differ from those of the majority. At the same time, such regimes provide for individual-scale land interests. One of the challenges that has to be confronted in reconciling these two sets of interests is to determine what happens when individual land interests come to be held by non-members. Linking regulatory powers to land tenure is one way of mitigating some of the threats that the transfer of interests to non-members could otherwise pose to the collective cultural and self-government interests of the group.

A regime that links land tenure to regulatory powers prevents non-members from acquiring perpetual interests that bring them and their successors in title into the political community of the minority group. By contrast, under a regime like that of the Nisga'a Nation, for example, a non-member can buy a fee simple interest in land that is forever subject to the regulatory powers of the First Nation. While purchasing such an interest certainly does not make the buyer a voting citizen of the Nisga'a Nation, it does give that buyer and the buyer's successors in title a significant stake in how Nisga'a institutions function.

Where non-member landowners hold a significant body of land within a community, they can be expected to become effective lobbyists for their interests and expectations, even if they cannot vote in local elections. The views of these landowners will tend to be rooted in the values of their own, non-Indigenous culture. Importantly, these landowners would not necessarily engage in lobbying only within the Indigenous group's institutions; they would also be expected to lobby the settler-state government to use its powers to ensure the Indigenous group's institutions conform to their expectations.[122] Moreover, reputation effects and other market forces would constrain the exercise of Indigenous jurisdiction in relation to investments in their territory.[123] Non-member landowners subject to the governance jurisdiction of a group whose culture they do not share might turn out to be a powerful force for cultural assimilation. If the purpose of the legal regime is to create space for self-government according to the distinctive values of the minority group, this outcome seems undesirable. It is true that the same assimilationist effects are possible under a regime that allows non-members to hold leasehold interests in Indigenous com-

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[122] Something like this phenomenon has already played out on allotted reservations in the United States, where the presence of non-member land-owners provided part of the motivation for courts to circumscribe tribal jurisdiction: see e.g. *Brendale v Confederated Tribes and Bands of Yakima Indian Nation*, 492 US 408 at 422–33 (White J), 438–47 (Stevens J).

[123] See Graben, *supra* note 56 at 430–32.

munities subject to Indigenous regulatory powers. However, these effects are necessarily time-limited and more readily reversible than is the case with respect to perpetual possessory interests.

From the perspective of the majority culture, the prospect that significant numbers of citizens will forever be under the jurisdiction of a political community they cannot fully join may also be cause for concern, based on the values of participatory democracy. Of course, situations often occur outside the Indigenous context where a landowner might not have full membership in a political community. A Canadian who buys a house in Massachusetts is not necessarily able to vote there. However, typically liberal regimes do provide a path to full citizenship for long-term residents, or at least for their children.[124] An Indigenous group facing the threat of assimilation might be loath to offer full political rights to significant numbers of non-Indigenous people—even if they are residents with a property right entitling them to remain in the community in perpetuity. Accordingly, delinking land tenure from jurisdiction may in the long run lead to situations in which governance institutions fail to conform to liberal norms of political participation.

A number of factors could potentially inform how a link between land tenure and jurisdiction is assessed. These suggestions are mostly speculative and in need of empirical confirmation. However, it is nevertheless worth considering which factors might impact the trade-offs between different institutional approaches. For instance, groups with small populations relative to the majority may be more vulnerable to the assimilationist effect that exercising jurisdiction over non-member land may have. Similarly, groups located in less remote and more heavily populated areas might be more vulnerable to having their institutions' cultural distinctiveness eroded by an influx of non-members. Such groups could potentially benefit from rules that exclude non-member-held land from their jurisdiction. That said, the improved land development prospects that might exist for such groups could outweigh these concerns.[125] In addition, rules that link governance powers with property interests may be better suited to communities with more limited governance powers. Where a group exercises broad-ranging sovereign powers, fluctuating territorial boundaries may be more of a problem, for instance if certain government tasks in-

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[124] See e.g. *Citizenship Act*, RSC 1985, c C-29, s 5(1)(c).

[125] Indeed, Indigenous groups with better land development opportunities are actually more likely to adopt freely alienable leasehold interests, according to one empirical study of First Nations land codes: see Lavoie & Lavoie, *supra* note 17 at 588–90. It is also possible that revenue from land development projects could be used to affirmatively support the traditional language and culture of the group, counteracting any associated threat of assimilation.

volve investments with high fixed costs, like building a police station. Fluctuating boundaries may be less of a problem if the Indigenous governance powers are more limited and more reliance is placed on non-Indigenous governance institutions even within the group's territory. Finally, groups that are more market-oriented may see less of a problem in adopting fixed jurisdictional lines if it will allow them to adopt land interests that are freely transferable without the worry associated with giving up governance powers over the land. Such groups may similarly be content to adopt governance institutions that will help attract investment from non-Indigenous purchasers of land who would be subject to the group's jurisdiction.

The Nisga'a Nation, which is a rare example of an Indigenous group whose governance jurisdiction is not linked to land tenure, provides a useful case study for thinking about some of the trade-offs involved. The unique situation of the Nisga'a is the result of a modern treaty concluded in the late 1990s and the terms of that treaty may be taken to at least partially reflect a perception by the Nisga'a of their own interests.[126] The Nisga'a Nation is relatively large by the standards of Canadian First Nations, both in its member population and in the size of its territory.[127] It is located in a fairly remote part of British Columbia, close to the border with Alaska. Accordingly, it is unlikely that the distinctive Nisga'a institutions will be swamped by a large influx of non-Indigenous land buyers, even though the community does allow non-Nisga'a parties to purchase fee simple interests in its territory.[128] The Nisga'a government's powers are also quite extensive, and so fluctuating jurisdictional lines could be impractical.[129] Accordingly, the circumstances of the Nisga'a Nation seem to be especially well-suited to delinking land tenure and governance powers. The same could not necessarily be said for all Indigenous groups in common law countries.

As I indicated above, some important criticisms have been leveled at regimes linking property and regulatory authority. There are problems associated with these regimes under certain circumstances, especially the

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126 See generally *Nisga'a Final Agreement*, *supra* note 44.

127 The total number of registered members of the four villages that comprise the Nisga'a Nation was 6,108 in June 2017; see Indigenous and Northern Affairs Canada, "First Nations Profiles" (2017), online: *Indigenous and Northern Affairs Canada* <fnp-ppn.aandc-aadnc.gc.ca> [perma.cc/3HA6-RP6E]. Under the Nisga'a Final Agreement, roughly 2,000 square kilometers are under Nisga'a jurisdiction: see Indigenous and Northern Affairs Canada, "Lands & Access" (last modified 15 April 2010), online: *Indigenous and Northern Affairs Canada* <www.aadnc-aandc.gc.ca> [perma.cc/SDC3-V45A].

128 See Graben, *supra* note 56 at 421.

129 The jurisdiction of the Nisga'a Lisims Government is arguably akin to that of a provincial or state government. See *Nisga'a Final Agreement*, *supra* note 44, c 11.

problem of undue legal complexity. What I have sought to show with the foregoing is that there are nevertheless plausible reasons for linking property and governance jurisdiction. Some of these reasons are rooted in structural concerns relating to the management of a cultural semicommons, where a minority group seeks to use a land base as a means of self-government according to a distinctive set of cultural commitments, while also allowing for smaller scale land interests. In particular, allowing non-member land interests to come under the governance jurisdiction of the group can potentially threaten the group's viability as a culturally distinct self-governing community, and the link between land tenure and governance is a possible means of mitigating this threat.

C. Default Co-Ownership Rules

The rules governing co-ownership are the next area of property doctrine that reflects distinctive cultural semicommons considerations. While the significance of co-ownership to Indigenous self-government varies among common law countries, the specialized Indigenous land tenure regimes in these countries do not adopt the default common law approach. In many common law jurisdictions co-owners of land outside of Indigenous communities hold title as tenants in common unless they provide otherwise.[130] In cases where a joint tenancy does arise, it makes little practical difference from the point of view of partition and sale: a joint tenant may unilaterally sever the joint tenancy, giving rise to a tenancy in common.[131] Undivided tenants in common may freely sell their interest in the land to strangers. Moreover, each co-owner maintains a right to apply for partition.[132] While courts can order physical partition of the land, the more common outcome now is partition through sale, whereby the property is sold and the proceeds distributed among the co-owners in proportion to their interests.[133] Finally, while each co-owner retains a right to possess the land, significant decisions regarding the land, including granting an

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[130] See Hanoch Dagan & Michael A Heller, "The Liberal Commons" (2001) 110:4 Yale LJ 549 at 602–12; Mitchell, *supra* note 69 at 512–23; Michael Allen Wolf, *Powell on Real Property: Michael Allen Wolf Desk Edition* (New Providence: LexisNexis, 2009) at § 50.02; Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018) at 379–81.

[131] See *In Re Wilks*, *supra* note 3 at 61; *Prusa v Cermak*, 414 P (2d) 297 at 300 (Okla Sup Ct 1966); Megarry & Wade, *supra* note 2 at 513; American Jurisprudence 2d (online), vol 20, *Cotenancy and Joint Ownership* at § 21; Ziff, *Property Law* 6th ed, *supra* note 1 at 344–47.

[132] See *An Acte for Joynt Tenants and Tenants in Comon* (UK), 1539, 31 Hen VIII, c 1; *Joinctenaunts for lif or yeres* (UK), 1540, 32 Hen VIII, c 32; Wolf, *supra* note 130 at § 50.07; Ziff, *Property Law* 6th ed, *supra* note 1 at 351–53.

[133] See Mitchell, *supra* note 69 at 513–14; *Partition Act* (UK), 1868, 31 & 32 Vict, c 40, s 3.

easement or an exclusive leasehold interest, require unanimity among the co-owners.[134]

This default common law approach does the utmost to protect individual autonomy by preventing the owner of even a relatively small undivided interest from being locked into a co-ownership relationship. At the same time, though, it channels parties into what is a highly unstable legal arrangement, which can be terminated at any time by a single interest-holder. Moreover, collective decision-making on land management requires unanimity, and it may be difficult and costly to arrive at a consensus. In that sense, the regime is ill-suited to collective governance by a group of co-owners, particularly where the group is relatively large.[135] Common law co-ownership rules can pose a problem for communities motivated by cultural semicommons considerations. Rather than reconciling the collective self-government interest of the group with the interests of individual owners, the common law rules would allow a single individual title-holder to undermine collective control by forcing a partition or sale. Both the specific rules and the underlying history and contexts differ widely among common law countries, but in each case the unique co-ownership rules applicable to Indigenous communities can be understood as responding to cultural semicommons concerns.

The cultural and self-government implications of co-ownership rules loom largest for Indigenous groups in the US and New Zealand, because of past policies promoting individual forms of land tenure. In both countries today, significant portions of the land base held collectively by Indigenous people is held not by tribes or other collective entities but rather by groups of co-owners.

In the US, the compulsory allotment policies of the late nineteenth and early twentieth centuries resulted in the transfer of portions of many reservations from tribal to individual land tenure.[136] Typically, individual allotments were held in trust by the federal government for the allotment holder for a period of twenty-five years, and were thus subject to alienation restraints during that time.[137] When the allotment policy was abandoned in 1934 through the *Indian Reorganization Act*, many parcels re-

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[134] See Russel D Niles & William F Walsh, "Incidents of Co-Ownership" in A James Casner, ed, *American Law of Property: A Treatise on the Law of Property in the United States*, vol 2 (Boston: Little, Brown & Co, 1952) at 49, 51.

[135] These limitations of the common law approach have been identified as a problem in the non-Indigenous context of Southern heirship property held by black families. See Dagan & Heller, *supra* note 130 at 602–09; Mitchell, *supra* note 69 at 532–61; *Uniform Partition Act*, *supra* note 69.

[136] See Newton et al, *supra* note 7 at 72–73.

[137] See *ibid* at 1073.

mained in this restricted status. Under the legislation, the trust status of these lands was to be maintained in perpetuity.[138] In the intervening years, much of this land passed to heirs through state intestacy law, which over time has resulted in highly fractionated ownership.[139] In some cases, title is held by hundreds of co-owners.

The degree of fractionation has been exacerbated by the special rules governing Native American land tenure. Since co-owners could not freely sell their interests and special rules applied to partition actions, important tools of property interest consolidation were less readily available. While an action for partition can be brought, in most cases the decision to order partition is in the Secretary of the Interior's discretion.[140] By contrast, in non-Indigenous contexts, partition is typically available to co-tenants as of right.[141] While these distinct aspects of US law have led to fractionation, they could also be seen to reflect the collective cultural interest in the land in question. In many cases the tribal land base was significantly eroded during the allotment period, such that fractionated parcels today constitute a significant portion of the collectively held land base. By channeling co-owners away from partition and sale of the land, the rules arguably encourage collective decision-making informed by the distinct cultural values of the group.

Other unique aspects of the US regime could help promote collective governance of co-owned land. Rather than requiring unanimity for decisions relating to leases, current legislation and policies require either majority or super-majority support, depending on the number of co-owners.[142] This policy facilitates collective decision-making by reducing the potential for minority interest-holders to hold up decisions seen to be in the interest of the majority. Similarly, the presumptive right that any one co-owner would have at common law to possess the entirety of the land is absent on co-owned allotments.[143] This approach is understandable, since collective governance is seemingly incompatible with a unilateral power of this na-

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138 See 25 USC § 462 (2012).

139 See Shoemaker, "Complexity's Shadow", *supra* note 117 at 517–22.

140 See 25 USC § 483 (2012); 25 CFR § 152.33 (2018); *Sampson v Andrus*, 483 F Supp 240 at 242–43 (D S Dak 1980); Newton et al, *supra* note 7 at 1086.

141 The availability of partition as of right has been altered by statute in some jurisdictions, such that it may be within the discretion of the court to refuse partition. Even in these cases, though, co-owners are viewed as being presumptively entitled to partition in the absence of countervailing concerns: see Ziff, *Property Law* 6th ed, *supra* note 1 at 352.

142 See 25 USC § 2218 (2012).

143 See 25 CFR § 162.104(b), 166.200 (2002); 25 CFR § 162.005 (2014). See Jessica A Shoemaker, "No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem" (2015) 63:2 U Kan L Rev 383 at 394–99 [Shoemaker, "No Sticks in My Bundle"].

ture exercisable by a party who may hold only a small minority interest in the land in question. The trust role of the Secretary could also be exercised in a manner that is deferential to the wishes of the tribe, which can reinforce collective governance.[144] Finally, the current statutory framework also aims to promote the reacquisition of co-owned lands by the tribes, which are capable of using the land to effect a more robust and likely more economically efficient form of collective governance than is possible under co-ownership. For instance, under the *Indian Land Consolidation Act*, a tribe can reacquire the entirety of a parcel for its market value where only a majority of the interest holders consent.[145] Whatever else may be said about this regime, it is clearly one that at least tries to make collective governance work on what are often highly fractionated co-owned lands.

It must be acknowledged that while the US regime governing co-ownership aims to promote collective decision-making, in practice it may not succeed in reconciling this objective with competing considerations, such as the efficient allocation of resources for productive uses of the land like farming and housing. Indeed, the regime has been subject to criticism for its inefficiencies. The trust responsibilities of the Secretary, combined with the absence of a unilateral right to possess the land on the part of co-owners and the need to demonstrate majority support for decisions, are said to promote free-riding by minority interest holders.[146] A co-owner who actively uses or manages the land faces legal barriers and transaction costs associated with coordinating with other co-owners. A co-owner who does not remains entitled to a share of land returns.[147]

It is widely acknowledged that even in spite of the unique doctrinal features that aim to make collective governance function, it does not function well, and the costs of coordination are often insurmountable. Instead of collectively governing their land, co-owners are too often reduced to passive absentee landlords with respect to land that is managed on their behalf by the Bureau of Indian Affairs (BIA).[148] In many cases, the only ongoing connection to the land is rent they receive through leases managed by the BIA. Legislative efforts aimed at land consolidation and probate reform in recent decades reflect the view that co-ownership is not an

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144 Such an approach would be consistent with federal policy. It is the current policy of the Bureau of Indian Affairs to promote tribal self-determination. See "Mission Statement", online: *Bureau of Indian Affairs* <www.bia.gov/bia> [perma.cc/783A-LHND].

145 See 25 USC § 2204(a) (2012).

146 See Shoemaker, "No Sticks in My Bundle", *supra* note 143 at 439–41.

147 See *ibid.*

148 See *ibid.*

ideal means of collective territorial governance.[149] Nevertheless, it is difficult to explain current doctrine without reference to the perceived cultural interest in managing land as a group, which could be undermined by individualization of title.

New Zealand is another jurisdiction where, for historical reasons, much of the land held by Indigenous people came to be held in co-ownership rather than through tribes or other collective institutions. In the mid-nineteenth century, partly in order to facilitate the transfer of land from Maori to settlers, the colony established the Native (later Maori) Land Court, an institution with the power to convert land held under customary Maori forms of land tenure into fee title.[150] Rather than reflecting the often complex and overlapping sets of rights that different individuals and groups had with respect to the same tract of land, the court tended to simply reflect multiple owners as tenants in common.[151] Because of the instability of the tenancy in common, it would often lead to Maori land loss through partition and sale.[152]

Reforms in the twentieth century aimed to stem further Maori land loss and facilitate effective collective management of lands that were often held by hundreds of individuals in undivided co-ownership.[153] The current regime governing Maori land tenure is set out in the *Te Ture Whenua Maori Act*.[154] While some Maori land is held in reservations on Crown land set aside for Maori use, the large majority of collectively held Maori land is held as "Maori freehold land".[155] Rather than the common law rules of co-ownership, land tenure is governed by a special regime that facilitates collective decision-making. The Act provides three modes of collective management. Co-owners can make collective decisions through meetings with default rules set out in the legislation, or they can opt to manage the land collectively through a special Maori "incorporation" or

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149 See e.g. *Indian Land Consolidation Act*, Pub L No 97–459, 96 Stat 2517 (1983) (codified as amended at 25 USC §§ 2201–21 (2012)).

150 See Banner, *Possessing the Pacific*, *supra* note 13 at 95–97.

151 See Tom Bennion et al, *New Zealand Land Law*, 2nd ed (Wellington: Brookers, 2009) at 349.

152 See *ibid* at 350–51.

153 See *ibid* at 351, 356.

154 See *Te Ture Whenua Maori Act*, *supra* note 16.

155 Bennion et al, *supra* note 151 at 355–56; "Types of Māori Land: The Different Status Categories", online: *Community Law* <communitylaw.org.nz> [perma.cc/9WU9-NMEH].

land trust.[156] With respect to Maori land trusts, the government-backed Maori Trustee may be designated as trustee, but this is not required.

While the mechanisms of meetings of owners, incorporations, and trustees help to provide for the day-to-day management of the land, certain particularly significant types of decisions also require that statutory thresholds for support among interest-holders be met. For instance, the sale or gift of the land requires the consent of the holders of seventy-five per cent of the interests in the land, regardless of whether the land is held under co-ownership, incorporation, or land trust.[157] This requirement is in addition to other safeguards, such as the oversight of the Maori Land Court and rights of first refusal for designated parties with a connection to the land—the Preferred Class of Alienees. Long-term leases, by contrast, require only majority support of the interest-holders.[158] An application for partition is possible, though applications that propose a sale are unlikely to be accepted by the Maori Land Court.[159] Shares in the land can be sold or given only to other members of the Preferred Class of Alienees.[160]

Unlike the default common law rules governing co-ownership, the approach laid out in the *Te Ture Whenua Maori Act* apparently aims to make collective governance of land under co-ownership work, rather than encouraging mechanisms like partition that tend to consolidate and individualize title. It must be acknowledged, however, that collective governance under this regime often does not fully reflect the traditional governance structures of the Maori.[161] It is not clear whether this regime is more successful than the US regime in facilitating collective governance while also providing for efficient use of the land for activities like housing and farming. However, the fact that the regime allows for groups of co-owners to appoint a non-government trustee means the group is not held captive to a government bureaucracy in managing their land on a day-to-day basis. This feature of the regime may allow groups to find more effective

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156 Bennion et al, *supra* note 151 at 360–63; *Te Ture Whenua Maori Act*, *supra* note 16, s 172.

157 See *Te Ture Whenua Maori Act*, *supra* note 16, ss 150A(1)(a), 150B(1)(a), 150C(1)(a).

158 See *ibid*, ss 150A(1)(b), 150B(1)(b), 150C(1)(b).

159 See Bennion et al, *supra* note 151 at 371.

160 See *Te Ture Whenua Maori Act*, *supra* note 16, s 148.

161 See Banner, *Possessing the Pacific*, *supra* note 13 at 47–59, 96–103 (the original transition to freehold land tenure was based on a very rough translation of traditional Maori interests into interests recognized at common law. Modern legislation dealing with Maori freehold land has reincorporated traditional Maori principles to some extent, though common law concepts like undivided co-ownership and the trust are still a major part of the regime).

ways to manage the collective action and free-rider problems associated with land management on fractionated allotments. The capacity for diverse local institutional responses to managing co-owned land that is built into the New Zealand regime is consistent with proposals for reform that have been made in the US context.[162]

Land trusts are also employed as a means of collective decision-making in relation to lands with multiple owners under Australian statutory regimes. For instance, under the applicable regime in the Northern Territory, Indigenous land is held under land trusts. The land trusts are managed by regional land councils, which are elected by the Indigenous people in the region, and are directed to make decisions in accordance with the wishes of the traditional owners in a given area.[163] Similar regimes are in place in other Australian jurisdictions, though the Northern Territory is by far the most significant in terms of area covered, with most of the land in the territory now held under Aboriginal land trusts.[164] Lands subject to trust are inalienable, except through surrender to the Crown or transfer to another Aboriginal land trust.[165] As a result, nothing akin to a partition action is possible. While the Northern Territory approach is less flexible than, for instance, the New Zealand framework, it provides mechanisms for leases and other smaller-scale land interests oriented towards economic development.[166]

Default co-ownership rules are less significant on Canadian First Nations reserves, in part because most reserve lands are still collectively held through band institutions rather than through vested possessory interests held by individual members.[167] However, individual Certificates of

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[162] For proposals for reform in the US context, see e.g. Shoemaker, "Complexity's Shadow", *supra* note 117 at 540–47; Stacy L Leeds, "The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law" (2000) 10:3 Kan JL & Pub Pol'y 491 at 497–98.

[163] See *Aboriginal Land Rights (NE) Act*, *supra* note 16, ss 23, 23AA, 27, 29.

[164] See "About the Central Land Council", online: *Central Land Council* <www.clc.org.au> [perma.cc/YNY2-8KLY]. See also Geospatial Services, National Native Title Tribunal, "Indigenous Estates: Land Granted Under Specified Indigenous Land Grant Instruments" (26 April 2019), online: *National Native Title Tribunal* <www.nntt.gov.au> [perma.cc/FRG6-6KXL]. See e.g. *Aboriginal Land Rights Act*, *supra* note 30, ss 40(1), 42D, 42E.

[165] See *Aboriginal Land Rights (NE) Act*, *supra* note 16, s 19(4).

[166] See *ibid*, ss 19(4A), 19A. See e.g. Margaret Stephenson, "To Lease or Not to Lease? The Leasing of Indigenous Statutory Lands in Australia: Lessons from Canada" (2009) 35:3 Commonwealth L Bull 545 at 549–54.

[167] See Marena Brinkhurst & Anke Kessler, "Land Management on First Nations Reserves: Lawful Possession and its Determinants" (2013) Simon Fraser University Department of Economics, Working Paper No 13-04 at 7, online (pdf): *Simon Fraser*

Possession are widely held in some First Nations communities. These interests provide for an exclusive possessory right in perpetuity for the member or members of the First Nation who hold them. They cannot be revoked by a band council unilaterally, though they can be expropriated by First Nations operating under the *FNLMA*.[168] Since individual rights of possession have been a feature of the *Indian Act* land tenure regime since the late nineteenth century, a process of gradual fractionation has also taken place on Canadian First Nations reserves.[169] Under the *Indian Act*, there is no statutory mechanism for partition of land held by multiple owners under Certificates of Possession, so this regime does exemplify some of the same distinctive features as regimes in other jurisdictions. That said, Certificate of Possession lands held in co-ownership are a less significant form of collective land tenure than the other co-ownership regimes discussed above.[170]

Finally, at this stage it is worth noting a seemingly obvious point with respect to common law Aboriginal title. It is a form of land tenure that is either necessarily or presumptively collective in nature.[171] Title is held and managed by an Indigenous group's governance institutions rather than under a form of undivided co-ownership. This point is often taken for granted, but this approach differs from how the common law would treat a non-Indigenous group of owners holding title together on the basis of long-standing possession. Such a group would most likely be recognized as holding title under a tenancy in common or a joint tenancy. This distinction shows the orientation of the common law of Aboriginal title towards maintaining collective governance authority. In this way, it is consistent with the general thrust of statutory law in this area.

University <www.sfu.ca/econ-research/RePEc/sfu/sfudps/dp13-04.pdf> [perma.cc/8CCF-2AK5].

168 See *FNLMA*, *supra* note 25, s 28(1).

169 See Jack Woodward, *Native Law* (Toronto: Carswell, 1989) (loose-leaf 2017 supplement) at 10 §280; *Indian Act*, SC 1876, c 18, ss 5–10.

170 See Brinkhurst & Kessler, *supra* note 167 at 7.

171 There is binding authority in Canada for the proposition that Aboriginal title is necessarily collective in nature: see *Delgamuukw*, *supra* note 5 at 1082–83; *Tsilhqot'in*, *supra* note 5 at para 74. In Australia, the doctrine of Aboriginal title extends to both individual and collective interests, but individual interests are dependent on the collective title of the Indigenous group as a whole and only exist insofar as these interests are recognized under the traditional laws and customs of the group (see *Mabo*, *supra* note 15 at 61–63). US jurisprudence acknowledges the possibility of individual "original Indian title", though this is exceptional. See Newton et al, *supra* note 7 at 1070–71. On the collective nature of tribal title, see *Eastern Band of Cherokee Indians v United States*, 117 US 288 at 309 (1886); *Mitchel v United States*, 34 US 711 at 745–46 (1835).

These regimes channel parties into frameworks that provide for collective governance while at the same time making it possible to grant subsidiary individual rights to engage in productive uses. By contrast, the common law channels parties into regimes that make it easy to terminate co-ownership and fully individualize title. These distinct Indigenous co-ownership regimes can be particularly significant in cases where, for historical reasons, co-ownership is the principal means through which collective Indigenous governance is recognized by state authorities.[172] While these special default rules do introduce certain inefficiencies, they can be understood as providing for collective governance according to distinctive cultural values, while at the same time allowing for individual-scale productive uses.

D. Unique Estates in Land

The final distinctive feature of specialized property regimes that promote collective self-government is a degree of tolerance for what amount to unique estates (or forms of property interest) in land. These estates would generally not be permitted under the common law rules which fall broadly under the heading (borrowed from the civil law) of the *numerus clausus* principle.[173] This principle is essentially that the set of permitted estates in land is fixed. The restriction on unique estates in land is seen as a means of reducing information and transaction costs,[174] avoiding the excessive decomposition of property interests into "anticommons" property,[175] and perhaps also as a way to reflect the underlying values of the legal system.[176] However, restrictions on novel interests are much more

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[172] On the process that led to the individualization of title and fractionation of interests on most Maori-held lands, see Banner, *Possessing the Pacific*, *supra* note 13 at 96–103.

[173] See *Keppell*, *supra* note 1 at 1049; Ziff, *Property Law* 6th ed, *supra* note 1 at 56–57; Merrill & Smith, *supra* note 1 at 3–4, 12–14. While the *numerus clausus* principle is traditionally seen as a principle that guides courts, most of the policies that underlie the principle apply equally to novel interests created by either courts or legislatures. Novel interests in land give rise to an information cost burden for third parties, for instance, whether the interest is created by a court or through a statute. So to the extent that unique interests in land are available in the Indigenous context where they are not available in the non-Indigenous context, this is a phenomenon worthy of mention regardless of whether the interests in question are recognized by the courts, as is the case with respect to Aboriginal title, or whether they are recognized under statute.

[174] See Merrill & Smith, *supra* note 1 at 24–42.

[175] Michael A Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1998) 111:3 Harv L Rev 621 at 623–24, 664–65.

[176] See e.g. Joseph William Singer, "Democratic Estates: Property Law in a Free and Democratic Society" (2009) 94:4 Cornell L Rev 1009 at 1049–51; Nestor M Davidson, "Standardization and Pluralism in Property Law" (2008) 61:6 Vand L Rev 1597 at 1636–55.

flexible under the specialized regimes that facilitate Indigenous self-government. Not only do these regimes give rise to estates in land that would not be permitted at common law, like individual allotments with restraints on alienation, but in many cases they confer ongoing powers on groups to recognize novel estates.

This degree of toleration for unique estates in land can be explained in part as a form of deference to Indigenous legal traditions, which would often provide for land interests distinct from those available at common law.[177] However, it can also partly be explained by functional cultural semicommons considerations. These regimes reconcile larger-scale collective cultural and self-government interests in a land base with smaller-scale productive uses. The existing categories of estates in land at common law are not necessarily well adapted to this function.[178]

Among the results that are difficult to achieve at common law are alienation restraints, and in particular alienation restraints tailored to the particular circumstances and values of a given community. For instance, it is not clear how one could use ordinary legal and equitable tools to construct something as elaborate as the Preferred Class of Alienees that is central to the New Zealand system of restraints on alienation for Maori freehold lands.[179] Transfers within the class are relatively free while transfers outside the class are subject to specific restrictions, including internal voting requirements.[180] Moreover, membership in the class is defined in an open-ended way, partly by reference to cultural affiliation.[181] Where applicable, the rule against perpetuities and restrictions on parties' ability to limit the power of a trustee to transfer land would make a scheme like this difficult or impossible to implement using ordinary trust law.[182] Even if it were technically possible to set up a trust with these at-

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177 See Henderson, *supra* note 7 at 216–36.

178 It must be acknowledged that the traditional categories of estates in land are more malleable than they may at first appear, in light of the potential for recursion, or using different combinations of standardized estates: see Henry E Smith, "Standardization in Property Law" in *Research Handbook on the Economics of Property Law*, Kenneth Ayotte & Henry E Smith, eds (Cheltenham, UK: Edward Elgar, 2011) 148 at 152–53. That said, there are certain legal results that are difficult or impossible to achieve even with recursive combinations of recognized common law property interests, including alienation restraints.

179 See *Te Ture Whenua Maori Act*, *supra* note 16, ss 4, 147A.

180 See *ibid*, ss 150A, 150B, 150C.

181 See *ibid*, s 4.

182 The rule against perpetuities requires that property interests vest within a set period of time. This would preclude the creation of a "perpetual trust", with as-yet-unborn future generations of a community as beneficiaries. See Megarry & Wade, *supra* note 2 at 320–24, 474–75; Restatement (Third) of Property, *Wills & Other Donative Transfers*, vol 3

tributes, the transaction costs and other barriers to doing so could be prohibitive if all existing interest holders had to agree. There is thus a potentially important distinction between a default estate in land that supports collective objectives, on the one hand, and an institution that parties must piece together using existing estates in land, on the other. In principle, groups can benefit from the presence of default estates that address the particular challenges of governing a cultural semicommons.

The unique functional considerations arising from cultural semicommons land management give rise to potential demand for estates in land that fall outside traditional common law categories, such as those with a broad spectrum of restraints on alienation. These unique functional considerations partly explain the presence of *sui generis* estates in land. It is also possible that some trade-offs associated with designing property institutions for the cultural semicommons will vary depending on factors specific to each community, such as its cultural commitments and economic and demographic circumstances.[183] Indigenous communities are often able to design and give legal effect to novel property interests that defy traditional common law estates in land, which may be specifically tailored to local circumstances and values.

Accordingly, unique estates in land come in essentially two forms. The first are "off-the-shelf" interests that are not among the estates normally available at common law but are nevertheless more or less doctrinally fixed under the state legal system. The second are novel land interests recognized by particular Indigenous groups based on their own traditions, values, and circumstances.

Common law Aboriginal title is, at least in part, an example of the first type of interest. Aboriginal title clearly does not conform to any of the traditional common law estates in land. Nevertheless, its contours are to some extent fixed by the state legal system, in ways that may respond to

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§ 27.1 (2011). Among the jurisdictions of interest to this paper, the rule against perpetuities has been abolished in roughly two dozen US states and in the provinces of Manitoba, Nova Scotia, and Saskatchewan. The rule against perpetuities continues to apply in at least some form in most Commonwealth jurisdictions. See Alberta Law Reform Institute, "Abolition of Perpetuities Law: Final Report 110" (2017) at 5–18, online (pdf): *Alberta Law Reform Institute* <www.alri.ualberta.ca/docs/FR_110.pdf> [perma.cc/VZQ6-U7HD]. On the rise of the "perpetual trust" in US states that have abolished the rule against perpetuities, see generally Max M Schanzenbach & Robert H Sitkoff, "Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust" (2006) 27:6 Cardozo L Rev 2465. Maori freehold land trusts are specifically exempted from the rule against perpetuities: see *Te Ture Whenua Maori Act*, *supra* note 16, s 235.

183 For an overview of factors potentially relevant to a community's decisions regarding what types of restraints on alienation to adopt, see Lavoie & Lavoie, *supra* note 17 at 574–82.

the unique functional demands of the cultural semicommons. For instance, while some aspects of Aboriginal title may vary depending on the traditions and practices of a particular group,[184] Aboriginal title lands cannot under any circumstances be alienated to a party other than the settler-state government.[185] Moreover, Aboriginal title is presumptively held collectively by an Aboriginal group as a whole, and any individual interests are held according to the traditional laws and customs of the group as a whole.[186] Both of these aspects facilitate collective cultural control of a land base, while making room for smaller-scale productive uses.

Other unique interests found in statutes tend to be even more rigidly defined, though in ways that would similarly not conform to traditional common law estates in land. Statutory individual possessory interests under regimes in the US, Canada, and New Zealand are subject to alienation restraints.[187] Collectively held land is also subject to unique statutory rules governing land tenure, including alienation restraints and collective governance regimes.[188] Unique default and mandatory rules govern leasing under statutes in Canada, the US, Australia, and New Zealand. These include community and ministerial approval requirements which are often calibrated based on the duration of the lease.[189]

The second category of unique estates in land relates to interests that can vary from one Indigenous group to the next. In these cases, the state legal regime recognizes and gives effect to novel interests generated at the community level. Tribal or customary interests within Indigenous communities fall into this category, though these interests are often held not

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184 See *Mabo*, *supra* note 15 at 58–61; Anthony P Moore, Scott Grattan & Lynden Griggs, *Bradbrook, MacCallum & Moore's Australian Real Property Law*, 6th ed (Sydney: Thomson Reuters, 2016) at 390–92.

185 See *McIntosh*, *supra* note 15 at 584–85; *Paine Lumber*, *supra* note 31 at 472–74; *Symonds*, *supra* note 31 at 389; *Nireaha*, *supra* note 15 at 576–79; *Mabo*, *supra* note 15 at 60; *Calder*, *supra* note 31 at 320–22, 377–85, 390; *Delgamuukw*, *supra* note 5 at 1081–82; *Tsilhqot'in*, *supra* note 5 at para 74.

186 See e.g. *Delgamuukw*, *supra* note 5 at 1082–83; *Tsilhqot'in*, *supra* note 5 at para 74 (in principle an Indigenous group with an Aboriginal title interest should be able to grant individual interests under its own laws, but the Supreme Court did not address this directly); *Mabo*, *supra* note 15 at 61–63. See Newton et al, *supra* note 7 at 1070–71. See also *Yorta Yorta*, *supra* note 111 at 33–34.

187 See 25 USC § 2208 (2012); *Te Ture Whenua Maori Act*, *supra* note 16, ss 150A, 150B, 150C; *Indian Act*, *supra* note 16, s 24.

188 See 25 USC § 177 (2012); *Te Ture Whenua Maori Act*, *supra* note 16, ss 150A, 150B, 150C, 172; *Indian Act*, *supra* note 16, ss 37(1), 38(1), 39, 81(1).

189 See 25 USC § 2218 (2012); *Te Ture Whenua Maori Act*, *supra* note 16, ss 151–52; *Indian Act*, *supra* note 16, ss 37(2), 38(2).

to be enforceable in settler-state courts.[190] Various mechanisms exist that allow Indigenous groups to give effect to novel property interests that are enforceable in the settler-state court system. The Canadian *FNLMA*, for instance, gives Canadian First Nations that opt into the regime a substantial degree of power to design the rules governing land tenure within their community.[191] Groups exercising authority under the *FNLMA* define unique contours for possessory and leasehold interests. Groups have used this power to create *sui generis* forms of restraints on alienation, as well as unique rules governing other aspects of land tenure, such as leasing and expropriation.[192] The decisions made by First Nations in designing unique interests under the *FNLMA* can be understood in terms of some of the key trade-offs associated with maintaining collective control while at the same time facilitating productive use of the land.[193] In addition to recognizing unique interests enforceable in tribal courts, US Native American tribes can, through the *Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012* (*HEARTH Act*), adopt unique leasing regulations.[194] Tribal autonomy under this regime is more limited than under the *FNLMA*, however, since tribal leasing regulations adopted under the *HEARTH Act* must be "consistent" with federal leasing regulations.[195]

While standardized Indigenous land interests and interests developed at the community level can both in principle address cultural semicommons concerns, there are reasons to prefer an approach that allows Indigenous groups to determine the specific contours of property interests in their own communities. Regimes like the *FNLMA* allow particular communities to assess the trade-offs associated with designing property interests according to their own traditions, values, and circumstances. How these choices are assessed will differ from one community to the next.[196]

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190 See Flanagan, Alcantara & Le Dressay, *supra* note 55 at 69. See also Thomas Flanagan & Christopher Alcantara, "Customary Land Rights on Canadian Indian Reserves", in Terry L Anderson, Bruce L Benson, and Thomas E Flanagan, eds, *Self-Determination: The Other Path for Native Americans* (Stanford: Stanford University Press, 2006) 134 at 134–35; Newton et al, *supra* note 7 at 1069–70. For a contrary view, see generally Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Portland, OR: Hart Publishing, 2014).

191 See *FNLMA*, *supra* note 25, ss 6–16.

192 See Lavoie & Lavoie, *supra* note 17 at 567–71, 597–600.

193 See *ibid* at 585–96.

194 Pub L No 112-151, § 2(h), 126 Stat 1150 at 1151 (codified as amended at 25 USC § 415 (2012)).

195 See *ibid*, 25 USC §§ 415(e)(3), (h)(3)(B) (2012).

196 On the need for Indigenous institutions to match particular Indigenous cultures, see The Harvard Project on American Indian Economic Development, *The State of the Na-*

For instance, groups that are more remote may have less to fear from the potentially assimilative effect of land markets, while groups with valuable land development prospects may have the most to gain from alienable interests. Indeed, some of these tendencies have been borne out in empirical work. In a study of custom land codes under the *FNLMA*, it emerged that the communities most likely to allow for freely alienable long-term leases were the communities with the best land-development prospects.[197]

This area of law has long been characterized by institutional arrangements imposed by governments on Indigenous communities.[198] While it is possible to provide a functional explanation for some of the broad contours of the doctrines examined in this article, it does not follow that these sometimes rigid frameworks should be maintained in their current forms. Indeed, there are strong arguments for greater devolution of the power to design property institutions to the level of particular Indigenous communities so that local conditions and preferences can be accounted for.[199]

III. Assessing the Cultural Semicommons Thesis

In the foregoing, I have sought to show that structural considerations arising from managing land in a cultural semicommons can help explain many of the broad contours of Indigenous land tenure in common law countries. Alienation restraints, governance powers as an incident of land tenure, distinctive co-ownership rules, and toleration for unique estates in land can all help address challenges arising from the simultaneous use of land for self-government by cultural minorities as well as for smaller-scale productive uses. However, to the extent that contemporary justifications for these doctrinal features are offered, they tend to focus on other ideas, including the concept of Indigenous sovereignty,[200] or the particularly strong connection that Indigenous communities have with their tradition-

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tive Nations: Conditions under U.S. Policies of Self-Determination (Oxford: Oxford University Press, 2008) at 121–28. See also Ellickson, "Property in Land", *supra* note 34 at 1320–21 (Ellickson argues that closely knit communities tend to adopt property institutions that reflect the interests of members of the group, broadly understood, as long as institutions are not imposed from the outside).

197 See Lavoie & Lavoie, *supra* note 17 at 589–90.

198 See e.g. *Indian Act*, *supra* note 16; 25 USC § 177 (2012).

199 That said, there are countervailing economic arguments in favour of the standardization of property interests that also have to be weighed (see generally Merrill & Smith, *supra* note 1).

200 See e.g. McNeil, "Self-Government", *supra* note 7 at 496.

al lands.[201] Other explanations for specialized rules of Indigenous land tenure that do not amount to normatively appealing justifications are also sometimes offered. For instance, it has been suggested that the distinctive features of Indigenous land tenure are paternalistic holdovers of past eras of state control over Indigenous peoples,[202] or that they are the result of self-perpetuating bureaucracies.[203] Each of these alternative explanations contains some element of truth, and helps to explain some aspects of the doctrine. However, in this section I will argue that explanations rooted in these factors alone cannot adequately explain the broad contours of the rules governing Indigenous land tenure in common law countries. Structural considerations rooted in the idea of the cultural semicommons are necessary in order to provide a coherent explanation for the doctrine in a manner that is at least plausibly normatively appealing.

The first alternative theory to consider is rooted in the concept of Indigenous sovereignty. Indigenous sovereignty played a role historically in justifying some distinctive attributes of Indigenous land tenure, especially restraints on alienation of land to parties other than the Crown.[204] Moreover, "sovereignty" is seen to have a great deal of normative appeal in discussions relating to the law of Indigenous people for reasons that are relatively easy to grasp. Indigenous groups were self-governing before the establishment of settler states. Their powers to govern their territories were impaired by these states, often under circumstances in which the Indigenous groups did not consent or where consent was given in the context of power imbalances.[205] Claims rooted in Indigenous sovereignty aim to cor-

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[201] See Bobroff, *supra* note 6 at 536–37. See also Carpenter, Katyal & Riley, *supra* note 6 at 1112–24; Carpenter, *supra* note 6.

[202] See Robert A Williams, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990) at 312–17; Nicolas Peterson, "Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Australian Rights in Land", in Louis A Knafla & Haijo Westra, eds, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (Vancouver: UBC Press, 2010) 171 at 171, 181; Newton et al, *supra* note 7 at 1038–39.

[203] See McChesney, *supra* note 55 at 329–35.

[204] Because territory acquisition at the frontier involved international relations, it was seen in conceptual terms as a matter for the sovereign, rather than individual colonists. See Newton et al, *supra* note 7 at 11–12, citing De Victoria, *supra* note 7 at 55–100; McNeil, "Self-Government", *supra* note 7 at 490–96; Lavoie, "Restrain Alienation", *supra* note 27 at 1005–06.

[205] In *McIntosh*, *supra* note 15, Marshall CJ famously declines to defend the moral legitimacy of the colonial enterprise, regarding it instead as an irreversible *fait accompli* (at 587–92).

rect for these past injustices, in part by reinforcing the self-government capacities of present-day Indigenous groups.[206]

The argument that Indigenous groups have a claim to self-government rooted in their historic status as separate sovereigns is not incompatible with the cultural semicommons explanation for Indigenous land tenure. Property law is one means by which the collective self-government interests of Indigenous groups can be given effect in the present day. However, the concept of sovereignty alone is not sufficient to explain the distinctive property doctrine discussed in this article. A claim based on sovereignty might be reflected in a number of different ways, including through a federalism-like arrangement, such as the one negotiated by the Nisga'a, in which jurisdiction is divided within a territory in a manner that does not rely on land tenure at all. In the Nisga'a case, local political participation is contingent on citizenship in the First Nation, but that need not always be so. For instance, Indigenous claims to sovereignty might be manifested simply through the establishment of a partially self-governing territory in which the Indigenous group happens to form a majority, such as the Canadian territory of Nunavut or the US territory of American Samoa.[207]

The distinctive attributes of Indigenous land tenure discussed above emerge not from the concept of sovereignty alone, but rather from the tension associated with recognizing Indigenous self-government through land tenure while also allowing for individual forms of land holding. Restraints on alienation, governance powers linked to land tenure, distinctive co-ownership rules, and unique estates in land are not necessary attributes of *sovereignty*. None of these would be necessary to facilitate Indigenous self-government in a federalism-like regime. Indeed, regimes like that of the Nisga'a are not characterized by these features at all. In Nisga'a Nation lands, fee-simple interests are freely alienable, including to non-members, and the default rules of co-ownership apply as they would elsewhere in British Columbia.[208] Moreover, much of the common

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[206] See e.g. Sanderson, *supra* note 10 at 102–03; Philip P Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107:2 Harv L Rev 381 at 427–40.

[207] The creation of the territory of Nunavut came about due to the *Nunavut Land Claims Agreement*, 25 May 1993, art 4.1.1, online (pdf): <tunngavik.com/documents/publications/LAND_CLAIMS_AGREEMENT_NUNAVUT.pdf> [perma.cc/Q7ZN-ZKB6].

[208] See *Nisga'a Landholding Transition Act*, NLGSR 2009/02, s 2(1), online (pdf): *Nisga'a Lisims Government* <nisgaanation.ca> [perma.cc/7UUD-B25X] (provides for the granting of freely alienable fee simple interests to members); *Nisga'a Partition of Property Act*, NLGSR 2010/08, s 1, online (pdf): *Nisga'a Lisims Government* <nisgaanation.ca> [perma.cc/DAC7-8SFX] (provides that the *Partition of Property Act*, RSBC 1996, c 347 applies to Nisga'a lands under co-ownership); *Nisga'a Land Act*, *supra* note 42,; *Nisga'a Land Title Act*, *supra* note 42, s 125(2), online (pdf): *Nisga'a Lisims Government* <nis-

law of real property has been adopted through Nisga'a legislation.[209] The constellation of distinctive rules of land tenure discussed in this article stems from using property in land as a basis for Indigenous self-government, while at the same time also using property rights to facilitate more prosaic uses of land like housing, commerce, and farming. Indigenous sovereignty, as a concept and normative ideal, is arguably compatible with this approach, but it does not on its own explain the structure of legal doctrine in this area.

The second orthodox explanation for distinctive rules of Indigenous land tenure is the argument that these rules reflect Indigenous peoples' connection to land in their traditional territory. Such a connection to the land could form part of particular groups' traditional laws and values.[210] One way of conceptualizing the connection to the land is in terms of personhood or peoplehood.[211] Rather than being an object separate from the individual rights-holding subjects, the land may be a part of Indigenous people's collective identity.[212] Accordingly, treating it as a commodity that is separable from its owners rests on a miscategorization. Alternatively, the land may simply be seen as sacred and accordingly not something that should be bought and sold.

The idea that land is sacred or a part of the identity of the interest holders, and therefore not properly treated as an object of commerce, could potentially help justify restraints on alienation. It could also justify certain other features like co-ownership rules oriented towards preserving co-owners' legal link to the land. It is clearly true that a special cultural or religious link to the land is an important consideration for many groups in relation to at least some of their lands. However, it is less clear that these

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gaanation.ca> [perma.cc/EM9H-J9BV]. See also *Nisga'a Nation Entitlement Act*, NLGSR 2000/12, online (pdf): *Nisga'a Lisims Government* <nisgaanation.ca> [perma.cc/M4JQ-EK66]; *Nisga'a Village Entitlement Act*, NLGSR 2000/13, online (pdf): *Nisga'a Lisims Government* <nisgaanation.ca> [perma.cc/PJF9-E3VL]. For an overview of the Nisga'a land regime, see Graben, *supra* note 56 at 404–09.

209 See *Nisga'a Law and Equity Act*, NLGSR 2010/07, s 1, online (pdf): *Nisga'a Lisims Government* <nisgaanation.ca> [perma.cc/SAK2-YQ2D] (provides that the *Law and Equity Act*, RSBC 1996, c 253 is made applicable to Nisga'a lands held in fee simple; the latter act provides for the reception of English law in British Columbia, s 2). See also *Nisga'a Property Law Act*, NLGSR 2010/09, s 1, online (pdf): *Nisga'a Lisims Government* <nisgaanation.ca> [perma.cc/GDW2-ZFA7] (adopts the *Property Law Act*, RSBC 1996, c 377 as part of Nisga'a law).

210 See generally Overstall, *supra* note 6 at 25–47; Henderson, *supra* note 7 at 216–36.

211 See Carpenter, *supra* note 6. See also Bobroff, *supra* note 6 at 537.

212 See Carpenter, *supra* note 6 at 345–55; Bobroff, *supra* note 6 at 536–37. See also Margaret Jane Radin, "Market-Inalienability" (1987) 100:8 Harv L Rev 1849 at 1903–14.

considerations, without more, would fully explain the bulk of the existing legal doctrine.

For instance, the alienation restrictions under study tend to apply presumptively to all Indigenous groups within a given jurisdiction, and to all lands held by that group or its members. And yet Indigenous groups would be expected to have varying cultural and religious commitments with regard to their land, particularly given the cultural diversity among Indigenous groups. Moreover, one might expect that within a group certain lands might be regarded as especially significant for religious or cultural reasons while other lands, including those used for commercial activities, would not have the same significance. The fact that this area of law tends to employ broad restraints on alienation that apply to all groups and all lands implies an underlying justification rooted in features the groups have in common, rather than one based on the contingent commitments of particular cultures in relation to particular lands.[213] None of this is to deny that many Indigenous groups have deeply meaningful connections with some or all of the land they hold title to. However, a presumption that all the land held by an Indigenous group or its members is not properly treated as an object of commerce is simply untenable, considering that many Indigenous groups and individuals develop and acquire lands for all manner of commercial purposes.

A justification rooted in the functional necessities of the cultural semi-commons is more generalizable because it relies on structural elements that all or most Indigenous groups have in common, namely that they constitute minorities within their countries and seek to exercise collective control over a land base according to their distinctive values while also using the land for smaller-scale activities like housing, commerce and farming. It is true that many groups have a deep connection to some or all of their lands, but this fact on its own cannot fully explain the distinctive features of Indigenous land tenure.

It is also possible to assert that the distinctive features of Indigenous land tenure cannot be properly explained by any normatively appealing considerations. Instead, it might be suggested that they are the product of the historical oppression of Indigenous peoples and contemporary political incentives to preserve the institutional legacy of this oppression. Alienation restraints, for instance, first emerged historically in settler-state legal regimes due to a variety of factors that were not necessarily consistent with the interests of Indigenous groups. Restraints on alienation of Indigenous land to parties other than the government, for instance, allowed governments to manage their relationships with Indigenous groups in ac-

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[213] See Lavoie, "Restrain Alienation", *supra* note 27 at 1045–46.

cordance with their own strategic military and diplomatic objectives.[214] Indigenous groups were valuable military allies. Transactions between individual settlers and Indigenous groups, especially those involving the kinds of "frauds and abuses" referred to in the *Royal Proclamation, 1763*, could interfere with the government's relationship with these groups.[215] The government's role as a single buyer of Indigenous land also allowed it to direct settlement in a strategic manner, for instance by sending a critical mass of settlers into an area at the same time in order to deter retaliation by Indigenous groups.[216] The fact that there was a single buyer may have also helped to depress the effective land prices paid to Indigenous groups through treaties.[217] Finally, paternalistic attitudes towards Indigenous people also played a role in motivating restraints on alienation.[218]

None of these historic explanations for alienation restraints resonates today.[219] And yet restraints on alienation and associated doctrinal features—like immunity from execution and the non-availability of partition for co-owners—persist. It is possible to argue that they persist not because some novel and compelling justification has emerged but rather due to inertia or perhaps some more perverse reason. For instance, it has been suggested that restraints on alienation in the US have been maintained since the 1934 *Indian Reorganization Act* because they serve the interests of bureaucrats working in the Bureau of Indian Affairs.[220] According to this view, bureaucrats seeking to maintain and expand their budgets have been eager to maintain Indigenous people as captive clients to their bureaucracy.[221] Distinctive rules of land tenure that provide a significant role for government bureaucrats in reviewing applications and managing lands are consistent with these bureaucratic interests.

The twin factors of institutional inertia and perverse bureaucratic incentives should not be lightly dismissed. However, this account is difficult

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214 See Banner, *Lost Their Land*, *supra* note 14 at 85–95; Newton et al, *supra* note 7 at 14–16; Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln, NE: University of Nebraska Press, 1984) vol 1 at 108–14.

215 See George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 at 6 [*Royal Proclamation, 1763*].

216 See Kades, *supra* note 14 at 1156–75; Banner, *Lost Their Land*, *supra* note 14 at 45; Douglas W Allen, "Homesteading and Property Rights; or, 'How the West Was Really Won'" (1991) 34:1 JL & Econ 1 at 3–8.

217 See Kades, *supra* note 14 at 1110–18, 1127.

218 See McNeil, "Self-Government", *supra* note 7 at 477–81. See e.g. *Royal Proclamation, 1763*, *supra* note 214 at 6–7.

219 See Lavoie, "Restrain Alienation", *supra* note 27 at 1001–02.

220 See McChesney, *supra* note 55 at 329–35.

221 See McChesney, *supra* note 55 at 329–35.

to reconcile with the fact that, most of the time, when Indigenous groups are given a significant say in designing property institutions for their communities, they tend to adopt rules that seem to reflect cultural semi-commons considerations. For instance, under the *FNLMA*, First Nations are able to adopt custom land codes governing most aspects of land tenure in their communities, with the proviso that they cannot provide for the granting and transfer of fee simple interests.[222] Most First Nations that adopt custom land codes make the granting and transfer of leases and member possessory interests subject to the discretionary approval of the membership, band council, or some delegated decision-maker.[223] Typically, it is the community as whole or the band council that must give its approval for the granting or transfer of an interest.[224] In these cases, the federal Indigenous Affairs bureaucracy is not part of the approval process for individual transactions but communities have nevertheless opted to require discretionary approval for transfers of land interests. It is of course possible that the interests of local First Nations' bureaucrats are served by approval requirements, but it should be borne in mind that many of these communities are quite small and closely knit.[225] They may accordingly be less susceptible to interest-group capture and more likely to make decisions about land tenure that genuinely reflect the interests of community members.[226] These communities apparently see some means by which alienation restraints serve their interests as they strive to balance self-government as a cultural minority group with reasonably efficient forms of individual land tenure.[227]

Indeed, in the twentieth century there has been a resurgence of distinctive rules of Indigenous land tenure in common law countries, with Indigenous groups often advocating for special rules like alienation restraints and co-ownership frameworks.[228] Alienation restraints were adopted as part of the statutory Indigenous land regimes in Australia, and were reintroduced on Maori freehold land in New Zealand, in both cases with Indigenous support.[229] Rather than serving the interests of bu-

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222 See *FNLMA*, *supra* note 25, ss 5, 6, 18, 20, 26.

223 See Lavoie & Lavoie, *supra* note 17 at 597–600.

224 See *ibid*.

225 See *ibid* at 572–74.

226 See Ellickson, "Property in Land", *supra* note 34 at 1320–21.

227 See Lavoie & Lavoie, *supra* note 17 at 593–96.

228 See Lavoie, "Restrain Alienation", *supra* note 27 at 1029–30; *Te Ture Whenua Maori Act*, *supra* note 16, ss 150A, 150B, 150C; 25 USC §§ 483, 2204(a) (2012); 25 CFR § 152.33 (2018).

229 See Bennion et al, *supra* note 151 at 351–53; Moore, Grattan & Griggs, *supra* note 184 at 373–77.

reaucrats, these regimes seem to reflect an attempt to provide a reasonably secure basis for local self-government in an institutional context in which the collective powers of Indigenous groups are linked to land tenure.

Conclusion

The rules governing Indigenous land tenure in common law countries are sometimes viewed as anomalous. Seemingly basic principles of Western property systems, like rules against restraints on alienation and the creation of unique estates in land, or rules facilitating the individualization of land under co-ownership, are not followed within these specialized regimes. These distinctive rules are regularly the subject of criticism, and this criticism is sometimes justified, for instance in cases of unmanageable legal complexity. However, this paper has argued that there is a plausible unifying theory that can explain several of the distinctive aspects of Indigenous land tenure regimes in common law countries. This theory comes into focus only when one looks beyond the regime within one particular country or relating to one particular Indigenous group, to examine the broad patterns of Indigenous land tenure across common law countries. The patterns that emerge can be explained by the basic circumstances these groups have in common in attempting to engage in territorial self-government through collective property interests in states in which the Indigenous group is a minority. These circumstances give rise to a recurring set of functional challenges, in particular the need to reconcile individual-scale productive use of the land with the collective cultural and self-government interests of the group. The distinctive rules of Indigenous land tenure are best understood as mechanisms for addressing these challenges.[230]

This approach to understanding the functional basis for Indigenous land tenure in common law countries has implications for assessing proposals for law reform in this area. First of all, by highlighting the self-government function that these specialized property regimes can serve, this article may provide a basis for caution in approaching reform. Seemingly simple solutions like eliminating these unique doctrinal features

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[230] In addition to the doctrinal features identified in this article, it is also possible to point to other features that may play a role in supporting self-government through land tenure. For instance, special immunities from outside interference, including judgment execution, taxation, and regulation may also help provide a secure basis for collective self-government: see e.g. *Indian Act*, *supra* note 16, ss 87, 89(1); *Oneida Indian Nation v Oneida County*, 432 F Supp (2d) 285 at 289 (ND NY 2006).

and adopting off-the-shelf common law property interests may have unintended consequences. At the very least, reformers adopting such an approach would likely want to work carefully to ensure that alternative mechanisms of self-government are provided for if unique features like alienation restraints are removed.

This framework also has other implications, which are the subject of a forthcoming companion article to this piece.[231] Briefly, I argue that this theory helps improve our understanding of the trade-offs involved with institutional design in this area, which will be viewed differently from community to community. The theory thus provides new arguments in favour of devolving institutional design to the community level. This approach also provides a basis for identifying anomalous areas of doctrine, which do not have a readily identifiable functional basis relating to Indigenous self-government and which may thus be unjustifiable holdovers from past eras of Indigenous policy. Examples of anomalous areas of doctrine may include requirements for outside approval for transfers of interests between members of the same Indigenous community,[232] and restrictions on the use of lands based on outside interpretations of a group's specific cultural commitments.[233]

Restraints on alienation, group governance powers over member-held lands, default governance regimes for land under co-ownership, and unique estates in land all serve to address the challenges associated with using property as a platform for self-government, whatever else they may also do. It does not necessarily follow that these approaches to land tenure are appropriate or ultimately justified. However, criticisms of existing regimes and attempts to reform them should begin with an understanding of the regimes' functional basis, which I hope to have illuminated here.

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231 Malcolm Lavoie, "The Implications of Property as Self-Government" (2020) 70:4 UTLJ [forthcoming].

232 See e.g. 25 USC § 2208 (2012); *Indian Act*, *supra* note 16, s 24.

233 See *Mabo*, *supra* note 15 at 58–61; *Yorta Yorta*, *supra* note 111 at paras 43–44; *Delgamuukw*, *supra* note 5 at 1088–91; *Tsilhqot'in*, *supra* note 5 at paras 67, 74; Moore, Grattan & Griggs, *supra* note 184 at 396; Austl, Commonwealth, Australian Law Reform Commission, *Connection to Country: Review of the* Native Title Act 1993 *(Cth): Final Report* (Report No 126) (Sydney: Australian Law Reform Commission, 2015) at 137–38, 187–90, online (pdf): <www.alrc.gov.au> [perma.cc/Q8CD-VSED].