PRIVATE RESERVATIONS: LIBERAL FORMS AND INDIGENOUS NORMS IN THE THEORY AND PRACTICE OF PROPERTY

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Abstract

Much contemporary discourse about Indigenous and liberal conceptions of the nexus between property, culture, and individualism has emphasized the dichotomy between Indigenous and western European paradigms of property. Yet a closer examination of property forms in liberal society reveals a far wider range of Indigenous-style property holding than is broadly recognized. Versions of the collective ownership, control and self-constraint associated with the Indigenous model can also be seen in numerous forms of liberal property holding in non-Indigenous society, particularly where people are seeking to realize the Indigenous goods of distributive equity, community and collegiality, and the preservation of social or group identity.

Résumé

Bien des discussions sur les conceptions autochtones et libérales de l'intersection entre propriété, culture et individu ont souligné la dichotomie séparant les notions de propriété chez les autochtones et en Europe occidentale. Pourtant, un regard plus attentif de la propriété dans les sociétés libérales montre un nombre élevé de propriétés de type autochtone, beaucoup plus que ce qu'on reconnaît habituellement. Des formes de propriété, de contrôle et de gestion collectives, qu'on associe au modèle autochtone, s'observent dans de nombreuses formes de propriété dans des sociétés non-autochtones, surtout lorsqu'on cherche à réaliser des buts autochtones tels que : équité dans la distribution, communauté, solidarité, et la conservation d'une identité sociale ou collective.

Introduction

Contemporary discourse about Indigenous and western European or liberal conceptions of the nexus between property, culture, and individualism has been characterized by one dominant and one minor alternative sub-theme. The dominant theme has been an emphasis on the dichotomous nature of Indigenous and western paradigms of property. The Indigenous understanding, as it is most usually conventionally presented, is of property - the land particularly so - as a collective good possessed by the group without the interruptions of market exchanges, through time extending both into the past immemorial and, presumably, into the distant future. To this mutualistic understanding is contrasted the western conception of property as individualized and essentially capitalist. Property is perceived in this light as private and fungible, readily and promiscuously alienable in the name of the good of capturing market efficiencies.

The most prevalent departure from the dominant theme of western/Indigenous dichotomy is found in works critical of the fairly monolithic depiction of pastoral communality in historic Indigenous societies. Harold Demsetz, Martin Bailey, Terry Anderson, Bruce Benson, Tom Flanagan and others have all argued that private and individually held forms of property were considerably more prevalent in historic Indigenous societies than the conventional dichotomized view suggests. The underlying theme of a number of works here seems to be that despite the appeal of cultural mythologies to the contrary, we are all part of a singular human community whose membership is apparently characterized to a considerable degree by the shared trait of individual self-interest maximization.

The identification of private and individualized forms of property in the Indigenous context represents a valuable contribution to the discussion here because it provides a more accurate depiction of reality and a counter-balance to the tendency of the dichotomous perspective to over-emphasize cultural differences. Interestingly, despite the value of these sorts of reconsiderations of the dichotomous perspective, relatively little has been said in the context of this debate about an analogous conceptual possibility which might undercut this idea from a second side. My suggestion here is that a closer examination of forms of property holding in liberal societies suggests that the relatively monolithic association of individualized, privatized, and freely alienable property with western societies is as problematic as the overly comprehensive association of collective property with Indigenous communities. A wide variety of property forms in western societies resemble on one or more dimensions the mutuality associated with their Indigenous counterparts.

In section II, I briefly trace out some of the central ideas associated with Indigenous and western property models by advocates of the

dichotomous and alternative perspectives. Those, like Harold Demsetz, who identify and emphasize the existence of private forms of property in Indigenous societies largely contend that such forms arise whenever it makes possible capturing the economic and individualized goods associated with liberal forms of property holding (350). In section III, I make the corollary suggestion that collective and self-delimited forms of property tend to arise in western societies when persons seek to capture the social goods associated with the Indigenous model within the western context. Liberal property theorists emphasize the role of property in achieving moral goods such as individual independence and free self-direction, and economic goods such as efficiency, understood as the maximization of aggregate economic output. Indigenous forms of property, on the other hand, provide goods presumably also of value in human life: distributive equity, collegiality - that is, decision-making which includes all members of a society or group - and the expression and preservation of social or group identity. In section IV, I explore a variety of forms of liberal property holding which resemble the Indigenous form on one or more dimensions, noting some of the specific Indigenous goods associated with each of these western forms.

The identification of westernized forms of property in historic Indigenous communities suggests an understanding of them as less completely divorced from the individualistic orientations of liberal societies than is conventionally recognized. Similarly, the identification of a considerable number of analogues to Indigenous property in western societies would suggest the appropriateness of recognizing a less unrelievedly individualist orientation in these communities than either the dichotomous or the Demsetz inspired alternative perspectives seem to acknowledge.

Property in Theory and Practice

One need not look far to find significant associations in contemporary popular and political culture of western societal values with the norms of private and individualized property. From Margaret Thatcher's and George Bush's endorsements of the "ownership society" (Thatcher; Lindlaw) to North America's traditions of homesteading, the "family farm", and the ideal of the single family home in the suburbs, there seems to be a pervasive understanding in our societies that property is appropriately understood as a good both pre-eminently private and individual, and central to human aspiration.

What is more, it is an easy step from these more general inferences to more philosophical work which draws the same connections. C. B. Macpherson, for example, suggested that in the contemporary imagination, property is "identical with private property" (*Democratic Theory* 122; cited in Reeve 47). These understandings are for Macpherson

part of the deep structure of liberal and western thought. From Hobbes to classical liberalism's central philosopher, John Locke, the values of English speaking political philosophy have been expressed, Macpherson suggests, in the idea of "possessive individualism." Here,

> [s]ociety consists of relations of exchange between proprietors. Political society becomes a calculated device for the protection of this property and for the maintenance of an orderly relation of exchange. (Macpherson, *Possessive Individualism* 3).

In turn, Locke's ideas underpin in a central way both American constitutional discourse (in, for example, the inclusion of the Fifth Amendment's "takings clause" protecting private property) and political culture. Louis Hartz famously described the U.S. as a Lockean liberal cultural "fragment", characterized by an affinity to "atomistic social freedom" (*The Liberal Tradition* 62), emblematized among other ways by things like the "simple principle of freehold tenure" (*New Societies* 74).

To these claims about the ties between culture, individuality and property in liberal societies can be added more explicit connections. Here the idea is that liberalism, at least in its classical form, draws on property not only in a premissory or conceptual way, but as a means of securing its more aspirational values. Lewis Hinchman and Sandra Hinchman, for example, note that classical liberalism "envisoned a polity composed of independent, property-owning individuals" because its valuations of "order, economic progress, and security of expectations" depended, in theory at least, on the idea of a state in which property was securely controlled by individual owners (23). Charles Reich identifies property with the liberal valuation of individualism, arguing that ". . . property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner" (771). A stream of others connect private property to the liberal value of liberty itself. Alan Ryan cites the traditional liberal idea that "[p]rosperous, private property based economies preserve . . . liberty", citing the "exegesis of the liberal tradition" by commentators "draw[ing] a line from Locke through Herbert Spencer to modern defenders of a natural right of property such as Robert Nozick" (*Property* 36).

Interestingly, a number of characterizations of Indigenous property paradigms pick up on similar themes in constructing their contrast with liberal property models. In her critique of individualistically-oriented "Anglo-European" interpretive approaches to the *Canadian Charter of Rights,* Mary Ellen Turpel-Lafond emphasizes the ties between the array of individual rights in the *Charter* and their prototype, the property right:

> The idea of the absolute right to property, as an exclusive zone of ownership . . . is arguably the cornerstone of the idea of rights in Anglo-American law. . . . Obviously this is a highly individualistic and negative concept of social life based on the fear of attack on one's 'private' sphere. (15)

Turpel-Lafond's critique here rests on the notion that the liberal, property-centric conception of rights she sees as embodied in the *Charter* is culturally alien from the Indigenous perspective. Where liberal theories of community and rights "emphasize a . . . conception of social life where the maximization of wealth and happiness through self-interest is the guiding creed," Indigenous communities are based on principles such as "trust, kindness, sharing and strength" (29). "There is no equivalent of 'rights'" in such societies, Turpel-Lafond asserts, "because there is no equivalent to the ownership of private property, and no equivalent to private or exclusionary spheres of social life" (29).

Similar concerns have been raised in the context of native land claims negotiations with Canadian governments. David Rossiter and Patricia Wood argue that the normative orientations and public discourse of Canadian governments responding to native claims suggest that those governments are acting in aid of the construction of a "globalised, neo-liberal economic topography in Native-claimed space"; that is, seeking agreements which are shaped primarily by the desire to create the certainties of ownership and access necessary to encourage private capital investment in resources aimed at "exploitation for individual gain" (364). These are orientations, they suggest, which conflict with more authentic Indigenous relationships to the land which emphasize history, community, continuity, and the "constraints of custom" (364).

Constraint is an important theme in characterizations of Indigenous conceptions of property in land. Donald Large, for example, notes that American Aboriginals "viewed the land as being incapable of dominion by man" (1041), a notion which made the concept of the sale of the land virtually incomprehensible. "The country was made without lines of demarcation" observes Chief Heinmot Tooyalatket, "and it is no man's business to divide it" (McLuhan 54; cited in Large 1041). Chief George Desjarlais of Canada's West Moberly First Nation also emphasizes the limitations on property embodied in Indigenous thought, noting that historically, Indigenous "values and beliefs emphasized stewardship, [and] sharing and conservation of resources, as opposed to the foreign values of ownership, exclusion and domination over nature" (RCAP vol. 2, part two, chapter 4, s. 3.2). As noted in the Report of the Royal Commission on Aboriginal Peoples, Indigenous lands and resources were historically "not considered a commodity that could be alienated to exclusive private possession"; Indigenous forms of ownership emphasized instead the ideas of "universal access and

benefit within the group" and "universal involvement and consensus in management" (vol. 2, part two, chapter 4, s. 3.2).

Despite the broad endorsement of the dichotomous paradigm in commentary on western European and Indigenous conceptions of property, there are some exceptions to this idea which might be noted. The most noteworthy of those which bring into question the connection of liberal thought to absolute forms of private property is offered by James Tully in *A Discourse on Property*. There Tully rejects C. B. Macpherson's virtually canonical reading of John Locke, noting a number of attributes of Locke's theory which seem to undercut the idea of the property right as absolute and individual.

Locke, Tully argues, founds the idea of property in the natural order as ordained by God. Property, in this view, is an expression of the "right to use and to enjoy God's property for God's purposes" (122), a formulation which brings with it certain important characteristics and limitations. These include the obligations of charity, and of provision for the future well-being of one's family. Locke says, for example, that "*Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want where he has no means to subsist otherwise" (1.42; cited in Tully 131). And he suggests that "Children have a Title to part of [the goods their parents are possessed of], and have their Kind of Right joyn'd with their Parents" (1.88; cited in Tully 133). For Locke, this brings with it the implication that all the children of a family have a claim to their parents' goods upon death (Tully 134). Tully suggests, then, that the prototypical conception of property expressed in Locke's theory is not as an individualized right, but "as a common right enjoyed by all the family and, if necessary, by the whole kinship unit" (133). Both the limitations of property in the name of the positive duties of charity and the implied limitations on the right of devisability which Tully emphasizes in Locke's work suggest a considerably more socially-oriented understanding of the goods of property than is generally associated with either Locke or liberalism more generally.

While Tully's departure from the prevailing view of Locke's liberalism as fundamentally intertwined with absolute individual property is not widely duplicated, there are in fact a not inconsiderable number of scholars who do depart from the prevailing readings of Indigenous conceptions of property. The literature identifying Indigenous forms of private property has been a growth industry in recent years, with Demsetz, Posner, Anderson (*Property Rights*; *Sovereign Nations*), Bailey, Benson, Flanagan (*First Nations*), Rodriguez *et. al.*, and others all noting various forms of individualized private property in historical Indigenous communities. Martin Bailey, for example, describes individualized forms of private property in land among the Penobscot, Naskapi and the Ojibwa (189), and Harold Demsetz notes a similar phenomenon among the Montagnes of Quebec and other Indigenous communities of

the Labrador Pensinsula (351). Tom Flanagan discusses individualized forms of private personal property, such as horses, private property in economic rights such as trap line territories, and individual or family property among Indigenous communities such as "the horticulturalists of the Great Lakes and St. Lawrence Valley", the "the fishers of the Pacific Coast" (*First Nations* 117) and other North American Indigenous peoples. Perhaps the strongest statement of the revisionist school of Indigenous economic history is found in the work of Carlos Rodriguez, Craig Galbraith, and Curt Stiles, who describe the conventional vision of Indigenous property as "mythology" and cite approvingly Frederick Hodge's observation that "individual private ownership was the 'norm' for North American tribes" (19; citing Hodge).

Despite the recent import of the revisionist school in undercutting the theoretical unity associated with the dichotomous paradigm, in general the preponderance of scholarly commentary on property paradigms nonetheless associates western European forms with individualist and essentially absolute control of property, and Indigenous forms with collectivism and significantly more delimited conceptions of ownership. Among the central attributes associated with the liberal conception of property, then, would seem to be the ideas of (1) individualized ownership; (2) full and complete control of the property by the owner; (3) full, free, and unrestricted use by the owner; (4) perpetual rather than time-delimited ownership; consequently (5) the right to devise; that is, to assign future ownership of the property after one's death; and (6) the full and free right to alienate the property at will.

As the dichotomous model suggests, we might in turn define the Indigenous modality of property as characterized by a series of contrary attributes. (1) Collective or common ownership. (2) Limitations on control. Individual preferences as to the use and allocation of property within a system of collective ownership are delimited by the necessary recognition of one's co-owners' potentially conflicting preferences, a characteristic further extended by traditional Indigenous cultural orientations toward consensual rather than majoritarian decision-making. In a sense, ownership control over property in the Indigenous context is group-mediated rather than simply determined by the aggregation of individual preferences. (3) Restrictions on usage, such as the self-restraints associated with notions like environmental stewardship (RCAP, 1996: vol. 2) and the eschewal of non-customary forms of exploitation (Rossiter and Wood, 2005: 364; Braun, 2002: 215). (4) Ownership understood as delimited in time. Although the more overarching Indigenous conception of land ownership suggests a timeless relationship of peoples to land, from the individual perspective this operates as in effect a significant delimitation of temporal possession, with members of Indigenous communities understanding themselves as temporary users of land received from their ancestors and due in turn

in the future to succeeding generations. (5) The invalidity of notions like testamentary devisability, an idea which follows from the notion of trans-generational ownership. (6) An absence of the right to alienate property.

Liberal and Indigenous Property Goods

Two types of goods are most often associated with liberal, private forms of property. Political philosophers and cultural theorists most frequently note its association with values such as individual independence and self-direction (Turpel), liberty (Ryan, Spencer, Hayek), and certainty of expectations (a good associated with the liberal value of the rule of law (Hinchman and Hinchman)). Economists (Bailey, Demsetz), unsurprisingly, and political scientists commenting on Indigenous private property (Flanagan, "The Agricultural Argument", *First Nations*; Rodriguez *et al*) tend to emphasize the connection of liberal forms of property with the good of efficiency, understood as maximal aggregate output. This is obtained through the "incentive advantages of private property" (Bailey 187) which encourage owners to maximize the economic advantages of property when they will receive the entirety of the benefits from so doing, and through the market economy's efficiency via the price mechanism in allocating property resources to users who will maximize their economic output.

There is in the presentation of these ideas what seems often to be an apparently teleological train of thought suggesting that the emergence and predominance of the privatized model of property is an ineluctable consequence of the combination of human nature and economic development. The economic theory of liberal property suggests that the foremost impediment to the emergence of privatized property in less developed societies is the transaction, administrative, enforcement, and other costs associated with a private property regime; when the output of economic resources is marginal, those costs will tend to be higher than the returns of efficiency associated with privatization. When these costs are exceeded by increases in output created by enhanced technologies, changed economic valuations of property outputs or other developments, the suggestion is that collective and communal property forms will be supplanted by their more efficient fully privatized alternatives (see, for example, Demsetz 350; Bailey 187).

Both culturo-philosophical and economic commentaries suggest the conflict of the conventional Indigenous model of property with contemporary western society. The former suggests the incompatibility of the limitations and collectiveness of the Indigenous model with western cultural individualism and philosophical liberalism. The latter economically oriented analysis suggests that Indigenous forms and

limitations are anachronistic outside the historical Indigenous context (in those cases where they did in fact exist even in that context) and therefore unlikely to survive in modern circumstances absent coercive governmental interventions on their behalf. Tom Flanagan, for example, has observed that "[i]f there is anything for which Canadians should feel guilty, it is that our government, laws and courts have kept Indians outside the world of individual property rather than encouraging them to step inside" (*First Nations* 133).

It is intriguing, then, that virtually all the characteristics associated with the Indigenous model can be identified in various largely voluntarily adopted forms of property currently or historically found within western societies. These include property forms with attributes such as collective ownership (seen, for example, in things like vendors and consumers co-operatives, and country clubs), restrictions on usage (broadcast licences, and property control regimes like covenanting and municipal zoning), limitations of control (equitable and nature trusts) temporal delimitations of ownership (patents and joint tenancies), restrictions on devisability (embodied in property limitations such as joint tenancies, entail, and légitime), and restrictions on alienability (covenants, co-operative movements, and collective endeavours such as country clubs).

While the economics paradigm can be stretched to account for some of these forms in terms of efficiency, such explanations arguably fail to recognize the full implications and advantages of these sorts of property. The idea that property forms can be understood as attempts to capture particular property goods is a compelling one, but its explanatory power might be extended by expanding the conception of what constitute desirable property goods beyond the ideas of efficiency and aggregate output maximization emphasized in economic analyses of private property. Indeed, if the emergence of private and individualized forms of property in Indigenous societies is explainable as deriving from the attempt to capture the good of efficiency associated with the western property modality, there is perhaps some explanatory appeal in the conclusion that the existence of more mutualistic forms of property in western societies might be seen as corresponding attempts to capture goods associated with Indigenous property forms. At least three such goods are associable with traditionally Indigenous property forms and, as I will argue in the next section, to greater or lesser extents with their analogues in western societies.

First, while property in the liberal mode is associated with maximizing *aggregate* economic output, property in the Indigenous mode might more readily be associated with concern for questions involving *distributive equity* around economic outputs. Two forms of distributive concern are in play here. Indigenous forms of property imply the recognition of the importance of contemporaneous distributive equity

-- that is, the good of assuring equitable and sufficient distribution of property benefits among all current members of the community. And they imply the recognition of cross-temporal equity and well-being, particularly in the form of inter-generational equity -- that is, the good of assuring that future even as yet unborn members of the community as well as current members partake of the benefits of its property. It is perhaps to be expected that greater concern for issues of distribution would be immanent in Indigenous forms than in their western counterparts because of the genesis of the former in more economically tenuous undeveloped societies. As anthropologists like John Dowling have noted, "most observers have recognized that sharing is mandatory if these societies are to survive" (503; see also Bailey 183).

The distributive focus of Indigenous property holding is evidenced in virtually all features of that model. Collective and common forms of ownership, for example, help avoid the peril of excluding some of the community from access to returns on the sources of production. Historically, this ensured access to essential goods like food for all members of an Indigenous band; in the current era, it contributes to ensuring that all members of the band receive the benefit of such activities as resource extraction from their community's territory. Restrictions on use such as those implied in the professed Indigenous valuation of environmental stewardship suggest a concern for the availability of property benefits to future generations (as well as future selves), as do conceptions of property which emphasize the time delimitedness of present possession. Restrictions on alienability similarly contribute to assuring for future generations their portion of the benefits of the community's property. Additionally, in their functioning in the contemporary era, restrictions on the alienability of Indigenous property tend to assure that the benefits of the group's resources are more equitably distributed between the community and outside participants in their exploitation than they might otherwise be.

A second good arguably more readily obtained through Indigenous than western modes of property is that of what might be called *collegiality*. Collegiality in the sense I intend here exists when decisions which broadly affect the members of a group are made by that group, and when those decisions are made in a way which takes seriously the interests, preferences, and well-being of all the group's members. Conventional western property modalities permit individual owners to make efficient, self-interest maximizing decisions about their property regardless of the negative localized consequences of those decisions (the industrial plant closing is a paradigmatic example here). Collective forms of ownership on the other hand encourage more inclusive consideration of the impact of property decisions because all within the relevant group affected by those decisions are owners, and therefore entitled to their say.

Historically, the collegial aspect of Indigenous property ownership

was also enhanced by the limitations on individualized control associated with consensual rather than simply majoritarian forms of decision-making. In a sense, ownership control over property in the Indigenous context was group-mediated - with individual preferences limited by group norms and individual mutual awareness and self-limitation -- rather than simply determined by the aggregation of individual preferences. Arguably, this approach is more conducive to the comprehensive recognition of the assorted individual interests of group members than is pure majority decision-making. While some recent scholarship (Flanagan, *First Nations;* Harris, *et. Al* 115) has called into question the validity of this sort of characterization of Indigenous decision making in the contemporary context, arguably Indigenous forms are nonetheless still in the present day more conducive to collegiality in this sense than their western counterparts.

The third of the goods tied to Indigenous forms of property holding is a set associated with the expression and preservation of group *identity.* Indigenous property modalities are considerably more suited than their liberal counterparts to ensuring the expression and preservation of a social group's collective values, ways of living, sense of unity, and even its continuing existence.

The mechanism of collective ownership, for example, contributes to ensuring that decisions made by a social group about its property are reflective not of any single individual's theories about its purpose or value, but of something more akin to a social medium. Collective processes act as a restraint on choices which are too radical, inauthentic, or short sighted, and are thereby more apt to produce decisions expressive of the group's deeper and more longstanding collective values. The self-recognized limitations on property use which follow from Indigenous associations of the land with spiritual and not simply economic worth suggest similar restraints on property decisions which depart from the group's more permanent cultural values.

These features, along with the restrictions on alienability and devisability associated with Indigenous land holding contribute to creating and preserving physical space with a variety of attributes conducive to identity creation and preservation. The use and occupation of these collective spaces by those and only those with a shared identity contributes to social cohesion (Hinchman and Hinchman 50) and a sense of familial-like unity. The ability of the group to control local norms and restrict access by non-members to its territory contributes to enabling and fostering shared ways of life, patterns of social interaction, and other lived values. Restrictions on alienability contribute to preserving the local existence of the property holding group in the face of potential external permeation by non-members. Much commentary on the US's 1887 *Dawes Act,* an early experiment with individual property in land for Indigenous peoples, has tended to emphasize that free alienability

can mean a quick end to the local existence of an indigenous people (see, for example, Hinchman and Hinchman 49). Restrictions on devisability likewise contribute to ensuring that a group's occupation of a specific physical space continues over time.

Private property theory is largely dominated by characterizations which seem to imply that the Indigenous property model is both primitive, in the sense of belonging to a prior and less developed form of property culture, and limited, in the sense of emphasizing constrained rather than free use and disposition of property. The implication of the reading I am offering here is that Indigenous property forms need not necessarily be understood in these terms. They are in many cases more accurately explained as means of realizing property goods alternative and perhaps even complementary to those associated with conventionally recognized western property holding.

In the next section, I describe and explore in greater detail a number of western property forms which are structured in ways analogous to Indigenous ones. My suggestion is that these forms are appropriately understood or explained in many instances as attempts to capture the goods associated with Indigenous property modalities in the western context. My claim is not that they are identical with or even as comprehensive as their Indigenous analogues. The argument is, rather, that at least some of the characteristics of Indigenous property can be found in a number of sometimes quite widespread forms of western property holding, and that the presence of these characteristics is more compellingly explained in reference not primarily or singularly to efficiency oriented goods, but in reference to the Indigenous property goods I have noted here of distributive equity, collegiality, and identity expression and preservation.

Capturing Indigenous Property Goods in Western Societies

Among the simplest and most basic examples of Indigenous style delimitations in the context of western property holding are three constrained forms of property ownership associated with property and inheritance: joint tenancy, entail, and légitime. Joint tenancy is a voluntarily adopted form of ownership (not rental tenancy, despite the terminology) in which two persons own property collectively, sharing the right to its full enjoyment and use (Sinclair 56). Its most noteworthy characteristic is the attribute of survivorship, which gives to the surviving member the right to full title to the property upon the death of his or her partner owner. The attribute of survivorship functions here as a time delimitation on the ownership of jointly tenanted property. It in effect limits that ownership to a "life interest" - the formal legal term denoting that ownership is limited to the period of a designated

individual's lifetime -- for the first of the partners to die. Consequently, it also functions as a restriction on devisability, mandating that the first deceased's share goes to his or her partner regardless of the deceased's potential preferences to the contrary. While the joint tenancy form can be employed by any owners of shared property, its most prevalent expression in Canada is as the form of ownership most widely used for the family home by married or co-habiting couples.

Entail and légitime also embody time delimitations on ownership and restrictions on the devisability of property. Entailment is a mechanism by which an owner of property passes it not simply to his preferred heir, but to his heir and all future generations of the heir's family (Sinclair 17). The immediate beneficiary of an entailment in effect receives a life interest; upon his death, the property automatically passes to his child (in historic practice, usually the first born son) or children as a life interest, then to his child's child and so on down the line of ensuing generations. Along with its limitations on ownership and devisability, entail also imposes restrictions on alienability and use. In regard to alienability, entail restricts a property's current owner from selling any more than his own life interest in the property - that is, right to ownership privileges during the time the current owner continues to live -- should he wish to divest himself of it. In regard to use, current owners of a property in tail are restricted by the ancient "doctrine of waste" from destroying the property, in the extent to which they might change its character, and in how much of its goods and resources they might extract during their charge of it (Purdy 658). While entailment is less widely employed today than it has been historically, it nonetheless was through much of western history a rather significant form of property ownership.[1]

Légitime, a concept drawn from the civil law regimes of Europe and before that from the Romans, is a legal mandate that entitles children, adult or juvenile, to a prescribed portion of a decedent parent's property and estate. Under légitime, an owner holds the full and traditional liberal style interest in the share of his property not encumbered by the implicit interests of his children, but merely a life interest in the children's portion. Again, this limitation also represents a concomitant restriction on devisability, with the parental owner being prohibited by its existence from deciding to pass the légitime portion of his property to anyone other than his children. As its historical roots might suggest, légitime has had a somewhat different footprint of practice historically than the doctrines of joint tenancy and entailment, with the latter having been found primarily in common law and the former in civil law jurisdictions. While Quebec, Canada's sole civil law jurisdiction, no longer enforces légitime, Louisiana, the U.S.'s only civil law jurisdiction, maintained the practice until 1999 and in fact continues to require its observation in aid of children under the age of 24 (Rougeau).

Each of these forms of property ownership embodies a number of

attenuations, each of which is aimed at capturing property goods which we might associate with Indigenous property norms. Joint tenancy, for example, constructs property in a way which recognizes not just *pro rata* ownership, but mutual, collective possession by partners. This form thus implicitly recognizes that the owners have not just individual but also a shared identity - particularly apt in its usual application as the form of ownership associated with the marital home - and an element of collegiality of management and control. Along with joint tenancy, entail and légitime all place limitations on property ownership in time and in regard to devisability, with entail and légitime adding to this further restrictions on alienability and use for the current possessors of land. These forms of restriction all might be thought to speak to the goods of distributive equity. Joint tenancy ensures that a surviving marriage partner does not suddenly find themselves homeless or impoverished by the value of half their home because a deceased partner chose to pass by will his share of their mutual property to someone else. Entail and légitime similarly ensure to future generations some of the goods associated with a property by preventing this era's user from seizing all its benefits for themselves alone by consuming it in its entirety or selling it off or exploiting its goods in a way which destroys its value for the future. These restrictions in turn also express an underlying sense of the shared and long-term identity of those associated with the property: that it will be passed on in the future to some or all of the next generations suggests a vision of the property as belonging to a *family* over time, not merely to today's lucky legatee.

Indigenous style attenuations of liberal property modalities in the name of broader goods can also be found at levels above those associated with individual holdings - that is, in application to multiple properties across entire communities, sometimes imposed without, but often with the implicit or explicit consent of the property holders themselves. Here we might consider both city zoning by-laws and various forms of building covenants.

Zoning by-laws represent imposed restrictions on the uses to which an owner of land might put his property. Every householder will be familiar with restrictions concerning the types of use property can be put to - single family housing in some neighbourhoods and zones, multi-family and apartment in others, businesses of different sorts or mixed uses in yet others. Zoning regulations have also been embellished with ever more specific limitations in many places in recent years, mandating such things as limitations to building size and style, what sorts of businesses can be established in particular locales, and even whether or not chain or "big-box" stores might be allowed in particular neighbourhoods (see, for example, *San Francisco Planning Code*, s. 703.3)

Building covenants represent a similar set of limitations on property use. These take the form of legal limitations on the title of real property

which restrict its alienation or use. Restrictive covenants in this form were used historically to prohibit the sale of residential property to members of out-group races or religions (in the American context, almost invariably African-Americans, frequently Jews, and occasionally Catholics; in the Canadian context, most often Jews and Asian-Canadians (Plotkin; Walker)). In general, these covenants were applied to the titles of all the homes in a racially- or religiously-segregated neighborhood rather than in a patchwork fashion by individual home-owners. Fortunately, such covenants have over time been eliminated either by legislation (beginning in Canada in the 1930s) or by judicial invalidation (which, by the end of the 1960s in the US, had come to cover much of the country), and as such are no longer part of the property regime in North America.

Restrictive covenants of a less morally repugnant kind, however, have been in growing use in the contemporary era as mechanisms restricting such things as the sorts of changes owners can make to the external appearance of buildings within a neighborhood (by, for example, limiting the type of building materials or colours used, or the shape, dimensions, or architectural style of the neighborhood's structures). The most noted illustration of the latter is in the now famous "new urban" community of Seaside, Florida, whose building restrictions on every house include precisely defined mandates around such things as its homes' roof pitches, exterior cladding, driveway surfaces, fences (which, for example, must be painted with "Benjamin-Moore paint colours #103 or #105..."), and virtually every other structural feature associable with a residential property (Mohney and Easterling 261 - 2). Seaside, it might be noted, has become for many new urbanists a paradigm for residential development, and its recipe has been replicated in countless places since its establishment in 1986.

Zoning laws, and building and racial covenants all represent use restrictions on property which attempt to achieve within the liberal property paradigm the goods of identity-preservation and distributive equity. Zoning laws in their traditional forms speak to issues of local identity by contributing to ensuring, for example, that the lifestyle, mode of life, and demographic of a particular locale has some degree of continuity and homogeneity. In more recent elaborations, such as their deployment against chain and big-box stores, they are aimed at contributing to preserving the specific character, historical style, and ambience of existing neighbourhoods and communities, an end which contributes to the idea of local community and the "sense of place" which urban theorists have lamented our cities are losing in the current day. Racial and religious covenants historically ensured the preservation of local identity, of course, in perhaps the most direct way possible -- by preserving a colour or religious line within a given community, thereby ensuring an ongoing commonality of identity among members of the neighborhood in terms of that dimension of identity.[2]

Covenanted and zoning restrictions also speak to issues of distributive equity in their role in preserving or enhancing the economic value of property which might otherwise be effaced. In the absence of zoning laws, the sale by a property owner to the highest bidder, consistent with the liberal valuation of globally economically efficient allocation of land, may in some circumstances have the effect at enriching that seller and conveniencing the new owner at the expense of all other owners of property in the vicinity. When a new owner brings with him an undesirable use for his acquired property – the opening of a tire factory in the middle of a pastoral neighbourhood of single family homes for example – then the efficient disposition of property endorsed by liberal norms also brings with it costs to all the other owners in the locale whose property values have been diminished by this transaction. The highly specific building covenants of the Seaside-type also contribute to a form of distributive equity in neighbourhoods within which they exist. The value of each property in a locale is of course affected by the state and circumstances of neighbouring properties, and the value of each individual's property is enhanced by its situation in a neighborhood in which the community collectively maintains a standard of appearance and attractiveness which will preserve or enhance the market value of the neighborhood's properties.

While the forms of property I have noted to this point have been relatively concrete, primarily involving relatively straightforward ownership restrictions concerning interests in land, a number of more abstract examples of western property modalities also suggest Indigenous-style attenuation in aid of goods such as identity, collegiality, and distributive equity. Two examples here are patents and broadcast licences.

Patents represent ownership of the exclusive rights to exploit an innovation or invention, a form of intellectual property enforceable through legal structures provided by patents legislation in the patent-holder's jurisdiction. The most noteworthy feature of patent rights is probably their time delimited quality. In Canada, for example, patent protection generally comes to an end 20 years after the initial recognition of an inventor's claim (*Patents Act*, R.S.C., s. 44).

The patent system is a solution to what has been called the "incentive-access" dilemma (Greenspoon and Cottle). Protecting the economic value of innovations for inventors encourages such persons to devote time, energy, and resources to developing ideas which will ultimately be of benefit to the larger world, because the inventor knows he will be economically rewarded for his efforts. On the other hand, protecting the innovator's monopoly on this value for eternity would drastically reduce societal access over time to the goods of the idea the inventor has developed. What is more, it is clearly not the case that most patented innovations represent only the inventor's inspiration and perspiration.

Every inventor is a product of the society he lives in, and his imagination and the possibilities for innovation he works with are at least partly the end-product of the long history of incremental additions to the store of human knowledge and understanding: no caveman, however clever, was in a position to invent the phonograph. While absolute property in an intellectual innovation on the part of the inventor would result in the appropriation of history's and mankind's underlying contributions to a new invention, the time delimitations of patents ensures a fairer allocation of the goods of invention to both inventor and society in the long run. Distributive equity, then, would seem to figure strongly in explaining the development and appeal of the concept of time-limited patentable intellectual property.

Like patents, broadcast licences represent a government structured property-like right to a relatively abstract thing: in this case, to the entitlement to the exclusive use of local or national airwaves or other broadcasting channels (a limited and therefore scarce resource) as a venue for communication, generally of course with the expectation that such communication will attract advertisers or otherwise create revenue for the owner. In Canada, broadcast licences are distributed by the Canadian Radio and Telecommunications Commission, in accord with the requirements of the *Broadcasting Act*, other statutes, and related regulations.

Owners of broadcast licenses are entitled to their hold on their distribution channel for a period of from three to seven years, with the expectation that their entitlements will be renewed on an ongoing basis when they expire. However, the entitlement to a licence and to renewal is limited by a number of conditions and to the ongoing monitoring of the CRTC, as well as being subject to consideration through various public hearings processes. The ongoing requirements to maintain a licence include adherence to the mandates of the *Broadcasting Act*. These include requirements to "provid[e] a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity; display Canadian talent in entertainment programming; and offer... information and analysis concerning Canada and other countries from a Canadian point of view" (CRTC, "How to Apply"). These broad mandates are given specificity in the CRTC's regulations, which include among other things detailed requirements to provide to the public defined amounts of Canadian content and to make specific commitments to "contribute to a system that more accurately reflects the presence of cultural and racial minorities and Indigenous peoples in the communities they serve" (CRTC, "Public Notice").

The broadcasting licence system in Canada, then, represents a property-like allocation of rights to television broadcasters, with a number of important limitations on the rights bestowed. Licences are, for example, subject to restrictions on alienability, with the *Broadcasting Act*

requiring majority Canadian ownership and imposing a number of other requirements before a broadcaster is allowed to sell their air rights to a prospective buyer. Requirements for licence renewal suggest contingent temporal limitations on ownership. And, perhaps most importantly, the mandate to observe the conditions of the licence in terms of the quite specific types and content of programming a broadcaster offers represents a significant attenuation of the broadcaster's free use of the licence property.

Arguably, all three Indigenous property goods find some expression in the treatment of broadcasting licences in Canada. The authoritative mandates for Canadian content impeding the free use of the licence by a broadcaster suggest an underlying understanding of broadcast property as properly serving to aid a Canadian sense of identity. The legislative regulations of use, and the significant role for everyday members of the public in the CRTC's decisions to licence and renew licences for broadcasters are expressions of the notion of collegiality, suggesting a valuation of broad, collectively oriented decisions about how this property is to be used. The good of distributive equity is perhaps more obscure here, but the mandate of the system to broadcasters to include minority and everyday voices suggests the preservation of access to the public airwaves for not just the commercially remunerative voices that might outcompete all others, but to the less heard as well, even if that impedes efficient profit maximization.

While patents and broadcasting licences are somewhat abstract property modalities which suggest connection to very broad forms of community, other common western property structures suggest ties to smaller groups. Perhaps the best examples here are to be found in the forms of property characteristic of the co-operative movement. Co-operatives are collective ventures that generally look much like businesses or related enterprises whose members are in effect both the consumers or users of the co-operative's goods and the owners of the enterprise. Consumer co-ops, and vendor co-ops are important examples of this form, but we will look here only at housing co-operatives.

In housing co-ops, a residential property is collectively co-owned in some form or co-managed by the individuals who dwell there. In all housing co-operatives, members co-own the collective property associated with the residence – grounds, public spaces, and the building structure, for example – with each member being entitled to occupy a specific suite in the shared structure. This co-ownership brings with it collective management of the property by members. While in market equity co-ops, a resident selling his share in the arrangement captures the full value of the property including any appreciation in worth, in limited equity arrangements, a seller only takes with him the amount he originally paid for his share, with the ongoing co-operative keeping any increase in value above the original amount paid for the future use and

benefit of the co-op's continuing membership (Skelton).

In limited equity housing co-operatives, we see, then, true collective ownership of the ongoing surplus value of the property, in effect by the ongoing co-operative itself as an entity independent of any given individual member. The limitations on use and control associated with all the variations of housing co-ops are generally not noticeably different than those in typical condominium settings, but in many instances co-op limitations on alienability identify this form as quite different from more traditional arrangements around a property with shared ownership. In particular, housing co-ops often restrict alienability through rules or collective decision-making about who might buy their way into the co-operative as a previous member departs. While these often take the form of, say, abstract mandates about taking individuals from a particular socio-economic class (in labour-oriented or state-subsidized co-operative housing structures), some co-operatives engage in an individual-by-individual consideration of prospective new buyers. Famously, in the years following his disgraced departure from office, US ex-President Richard Nixon was, after putting down a deposit for purchase of a suite in one of New York's upscale housing co-operatives, refused admission by the collective decision of the building's members, presumably because they felt that Nixon would bring down the tone of the place (Baster and Krebs 44)!

The Indigenous property goods of collegiality, identity, and distributive equity all find expression in different forms of the housing co-operative. Collegiality finds its expression in property co-management, and while this on an everyday basis involves the same relatively trivial condo board like matters associated with traditional multi-residential housing structures, housing co-ops also find themselves addressing more substantive matters such as questions of membership and, when in limited equity forms considerable reserves are built up, of what the collectivity might do in terms of further expansion or development. As Richard Nixon's experience suggests, among the evident concerns of at least some housing co-ops are the expression and preservation of some sense of shared identity by the ownership group. Socio-economically structured co-ops suggest an orientation to identity concerns, and in some cases even more defined group membership requirements have been established through the housing co-op structure – women and children only co-ops represent one example (Wekerle). The allocation of windfall gains in property values to the ongoing membership rather than a departing seller in limited equity co-ops implicitly suggests an understanding of the co-op community as having a shared identity, as well of course as enabling the realization of a particular counter-market form of distributive equity by ongoing co-op members when one of their co-owners sells his property. As in Indigenous communities, a member of a limited equity co-op is entitled to the goods of the collective society

as long as he resides there, but takes none of its excess value with him when he leaves.

A number of other perhaps somewhat more complex forms of western property holding also suggest the value of attenuations in aid of broader Indigenous types goods. Here we might consider such arrangements as family and nature trusts. A trust is an arrangement in which a trustee is empowered by an original property owner to hold and manage property -- often subject to certain restrictions or mandates - to the aid and benefit of a third party beneficiary or beneficiaries. In their usual structures, trusts eliminate the opportunity for any future decision-making in regard to the trust property by the original owner and vest it, subject to the original owner's pre-determined conditions, in the hands of the trustee or trustees (Smith).

The most prevalent form of trust ownership is probably that of the family trust, where a (generally wealthy) parent vests some of his assets in a holding managed by a trust company, lawyer, or other skilled manager, with the direction that the earnings and assets of the trust be distributed over time to his children and sometimes subsequent generations of the family. Family trusts may include simple or elaborate conditions on the management and distribution of assets. These can include often a set age a beneficiary must attain before becoming entitled to receive trust benefits; mandates for certain achievements by beneficiaries before becoming entitled to benefits (such as attaining a university degree), directives about what the monies can be used for (educational purposes, for example), and the like (Smith).

Once they have been established and commence operation, family trusts embody a number of attenuations. They are suggestive of the idea of collective ownership, in the sense that the trust and its income belongs not to individuals as individuals, but as members of the collective and ongoing family. If age thresholds for benefits are established, the property is time delimited in its availability to members of the family. If mandates for disbursement include things like the requirement that beneficiaries marry, attain a university degree, or use the money for educational or other set purposes, the trust imposes limitations on use. And, finally, the property is subject to a rigid and complete separation of beneficial ownership, by its recipients, and control, by the trustee acting under the directions of the original establisher of the trust.

Like other forms of property holding associated with families such as joint tenancy, entail, and légitime, the family trust seems to emphasize in its structures the values of identity and distributive equity. The idea that a large wealth pile amassed by an original owner might continue to benefit future generations simply by virtue of their being born into the family clearly suggests the idea of that group as having an ongoing identity of importance. Indeed, some noteworthy studies of American "dynastic" families with large collective trusts such as the Rockefellers,

Rothschilds, and Kennedys suggest that such trusts not only express the idea of family as identity, but contribute substantively to *creating* that identity by "structuring social relations" and expectations within the family in a consistent way over time (Marcus 28; Gilding). The goods of distributive equity are in turn served of course in family trusts through the role of the trustee in doling out the income and assets of the family property in accord with required conditions so that no individual or even single generation expends simply for itself what the founder understood to be family not personal wealth.

With nature or conservancy trusts, an individual or a group purchases a piece of land, establishes a management trust to which the land is donated, and sets out conditions determining the future use of that property. As the terms "nature" and "conservancy" suggest, the principle use of these sorts of trusts has been to establish protected land areas on which future development is proscribed in aid of preserving some natural scenery or wildlife. As of 2005, over 1 400 conservancy trusts had been established in North America, including among them the nature reserves of the Canadian Georgian Bay Land Trust and the Nature Trust of New Brunswick, and the American Ouabache Land Conservatory (Brewer).

The attenuations of ownership here include collective ownership, limitations on use, and limitations on control. This form of ownership makes the nature trust or establishing association the effective owner of a particular conservation property, eliminating the idea of individual entitlements to the property. Limitations on use are of course inherent in the form itself, with nature trusts setting out either a complete prohibition on development of the trust land or substantive limitations on future use, with the aim of preserving the property in something close to its original state. Limitations on control are set out in the establishing conditions of such trusts, which generally preclude trustees acting on behalf of the owning association from later deciding to sell the conservancy property to, say, a tire plant or outlet mall developer.

The good of identity is probably foremost in nature trust arrangements, but in a slightly more abstract sense than in many of the other forms we have noted to this point. Effectively, the idea or value of identity in nature trusts comes from the establishing donors or owners setting out how land will be used in the future within the trust in a way which makes conservation, environmentalism, love of nature, love of this particular locale, or similar values the defining standard for future use. Identity here is not the identity of a group for its own sake, but the expression by individuals with shared values of those aspirations in the structuring of these land ownership arrangements, with the aim too of preserving the *land's* pre-existent identity.

In many ways, the voluntarily adopted restrictions on land use associated with the nature trusts movement seem strikingly accordant

with those which Canadian courts have adopted in their attempts to recognize and define the nature of collective Indigenous title to ancestral lands. In his judgment in the landmark *Delgamuukw* land claims case before the Supreme Court of Canada, for example, Chief Justice Antonio Lamer held that the use of such lands cannot be "irreconcilable with the nature of the [prior] attachment to the land which forms the basis of the particular group's Indigenous title." As such, "...if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot)." (*Delgamuukw* para. 128). Such strictures sound little different than those likely to be found in most nature trusts.

A final property form which might be considered here is one often associated with the wealthier levels of society: the country club. Many country clubs are, in a sense, not unlike some of the forms of co-operative co-endeavour we noted earlier. In their usual structure, a club owns a property or properties such as a club house, golf course, marina, or the like in a collective form. Those who wish to become members of such clubs generally have to be approved by the membership committee of their prospective club, a process which contributes to the sense of exclusivity often attributed these associations. New members pay an entrance fee upon joining, with a recently published study of Canadian, primarily Toronto, country clubs indicating that the average entrance fee for new members in 2008 ranged between $61 000 and $80 000 (Ferreira and Gustafson 74). Two ownership alternatives prevail in the country club model. In equity ownership forms, a member who chooses to leave the club is entitled, once the club has found a new member to replace him, to take away with him a substantial portion of his original entrance fee. In non-equity forms, a member does not receive this portion of the club's underlying asset value when he leaves, and has therefore in a sense contributed that value to the well-being of the ongoing collective group as he leaves. In both forms, decisions about the rules, activities, property, and future investments of the club's economic assets are made either through a vote of members or by a board elected to act on behalf of the larger group (Ferreira and Gustafson).

We see here, then, property attenuations involving collective ownership – particularly strongly expressed in the non-equity versions of such clubs – limitations on alienability, since club participants cannot sell their memberships to anyone they chose, and restrictions on control, in particular through the collective decision-making processes of club boards. The goods brought by these attenuations here are those associated with identity and collegiality. The idea of a collective group sense of self (involving presumably the likelihood of shared forms of identity involving wealth, social status, and perhaps professional or business occupations, besides shared enjoyment of the club's sporting activities)

are, of course, contributed to by the association's selection processes and by prohibitions on letting unselected members enter simply by buying a departing participant's membership. The structuring of property attenuations in aid of this good is further evidenced by the fact that even though alienation is restricted, most clubs do permit passing through inheritance one's membership to one's children, enhancing the sense of the club as an ongoing and multi-generational endeavour involving a shared group identity. Collegiality in the country club model comes of course from the collective decision-making of the club about its property through its democratic decision-making processes, which too strengthens the sense of club membership as involving not just access to the golf course or tennis court, but a shared and collective social identity as well.

Conclusion

In surveying the western forms of property considered here it does not take long to build a package of examples that suggest affinities in different circumstances to virtually every Indigenous-style property attenuation we have considered. As has been argued, in the case of these various and diverse forms, the intention on the part of those structuring their property holding in such lights would seem to be capturing in different circumstances and different ways many of the goods we associate with Indigenous property modalities: identity, collegiality, and distributive equity.

Three implications of these observations might be considered. First, as we noted in the introduction of this paper, much of the conversation about Indigenous and liberal property forms has either emphasized their dichotomous contrast, or, when this view has been challenged, the tendency has been to find and emphasize the presence in Indigenous communities of liberal forms. The intention of this paper has been to emphasize that the dichotomous theory might also be challenged from a less considered side, by finding and noting the prevalence of Indigenous norms in liberal forms of property. Second, and relatedly, the prevalence of evidence from both sides undercutting the dichotomous approach suggests, fortuitously, that there is more in common between persons and societies on both sides of the Indigenous-western divide than is sometimes acknowledged in contemporary debate. Third, the reality that property structures on both sides of this divide are multiple, complex, and variegated suggests that there is perhaps much to be valued in embracing a non-monolithic model of the property paradigm for all human communities. Dichotomous discourse, particularly when it understands itself as prescriptive as well as descriptive, can miss this. The voluntary adoption in liberal society of the kinds of forms seen here

suggests that teleological theories which suggest that we are all moving toward the unfettered western European model of property in aid of maximal efficiency are under-recognizing what might be called the values of non-efficiency. Humans want their property to provide them many goods, including those which may undercut efficiency for society or even for themselves in many cases.

In recent times, the idea of seeking to restructure or transform current Indigenous modes of property in aid of a move toward more free market forms has attracted growing currency in the commentary of some scholars (Tom Flanagan most notably (along with co-authors Christopher Alcantara and André Le Dressay), in *Beyond the Indian Act*), Indigenous leaders (Manny Jules, former chief of the Kamloops Indian Band is one example (Flanagan *et. al., Beyond* vii)), the Fraser Institute (Dobra), and the federal government (Aboriginal Affairs). Efficiency goods and the desirability of having an opportunity to structure property forms in different ways to achieve different goods tells us the value of making for greater structural diversity of property holding within First Nations communities by finding ways to make available private property forms. At the same time, a value of property diversity and non-efficiency goods indicates some caution here. The rich range of forms developed over time in liberal society in aid of capturing Indigenous style goods through property suggests that the solutions are likely to be varied and complex, rather than singular and absolute.

Notes

1. A.M. Sinclair notes that over half of Canadian provinces have now abolished the fee tail (1987: 18). Ontario, for example, abolished entail in 1956 (*Conveyancing and Law of Property Act*, RSO 1990, s. 4). Nonetheless, some provinces still enable its use, as do some American states (see, for example, Massachusetts; *Massachusetts General Laws - General Provisions Relative to Real Property* - Chapter 184, Section 4.

2 It need hardly be said that the intention of the discussion here is not to celebrate such historical barbarisms as racial and religious restrictive covenants. Racial covenants are, of course, morally deplorable and our societies have happily said good riddance to them. They nonetheless are noteworthy as an example of an historically prevalent practice of self-attenuation of property-holding in aid of a non-efficiency good.

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