

A 21st Century Citizen in a Brave New Republic

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Abstract

This chapter explores ‘what constitutes the 21st-century citizen’ and how we feel about our political and legal rights, and our identity, in the move from a monarchy to a republic in contemporary Australia. The central theme questions the notion that ‘citizenship is the local expression of universality’¹ and that ‘the main aim of property is to constitute subjectivity as intersubjectivity through the mediation of objectivity.’ Drawing on data collected in a series of focus groups, the paper takes as its premise the suggestion that the removal of the Crown creates a moment of opportunity for recognition of the guardians of this land, albeit the journey of Indigenous Australians to be accepted as citizens has been harrowing. Such a contest of ideas is seen by some to undermine the very fabric of contemporary (settler) society, and a possible move from freehold title to leasehold tenure presents a threat to their interpersonal recognition. Through a political economy exploration of property rights and options in a new republic, which is grounded in an analysis of focus group data, the chapter explores Douzinas’ argument that: ‘Political rights emerge out of the destruction of traditional communities and the undermining of the pre-modern body politic and these rights, in turn, accelerated the process. Mutual recognition has moved from the relations of love and care which predominantly characterised the pre-modern world to legal recognition, to the construction of identities through rights ... But as Marx insisted, political community and citizenship are both the recognition of the universality of rights and of their denial, since rights support and are supported in turn by the inequalities of economy and culture. Secondly, citizenship is a limited universality which is exhausted within the confines of the nation-state and excludes the non-citizens, the foreigners, enemies without and within.’²

Key Words: Property rights, republic, Australia, Aboriginal Title, crown, transdisciplinarity, focus group.

I would like to respectfully acknowledge the Local Aboriginal people, the Gadigal people of the Eora Nation, who are the Traditional Owners of the land on which this conference is taking place. It is on their ancestral lands that this venue, and the University of Technology Sydney, across the road, stands. Similarly, I would like to pay respect to the Elders both past and present, acknowledging them as the traditional custodians for this place.

Indigenous Australians have occupied this place for more than 60,000 years, whereas white settlement began a little over 200 years ago. White law deemed the

land *terra nullius* and under colonisation the various adaptations of English law that came into force in each of the six States and two Territories vested the superior interest in the land in the English Crown as Head of State.

But let us put the last two conflicting paragraphs into context, and provide some background for this chapter. In 2007, I was invited by the then Director of Jumbunna, the Indigenous House of Learning within the University of Technology Sydney (UTS), to speak at the Indigenous Studies Indigenous Knowledge (ISIK) conference that he was facilitating here in Sydney. As the only non-Indigenous speaker, my presence and my property rights paper on customary land in the Pacific caused something of a stir. Likewise, the statement that Aileen Moreton-Robinson made in closing her paper stirred me: ‘...we own this f***ing country.’³ Whilst her peroration was met with rapturous applause, I felt that her use of the word ‘own’ was a misplaced western term that is more reliant on possessive individualism than customary collective guardianship. More on the semantics later, but meanwhile the seeds of a research collaboration that goes to the very root of identity were starting to germinate.

Imagine, if you will, what might change in terms of our identity as citizens if Australia were to become a Republic – something that many see as inevitable, although it is yet to become a reality. I am not talking here about the tokenism of a new flag or national anthem, or even in the transfer of proxy leadership from a Governor General as representative of the English Crown to a President as representative of the Federation of States and Territories. Rather, my interest lies in what happens to the superior interest in land and the associated subsidiary property rights when (rather than if) Australia becomes a Republic, and what the ramifications are for notions of identity.

Perhaps it is my background as a researcher of property rights (an eclectic amalgam of ideas that sits uncomfortably at the nexus of law, economics, sociology, geography, philosophy, political science and property theory, not to mention archaeology, anthropology, ethics, history, and planning) that keeps drawing me back to ponder this particular question: if we replace the Crown and the Crown’s superior interest in the land with something, and if that something is an acknowledgement of the guardianship of the land through Aboriginal and Torres Strait Islander stewardship, would this, could this, or should this affect the underlying way that we as 21st century citizens relate to real property? This leads into an inherently deeper sociological question that is grounded in our identity, our citizenship, and the respective interplay with how our identity and citizenship are to some degree wrapped up in how we understand land, real property, and our real property rights.

In an attempt to respond to this question, a few years ago I established a trans-disciplinary project that brought together Indigenous lawyers and public intellectuals, an historian, a project manager, a land and property tax specialist, and a property theorist, to muse over these issues.⁴ We gave the project the ambiguous

title of 'Sydney Restored' and managed to secure internal funding from UTS under a challenge grant scheme. The timing of the project's inception was important, as the (then) Howard Coalition government was persistently refusing to say 'Sorry' for the past misdeeds of the State towards Aboriginal and Torres Strait Islanders (an issue subsequently redressed under the Rudd Labour government's apology to stolen generations on 13 February, 2008).⁵

Our early work focused on visualising our understanding of the project from our respective backgrounds, establishing a blog site (which, despite its contentious content, never attracted any real attention) and developing conference papers, which were well received.⁶ What these early collaborations demonstrated was that, in the Indigenous community, the recognition and restoration of property rights that had been lost under the legal fiction of *terra nullius* was a given. There was nothing to discuss from an Aboriginal perspective, as it was perfectly natural to recognise Indigenous sovereignty in a post-*Mabo* world.⁷ Rather, our challenge lay with the identity and preconceptions of settler citizens who saw their rights (and obligations and restrictions) over land and property as sacrosanct.

Our politically controversial project envisioned an optimal resolution to the Native Title discourse and a pointed response to the Howard Government's refusal to apologise for historic misdeeds. The project identified two core aims. First, we wanted to undertake a theoretical inquiry into the institutional arrangements necessary to enable an innovative land restitution model for Sydney that vests the superior interest in land (and buildings thereon) in the stewardship of the customary Indigenous guardians (rather than the State or Crown). Second, the solutions-oriented project tested a head-leasehold outcome for existing holders of freehold/strata title to ensure intergenerational equity of property rights; and contrasted this with a land taxation model. Crucially, both models analysed how to ensure the continued economic growth of the City of Sydney under such a restitution arrangement.

We started by taking a property rights approach, and then explored a leasehold solution and a restoration rent/tax framework. In parallel, using the tool of creative non-fiction, we elaborated on these issues with other scholars.⁸ Property rights are fundamentally about social relations.⁹ Real property rights, obligations and restrictions can be found in and change across the full range of human societies, temporally and spatially.¹⁰

Property rights research has emerged from a broad range of disciplines including archaeology,¹¹ anthropology,¹² ethics,¹³ sociology,¹⁴ psychology, law,¹⁵ geography,¹⁶ history,¹⁷ philosophy,¹⁸ economics,¹⁹ planning,²⁰ and business studies.²¹ By taking a trans-disciplinary approach,²² our research challenges the variable interpretations of real property rights that have evolved in the fields of economics and law.

The gulf between economic and legal interpretations is accentuated by confusion over property rights within the literature (summarised above).²³ This is

partly fuelled by the differing definitions of real property,²⁴ the urban planning perspective,²⁵ and an investigation of the sociological dimension of people, place, and property.²⁶

Our research inevitably challenges the accepted notion of private real property rights in Sydney (and indeed elsewhere). We needed a picture of the ways that the things we take for granted have been made. We needed a story of the construction of the basic categories through which land is known in a public sense.²⁷ The 1973 Federal Commission of Inquiry into Land Tenures demonstrates a good example:

In our modern complex society, an individualistic approach to property rights and land ownership is incompatible with public interest, unless individual rights are restricted to the use and enjoyment of the land.²⁸

Our challenge then became how to understand these notions of identity from the perception of those who may rail against any change to the status quo. In other words, how might we respond to those that may see any tenure change as impacting or limiting the ‘enshrined’ rights, as proprietary rights and interests are generally perceived in Sydney, of the settler community in the business world of our global city?

The research design focused on assessing both the scope of current knowledge about property regime options and attitudes to particular changes. To do this we engaged three focus groups, each comprising 5 - 7 ‘expert’ participants drawn primarily from the property, legal and planning professions (both public and private sector). The research team identified these groups as representative of the professions with expertise in the valuation, management and administration of land and property that could promote a meaningful dialogue on options and variation to tenure and property title under a Republic model. We also secured the services of Eva Cox as the focus group facilitator. Eva has been at the forefront of research design that engages free-flowing focus group dialectic. She is a recognised expert in the field and cognizant with all protocols related to eliciting rich data from participants.

Drawing on the focus group transcriptions and reflections provided by Eva Cox, the participants demonstrated considerable interest in both the content of the research and in having a forum for discussing the multiplicity of issues raised. The question of what constituted tenure, i.e. title and usage of land, was of considerable interest. Whilst recognising support for gaining uniformity of property law and related commercial cost differences across the States and Territories,²⁹ there was a deeper interest and awareness of the complexity associated with determining the various interests. The focus groups also recognised the existing diverse interests already involved in decisions about land ownership and usage. These included the role of the Crown and its residual powers, the various concepts of leasehold and

the interests involved in the processes, as well as the differences between the capital value of land and valuing of the improvements of development and usage.

Current debates on various environmental challenges were a stimulus for wide discussion on the possible increased government need, in the 'public interest' to intervene in basic private ownership rights. This highlighted an interesting acceptance amongst participants that the need for action, on the basis of the common good interests in land, was likely to become more prominent and acceptable over time. This has been witnessed by climate and other changes that necessitate a more public intervention over the perceived levels of control held by individual owners.

Such recognition was, however, heavily tempered by the widespread recognition that the general public have strong beliefs that their property rights are, or should be, inalienable. Whilst acknowledging different forms of communal tenure that are more commonplace in some European countries and amongst our Pacific Island neighbours, the prevailing perception of the Anglo-colonial legacy in Australia was of the 'home as Castle.' Expanding on this, the participants commented that most people do not understand the limits on their property rights that are detailed in their current titles, let alone any potential for further intervention by the Crown or its agents (this, despite the multifarious mineral and exploration licences that have been granted by the State under most land in Australia, including in and around Sydney).

There were clear assumptions underpinning the initial discussions on the role and purpose of any tenure process. These were to allow business to be secure in its investments, and for the costs of managing the documentation minimised through simple, efficient, and inexpensive titling regimes. This suggested the role of government is to set in place regimes that facilitate national and international business transfers. This underlines Aristotle's observation that 'debates about rights are often unavoidably debates about the purpose of social institutions, the goods they allocate, and the virtues they honour and reward.'³⁰ Despite the fact that the financial crisis has discredited market triumphalism in both its *laissez-faire* and neoliberal versions, there was a strong view from those embedded within the business world of 'why change a tenure system that isn't broken?' Such a response, of course, highlights the importance of how any future proposal for change to the tenure system associated with the declaration of a Republic needs to be presented very carefully. Is there a burning issue? Financial problems (costs)? Or is this a question of fixing something that is wrong and offends basic values and equity? Given the make-up of the focus groups, the participants who prioritised business needs understandably tended to dominate the discussion, with public needs seen as residual.

The focus on market triumphalism suggests that the identification of the wider questions of how and why land is held and used may provide a useful entry point into public debate on what is meant by title and land-use. There are significant

preconceptions in society about land and the title attributes of freehold interests and leasehold interests. The majority of the populace do not fully comprehend the notion of ownership. Freehold interest, for example, is a fee simple absolute in possession there by grace of the Crown. What people own is not the land or property thereon, but rather what they own is a collection of often overlapping and incomplete property rights associated with a particular plot of land or a particular property or building. Likewise, the assertion ‘we own this f***ing place’ is misconstrued. To quote from one of the original collaborators on this project:

Our affinity with land is like the bonding between parent and child. You have responsibilities and obligations to look after and care for a child. You can speak for a child. But you don’t own a child.³¹

As this quote illustrates, land can be thought of beyond the westernised, to represent a number of issues, such as rights, obligations and restrictions. We have heard the free-market triumphalism perspective, and the picture is not necessarily any clearer if we introduce the legal view:

Land is elemental: it is where life begins and it is where life ends. Land provides the physical substratum for all human activity; it is the essential base of all social and commercial interaction.³²

The above would indicate that there might be some logic when raising the idea of changing the basic tenure name and associated rights, obligations, and restrictions, to move beyond our supplanted western interpretations of freehold and leasehold. Such an approach is not without precedent, given that the hitherto unrecognised and previously inconceivable property right known as Native Title was brought under the aegis of Anglo-Australian common law with the 1992 decision in *Mabo (No. 2)*.

A new word and definition of a superior Aboriginal interest to replace the Crown situates both the name and the process change in a bigger future picture and allows questions of heritage and recognition to be raised as part of the collective well-being debate.

However, in the focus groups, the immediate reaction to the idea of some form of Superior Aboriginal Title was negative. This was grounded in concerns that it would raise public fears, and that Aboriginal ownership of the superior interest would not be seen as acceptable. Such initial reactions were emotive rather than rational, given that the prior discussions within the focus groups had opened the possibilities of some form of strategic tenure recognition.

Inherent in notions of identity, such responses were also partly personal and

partly based on assumptions by focus group members that the wider public reaction would be more negative than their informed understanding. Critically, fears were expressed that linking some form of superior Aboriginal title to the Republic could sink the (as yet unrealised) Republic. Participants assumed that this type of change would have major financial implications, even though Eva Cox did not initially raise the land taxation issue. Indeed Eva's reflection on this point was that it demonstrated a widespread anxiety/guilt mix in the community that somehow assumes the damage White Australians have done to Indigenous people will drive demands for high financial compensation. Additional anxieties related to transferring residual rights of the Crown, such as those associated with mineral rights in some title regimes, to Aboriginal guardianship. There was a sense that there could be a loss of accountability. Inherent in the concerns were scare tactics raised about the difficulties of transferring, codifying or negating established authorities, and systems, to an alternative model.

On this point, I share the perspective offered by Michael Sandel in the fourth of his 2009 Reith Lectures:

Market-mimicking governance is appealing because it seems to offer a way of making political choices without making hard and controversial *moral* choices. It seems to be non-judgemental. So, for example, rather than engage in a morally charged debate about the proper way of valuing the environment, or about the attitudes toward nature we should try to cultivate – rather than do this, we try to set environmental policy by working from people's market preferences.³³

The same hard and moral choices are to be found in dealing with the fundamental dimension of the Republic debate – the land. So hard are the moral choices, that typically the wider debate has hitherto been reduced to the lowest common denominators of the flag, the anthem and the top job. To move the Republic agenda forward, we need to explore a new kind of politics, what Sandel refers to as 'a politics of the common good.'

Contemporary market-driven politics sees citizens as consumers, with market-mimicking preferences that are given and fixed. If our new 21st century citizens want to live in a brave new Republic, and fully engage in democratic argument:

The whole point of the activity is to critically reflect on our preferences, to question them, to challenge them, to enlarge them, to improve them... Every successful movement of social or political reform has done more than change the law. It has also changed attitudes and dispositions.³⁴

If Australia is to move forward as a Republic, we the citizenry of a brave new Republic need to change our preferences, attitudes, and dispositions about real property rights in a way that enables a local expression of universality.

Notes

¹ Costas Douzinas, 'Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?', *Journal of Law and Society* 29, No. 3 (2002): 397.

² *Ibid.*, 397-398.

³ Aileen Moreton-Robinson, 'Everyday Encounters: Witnessing the Workings of White Possession', paper presented at the Indigenous Studies – Indigenous Knowledge (ISIK) Conference, University of Technology, Sydney, 11-13 July 2007.

⁴ The original transdisciplinary 'Sydney Restored' – Blueprints for Sydney, UTS Challenge Grant project team comprised Spike Boydell, Larissa Behrendt, Heather Goodall, Shankar Sankaran, Garrick Small, Nicole Watson, Vincent Mangioni and Mark McMillan.

⁵ Kevin Rudd, 'Apology to Australia's Indigenous Peoples', Hansard: Commonwealth of Australia - House of Representatives, 2008.

⁶ Spike Boydell et al., 'Regaining the Institutional Landscape: Sydney Restored', paper presented at the Cities Nature Justice: Dialogues for Social Sustainability in Public Spaces, University of Technology, Sydney, 8-10 December, 2008; Spike Boydell et al., 'The Republic and Its Impact on Property Rights in Sydney', paper presented at the State of Australian Cities (SOAC) Conference - City Growth, Sustainability, Vitality and Vulnerability, University of West Australia, Perth, 24-27 November, 2009.

⁷ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, see also *Native Title Act 1996 (as amended)* (Cth).

⁸ James Arvanitakis and Spike Boydell, 'Is Crown Land Indigenous Land?', *New Matilda* 24 (2011), <http://newmatilda.com/2011/03/24/crown-land-indigenous-land>; Spike Boydell and James Arvanitakis, 'Five Questions on the Republic', *Altitude: An e-Journal of Emerging Humanities Work* 10, No. 1 (2012), http://www.thealtitudejournal.net/uploads/4/2/3/3/4233079/arvanitakis_boydell_altitude_2012_final.pdf.

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¹⁰ Rebecca Jean Emigh, 'Means and Measures: Property Rights, Political Economy, and Productivity in Fifteenth-Century Tuscany', *Social Forces* 78, No. 2

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¹¹ Timothy Earle, 'Archaeology, Property, and Prehistory', *Annual Review of Anthropology* 29 (2000): 39-60.

¹² Von Benda-Beckmann, Von Benda-Beckmann and Wiber, 'The Properties of Property'.

¹³ Walter Block, 'Ethics, Efficiency, Coasian Property Rights, and Psychic Income: A Reply to Demsetz', *The Review of Austrian Economics* 8, No. 2 (1995): 61-125.

¹⁴ Richard Swedberg, *Principles of Economic Sociology* (Princeton: Princeton University Press, 2003); Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton: Princeton University Press, 2003); Aage B. Sorenson, 'Toward a Sounder Basis for Class Analysis', *American Journal of Sociology* 105, No. 6 (2000): 1523-1558.

¹⁵ Craig Anthony Arnold, 'The Reconstitution of Property: Property as a Web of Interests', *Harvard Environmental Law Review* 26, No. 2 (2002): 281-364; Peter Butt, 'Carbon Sequestration Rights: A New Interest in Land?', *The Australian Law Journal* 73, No. April (1999): 235-236; Peter Butt, *Land Law*, 5th Edition (Pyrmont, NSW: Lawbook Co., 2006); Kevin J. Gray and Susan F. Gray, *Elements of Land Law*, 4th Edition (Oxford: Oxford University Press, 2005); Von Benda-Beckmann, Von Benda-Beckmann and Wiber, 'The Properties of Property'; Sandra B. Zellmer and Jessica Harder, 'Unbundling Property in Water', *Alabama Law Review*, <http://ssrn.com/abstract=1010617>.

¹⁶ Nicholas Blomley, 'Enclosure, Common Right and the Property of the Poor', *Social & Legal Studies* 17, No. 3 (2008): 311-331.

¹⁷ Gary D. Libecap, 'Property Rights in Economic History: Implications for Research', *Explorations in Economic History* 23, No. 3 (1986): 227-252.

¹⁸ Jerry L. Anderson, 'Takings and Expectations: Toward a Broader Vision of Property Rights', *University of Kansas Law Review* 37 (1989): 529-562.

¹⁹ Armen A. Alchian, 'Some Economics of Property Rights', *Il Politico* 30, No. 4 (1965): 816-829, no. Reprinted (1977) in Armen A. Alchian, *Economic Forces at Work* (Indianapolis: Liberty Press, 1965); Yoram Barzel, *Economic Analysis of Property Rights*, Political Economy of Institutions and Decisions (Cambridge: Cambridge University Press, 1989); Daniel W. Bromley, *Environment and Economy: Property Rights and Public Policy* (Cambridge, MA: Basil Blackwell, Inc., 1991); Daniel W. Bromley, 'Reconsidering Environmental Policy: Prescriptive Consequentialism and Volitional Pragmatism', *Environmental and Resource Economics* 28 (2004): 73-99; Daniel W. Bromley, *Sufficient Reason: Volitional Pragmatism and the Meaning of Economic Institutions* (Princeton, NJ: Princeton University Press, 2006); Alan Carter, *The Philosophical Foundations of Property Rights* (Hemel Hempstead: Harvester Wheatsheaf, 1989); Harold Demsetz, 'Toward a Theory of Property Rights', *American Economic Review* 57 (1967): 347-359; T. Eggertsson, *Economic Behaviour and Institutions* (Cambridge: Cambridge University Press, 1990); Erik G. Furubotn and Svetozer Pejovich, eds., *The Economics of Property Rights* (Cambridge, MA: Ballinger Publishing Company, 1974); H. Scott Gordon, 'The Economics of a Common Property Resource: The Fishery', *Journal of Political Economy* 62, No. 2 (1954): 124-142; Garrett Hardin, 'The Tragedy of the Commons', *Science* 162, No. 3859 (1968): 1243-1248; Wolfgang Kasper, *Property Rights and Competition: An Essay on the Constitution of Capitalism*, Vol. 41, Policy Monograph (St. Leonards, NSW: The Centre for Independent Studies Limited, 1998); Wolfgang Kasper, *In Defence of Secure Property Rights*, 2nd Edition, CIS Occasional Paper 92 (St Leonards, NSW: The Centre for Independent Studies, 2004); Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990); Svetozer Pejovich, *The Economics of Property Rights: Toward a Theory of Comparative Systems*, Vol. 22, International Studies in Economics and Econometrics Volume 22 (Dordrecht: Kluwer Academic Publishers, 1990).

²⁰ Chris Webster and Lawrence Wai-Chung Lai, *Property Rights, Planning and Markets: Managing Spontaneous Cities* (Cheltenham, UK: Edward Elgar, 2003).

²¹ Yoram Barzel, 'The Capture of Wealth by Monopolists and the Protection of Property Rights', *International Review of Law and Economics* 14, No. 4 (1994): 393-409.

²² Basarab Nicolescu, 'Transdisciplinarity: Past, Present and Future', in *Moving Worldviews: Reshaping Sciences, Policies and Practices for Endogenous Sustainable Development*, eds. Bertus Haverkort and Coen Reijntjes

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²³ Daniel H. Cole and Peter Z. Grossman, 'The Meaning of Property Rights: Law versus Economics?', *Land Economics* 78, No. 3 (2002): 317-330; Richard A. Posner, *Economic Analysis of Law*, 3 Edition (Boston: Little, Brown, 1986).

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²⁵ Thomas Hartmann and Barrie Needham, eds., *Planning by Law and Property Rights Reconsidered* (Farnham, Surrey: Ashgate, 2012).

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²⁷ Helen Verran, 'Re-Imagining Land Ownership in Australia', *Postcolonial Studies* 1, No. 2 (1998): 243.

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²⁹ This is a wider initiative of the Property Law Reform Alliance (see: <http://www.plra.com.au>).

³⁰ Michael Sandel, 'A New Citizenship', in *Reith Lecture 2009 (Lecture #2 - Morality in Politics)*, BBC Radio 4,

http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/20090616_reith_moralityinpolitics.rtf2009.

³¹ Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Leichhardt, NSW: Federation Press, 2003), 33.

³² Kevin J. Gray and Susan F. Gray, *Elements of Land Law*, 4^e Edition (Oxford: Oxford University Press, 2005).

³³ Michael Sandel, 'A New Citizenship', in *Reith Lecture 2009 (Lecture #4 - A New Politics of the Common Good)*, BBC Radio 4, http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/20090630_reith_anewpolitics.rtf2009.

³⁴ Ibid.

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The background is a complex, abstract composition. It features a central, somewhat ethereal face with two bright, white, circular eyes. Above the face is a dark, wide-brimmed hat. The entire scene is set against a dark, textured background with various shades of blue, green, and brown. There are numerous small, sharp, geometric shapes and lines scattered throughout, giving it a sense of depth and complexity. The overall mood is mysterious and intellectual.

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