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## Retelling Allotment: Indian Property Rights and the Myth of Common Ownership

Kenneth H. Bobroff

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# Retelling Allotment: Indian Property Rights and the Myth of Common Ownership

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Kenneth H. Bobroff

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*The division of Native American reservations into individually owned parcels was an unquestionable disaster. Authorized by the General Allotment Act of 1887, allotment cost Indians two-thirds of their land and left much of the remainder effectively useless as it passed to successive generations of owners. The conventional understanding, shared by scholars, judges, policymakers, and activists alike, has been that allotment failed because it imposed individual ownership on people who had never known private property. Before allotment, so this story goes, Indians had always owned their land in common. Because Indians had no conception of private property, they were unable to adjust to the culture of private land rights and were easy targets for non-Indians anxious to acquire their land. Professor Bobroff argues that this story is wrong. Attempting to draw on often ignored Indian voices and considering anthropological and historical accounts, he reviews evidence that before allotment and continuing on reservations today, Native American societies have had a wide range of property systems. These native property systems vary across climates, resources, cultures, and historical periods, but many have recognized private property rights in land. Bobroff argues that allotment failed not because Indians had never known private property, but because it imposed a single dysfunctional property system on all Indian tribes and prohibited those tribes from changing it. Once an Indian reservation was allotted, tribal property laws were replaced and could no longer evolve. They could only be changed, quite literally, by an act of Congress. This insight into allotment is important*

*because it suggests that the solution to the problem of highly fractionated Indian land titles is neither, as previous reforms attempted, to return all allotted land to tribal ownership nor to remove all restrictions from allotted lands. Rather, the solution lies with tribes and allotment owners reestablishing functional property systems that allow efficient use and rational inheritance of allotted lands. Having created the monster of allotment in 1887, it is only fair that Congress should provide resources and assistance to help tribal property systems succeed.*

# Retelling Allotment: Indian Property Rights and the Myth of Common Ownership

*Kenneth H. Bobroff*

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\* Assistant Professor of Law, University of New Mexico. A.B. 1986, Princeton University; M.Phil. 1988, Oxford University; J.D. 1994, Stanford Law School. Warm thanks to Lucy Beals, Sam Deloria, Chris Fritz, Em Hall, Jerry López, Alfred Mathewson, Alfonso Morales, Tom Mucci, Bill Rice, Scott Taylor, Gloria Valencia-Weber, Mark Welliver, Christine Zuni-Cruz, and the staff of the library at the University of New Mexico School of Law.

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*Ceremony*

I will tell you something about stories,  
[he said]  
They aren't just entertainment.  
Don't be fooled.  
They are all we have, you see,  
all we have to fight off  
illness and death.  
You don't have anything  
if you don't have the stories.  
Their evil is mighty  
but it can't stand up to our stories.  
So they try to destroy the stories  
let the stories be confused or forgotten.  
They would like that  
They would be happy  
Because we would be defenseless then.

*Leslie Marmon Silko*<sup>1</sup>

I. INTRODUCTION

When Congress authorized the division of Indian reservations into individual tracts in 1887, the indigenous peoples of what is now the United States had already lost more than 90 percent of their land.<sup>2</sup> Advocates for "allotment," as the 1887 policy was

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1. LESLIE MARMON SILKO, CEREMONY 2 (1977).

2. This Article uses the terms "Indian," "native," and "Native American" interchangeably to refer to the indigenous peoples of the Americas. During the allotment period of the late 19th and early 20th century, "Indian" was universally used. Today, "Indian" and "Native American" are widely used by native peoples, particularly in Indian Country, while "Native" (capitalized and not) is increasingly common among native activists and intellectuals. As scholar Stephen Cornell noted a decade ago, use of these terms is by no means consistent. STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE vi (1988).

known, told a compelling story to justify partitioning the Indians' remaining 138 million acres. The advocates' story was that Indians needed private property in order to join American society. As long as Indians continued to hold their lands in common, so the story went, they could never know the benefits of civilization. Without the security of private property and the progress it would bring, they would be crushed by the irresistible tide of white settlement.<sup>3</sup> Without allotment and assimilation, the reformers asserted, Indians were doomed to extermination.

Today, a very different story is told about allotment. Scholars, bureaucrats, judges, and activists, Indian and non-Indian alike, agree that the policy devastated Indian societies.<sup>4</sup> By 1934, when the Federal government ended allotment, the policy had cost Indians almost 90 million acres, two-thirds of the land they owned fifty years earlier.<sup>5</sup> Allotment had wreaked havoc in Indian communities and eviscerated tribal governments. Indians survived, but Indian Country has never recovered. Allotment failed, this modern story goes, because it attempted to impose private property on indigenous peoples who had no conception of the private ownership of land.<sup>6</sup> When Indians went from holding their land communally to owning it individually, they had few defenses against those anxious to gain

3. See, e.g., Henry L. Dawes, *Solving the Indian Problem* (1883), in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900* (Francis Paul Prucha ed., 1973) [collection hereinafter *AMERICANIZING THE AMERICAN INDIANS*].

4. See generally *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997); *Hodel v. Irving*, 481 U.S. 704, 706-07 (1987); WILLIAM C. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 20 (3d ed. 1993); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 147-52 (3d ed. 1991); Michael Lawson, *Heirship: The Indian Amoeba*, reprinted in *Hearing on S. 2480 and S. 2663 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 77 (1984); Judith V. Royster, *The Legacy of Allotment*, 27 *ARIZ. ST. L. J.* 1 (1995).

5. OFFICE OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, *INDIAN LAND TENURE, ECONOMIC STATUS AND POPULATION TRENDS* 6 (1935) [hereinafter *INDIAN LAND TENURE*].

6. See generally *Babbitt*, 519 U.S. at 238; INST. FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 460-61 (1928, reprinted 1971), cited in *Hodel*, 481 U.S. at 707; *NATIVE AMERICAN TESTIMONY* 232-33 (Peter Nabokov ed., 2d ed. 1991); William H. Gilbert & John L. Taylor, *Indian Land Questions*, 8 *ARIZ. L. REV.* 102, 111 (1966); Stephen A. Langone, *The Heirship Land Problem and Its Effect on the Indian, the Tribe, and Effective Utilization*, in U. S. CONG. JOINT ECON. COMM., *TOWARD ECONOMIC DEVELOPMENT FOR NATIVE AMERICAN COMMUNITIES* 519, 521 (1970); Lawson, *supra* note 4, at 77, cited in *Hodel*, 481 U.S. at 707; John H. Leavitt, *Hodel v. Irving: The Supreme Court's Emerging Takings Analysis—A Question Of How Many Pumpkin Seeds Per Acre*, 18 *ENVTL. L.* 597, 606 (1988); Mark D. Poindexter, *Of Dinosaurs and Indefinite Land Trusts: A Review of Individual American Indian Property Rights Amidst the Legacy of Allotment*, 14 *B.C. THIRD WORLD L.J.* 53, 59-60 (1994). For a counter-example of a scholar and activist not adopting this story, see generally FLORENCE CONNOLLY SHIPEK, *PUSHED INTO THE ROCKS* (1987) (tracing historical ownership and land use among California Indians to assist tribes attempting to regain and maintain control of their land).

control of Indian lands. Indians soon lost their land to white settlement, fraudulent land transactions, and property taxes.

Stories have a long tradition in the law of property.<sup>7</sup> As Carol Rose writes, stories structure our experience of events, in effect constructing memories and consciousness upon which we can draw to act in the future. New stories can change our minds and allow us to reconsider our approach, reorder our thoughts, and react differently in the future.<sup>8</sup> Indians' stories, in particular, have long been hidden and repressed.<sup>9</sup> This Article aims to illuminate the stories told about allotment, to recover parts of Indians' own stories about their property laws, and to draw on the insights gained, to recreate a truer story that might start to repair the damage done by storytellers who got it wrong.

The reformers' story and the modern story both agree that, before allotment, Indians owned their land in common. They agree that allotment imposed private property on people who had previously known none. They only disagree on whether allotment was good or bad for Indian people. Yet, both of these stories are, at best, confused. Neither story appreciates that Indians recognized property rights in their lands before allotment, nor understands the actual private property regime Congress imposed on Indians in the Dawes General Allotment Act of 1887.

A little more than a decade ago, a few economists began to tell a more accurate story about allotment.<sup>10</sup> Drawing on insights from law and economics, these scholars explained that allotment did not impose private property on people who had never seen it before.<sup>11</sup> Rather, it replaced numerous tribal systems of property

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7. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 38 (1990).

8. *Id.* at 55 (drawing on the work of feminist theorist Robin West); see also JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 168-91 (1985); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411-16 (1988).

9. NATIVE AMERICAN TESTIMONY, *supra* note 6, at xxi-xxii.

10. See, e.g., LEONARD CARLSON, *INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING* (1981) [hereinafter CARLSON, *INDIANS, BUREAUCRATS, AND LAND*]; Leonard Carlson, *Learning to Farm: Indian Land Tenure and Farming Before the Dawes Act*, in PROPERTY RIGHTS AND INDIAN ECONOMIES 67 (Terry L. Anderson ed., 1992) [hereinafter Carlson, *Learning to Farm*].

11. Carlson, *Learning to Farm*, *supra* note 10, at 69-73. Discussion of indigenous property rights has been important in the development of the field of law and economics. See generally Martin J. Bailey, *Approximate Optimality of Aboriginal Property Rights*, 35 J. L. & ECON. 183-98 (1992); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II)*, 46 AM. J. COMP. L. 509, 518 (1998); Harold Demsetz,

rights in land with a single, badly flawed regime designed in Washington, D.C.<sup>12</sup> This Article aims to extend the economists' story, arguing that allotment replaced myriad functioning and evolving tribal property systems with a single dysfunctional and unchanging system. When it did so, allotment did more than just disable tribal property laws. Most significant, it destroyed tribes' power to adapt their property laws to meet new social, economic, political, and ecological conditions. By statutorily imposing a static version of Anglo-American property and inheritance law on Indian lands, the Dawes Act froze Indian property law in place. Once an Indian tribe's land was allotted—and its property laws replaced—it lost the ability to modify its property law. From that moment on, changing a tribe's property law has required, quite literally, an act of Congress.<sup>13</sup> Reform today requires that tribes gain the ability to create new, functional, and flexible property systems that can repair the damage allotment has done to tribal lands over the past century.

Part Two of this Article will examine the story told by nineteenth-century proponents of allotment, who claimed Indians had no systems of private property. Part Three will consider some of the specific Indian property systems that did provide property rights in land, property systems drawn from across a wide range of historical periods, geographical areas, and tribal cultures. Part Four will consider the stories told by opponents of the allotment policy, particularly the oft-ignored stories of Indians themselves. Part Five will briefly describe how allotment caused the loss of Indian land title, and Part Six will describe the policy's enduring effects on Indian property law. Finally, Part Seven will discuss the implications of these different stories for current policy proposals to address the damage that allotment continues to do in Indian Country.

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*Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348-58 (1967); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

12. This point has been made most explicitly by Jennifer Roback, *Exchange, Sovereignty, and Indian-Anglo Relations*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 10, at 5, 17.

13. See, e.g., Pub. L. 98-513, 98 Stat. 2411 (governing inheritance of Sisseton-Wahpeton allotted lands on the Lake Traverse Indian Reservation in North Dakota and South Dakota); Pub. L. 105-188, 112 Stat. 620 (permitting mineral leasing with consent of a simple majority of co-owners of Mandan-Hidatsa allotted lands on the Ft. Berthold Indian Reservation). The Indian Land Consolidation Act itself was introduced in 1982 originally as just a bill to change the law governing inheritance of allotted land on the Devil's Lake (now Spirit Lake) Sioux Reservation. Pub. L. 97-459, 96 Stat. 2512.



## II. THE "FRIENDS OF THE INDIANS" STORIES: ALLOTMENT AS CIVILIZATION

The policy of the bill is to break up this large reservation, to individualize the Indians upon allotments of land . . . to aid them with stock and with agricultural implements, and by building houses upon their allotments of land, to become self-supporting, to be cultivators of the soil; in a word, to place them on the highway to American citizenship, and to aid them in arriving at that conclusion as rapidly as can be done.<sup>14</sup>

Sen. Richard Coke  
Chairman, Senate Committee  
on Indian Affairs  
April 1880

The head chief told us that there was not a family in that whole Nation that had not a home of its own. There was not a pauper in that Nation, and the Nation did not owe a dollar. It built its own capitol . . . and it built its schools and its hospitals. Yet the defect of the system was apparent. They have got as far as they can go, because they own their land in common . . . and under that there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress.<sup>15</sup>

Sen. Henry M. Dawes of Massachusetts  
Following a visit to the Cherokee Nation, 1885

Congress passed the General Allotment Act in 1887. Known as the Dawes Act after its Senate sponsor, Henry A. Dawes, it authorized the President to divide any Indian reservation into separate plots for individual tribal members, ranging in size from 40 acres for a child to 160 acres for the head of a family.<sup>16</sup> If land remained after each eligible tribal member on a reservation had received an allotment, the Act authorized the Secretary of Interior to negotiate the purchase of the tribe's "surplus lands" for settlement by white homesteaders.<sup>17</sup> To protect allotments against "im-

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14. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900*, at 238 (1976) (citing 10 CONG. REC. 2059 (1880) (statement of Sen. Coke during hearings on S. Bill No. 1509, a predecessor to the Dawes Act)).

15. PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIAN 43 (1886).

16. General Allotment (Dawes) Act, ch. 119, § 1, 24 Stat. 388 (1887). The Act authorized allotments *pro rata* if a reservation was small and larger divisions if provided for by previous treaty or statute. *Id.* § 1. Married women could not receive land under the original Act. This was changed four years later so that each adult received 80 acres of land, regardless of family status. Act of February 28, 1891, ch. 383, §1, 26 Stat. 794. For allotment's particular impact on women, see Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 688 (1999).

17. As historian Vine Deloria, Jr. notes:

provident alienation," the Act directed the Secretary of Interior to issue patents declaring that the United States held the land "in trust" for the Indian allottees' sole use and benefit. After twenty-five years—longer at the President's discretion—a fee patent was to be issued to the allottees, but until then the land would stay in trust, exempt from conveyance or contract.<sup>18</sup> The Act replaced tribes' inheritance laws by providing that Indian lands would descend according to the laws of the state or territory where the land was located.<sup>19</sup> Finally, the Act bestowed United States citizenship on those tribal members who received trust patents.<sup>20</sup>

The Dawes Act culminated almost two decades of popular advocacy and Congressional lobbying by earnest Eastern reformers who called themselves the "Friends of the Indian."<sup>21</sup> Sure in their Christian righteousness, allotment advocates had a messianic faith in the civilizing force of private property.<sup>22</sup> Dividing reservation lands among individual Indians would, according to their story, overcome savage tribalism, convert the Indian into a yeoman farmer and prepare him for his "ultimate absorption in the great body of American citizenship."<sup>23</sup>

The idea of non-Indians dividing Indian lands was much older than the late nineteenth century reform movement. In 1652, the Virginia Grand Assembly passed a statute recognizing Algon-

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The lands were not, of course, surplus. The formula used, 160 acres for the head of the family, eighty acres for older children and wives, and forty acres for minor children, did not look even five years down the road to the future of the tribe. If an adult man were capable of supporting his family on 160 acres, did that mean that his eighteen-year-old son could do so on eighty acres, and a decade later his twelve-year old, now twenty-two, on forty acres?

Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 978 (1996). Proceeds from the sale of surplus lands were subject to appropriation by Congress for the "education and civilization" of the subject Indians. General Allotment (Dawes) Act § 5.

18. General Allotment (Dawes) Act § 5.

19. *Id.*

20. *Id.* § 6. This was changed by the Burke Act of May 8, 1906, delaying citizenship until the issuance of a patent in fee. FRANCIS PAUL PRUCHA, 2 THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 875 (1984).

21. See generally AMERICANIZING THE AMERICAN INDIANS, *supra* note 3.

22. An example of the religious atmosphere that pervaded the reformers' work is found in a speech by Merrill E. Gates, who for several years presided over the reformers' annual conference: "As we get at them one by one, as we break up these iniquitous masses of savagery, as we draw them out from their old associations and immerse them in the strong currents of Christian life and Christian citizenship, as we send the sanctifying stream of Christian life and Christian work among them, they feel the pulsing life-tide of Christ's life." Merrill E. Gates, *Christianizing the Indians* (1893), in AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 288.

23. D. W. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis Paul Prucha ed., 1973) (quoting Carl Schurz, Secretary of the Interior, 1877-1881); see PRUCHA, *supra* note 14, at 227-33, 249-50.

quian ownership of certain parcels of land within the colony and setting aside 50 acres for each "bowman" in the tribe.<sup>24</sup> Massachusetts made individual grants to Indians as early as 1672.<sup>25</sup> President Thomas Jefferson wrote to Cherokee Deputies in 1809, urging them to "make a law for giving to every head of a family a separate parcel of land, which, when he has built upon and improved, it shall belong to him and his descendants forever, and which the nation itself shall have no right to sell from under his feet."<sup>26</sup> Within a few years, Jefferson's suggestion that Indians establish laws to divide their own lands had been extended by federal officials who advocated negotiating allotment of Indian lands by treaty.<sup>27</sup>

The story justifying allotment (including the story the "Friends of the Indian" used later to justify *forced* allotment) was well formed by 1838. The Report of the Commissioner of Indian Affairs for that year tells most of that story and is worth quoting at length:

Unless some system is marked out by which there shall be a separate allotment of land to each individual . . . you will look in vain for any general casting off of savagism. Common property and civilization cannot co-exist . . . . At the foundation of the whole social system lies individuality of property. It is, perhaps, nine times in ten the stimulus that manhood first feels. It has produced the energy, industry, and enterprise that distinguish the civilized world . . . . With it come all the delights that the word home expresses; the comforts that followed fixed settlements are in its train, and to them belongs not only an anxiety to do right that those gratifications may not be forfeited, but industry that they may be increased . . . . This process, it strikes me, the Indians must go through, before their habits can be materially changed . . . . If, on the other hand, the large tracts of land set apart for

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24. The act passed read:

Whereas many complaints have been brought to this Assemblye touchinge wrongs done to the Indians in takeing away *theire* land, or fforcing them into such narrow Streights, and places That they cannot subsist . . . . [therefore, be it] Enacted that all the Indians of this collonye Shall, and may hold and keepe those seates of Land that they now have, And that noe person . . . be suffered to Intrench, or plant uppon Such places as the Indians Claime, or desire, untill full Leave from the governor, and Councill, or Commissioners of that place.

STEPHEN R. POTTER, COMMONERS, TRIBUTE, AND CHIEFS: THE DEVELOPMENT OF ALGONQUIAN CULTURE IN THE POTOMAC VALLEY 195 (1993) (quoting *Some Acts Not in Hening's Statutes: The Acts of Assembly, April 1652, November 1652, and July 1653*, VA. MAG. HIST. & BIOGRAPHY 22 (Warren Billings ed., 1975)).

25. Richard H. Pratt, in PROCEEDINGS OF THE EIGHTEENTH ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF THE FRIENDS OF THE INDIAN 79 (1901) (citing Act 1633, LAWS OF MASSACHUSETTS 74 (1672)).

26. Letter from Thomas Jefferson to the Cherokee Deputies (Jan. 9, 1809), in THOMAS JEFFERSON, XVI THE WRITINGS OF THOMAS JEFFERSON, 455-58, reprinted in RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 238 (1975).

27. See HOUSE OF REPRESENTATIVES MISC. DOCUMENT 18, *Memorial of the Creek Nation, Allotment of Lands in Severalty Among Indian Tribes*, 47th Cong., 2d Sess. app. A (Feb. 3, 1883) (reprinting H.R. REP. 188, 45th Cong., 3d Sess. (Mar. 3, 1879)), microformed on Serial Set Vol. 1, 2115.

them shall continue to be joint property, the ordinary motive to industry (and the most powerful one) will be wanting. A bare subsistence is as much as they can promise themselves. A few acres of badly cultivated corn about their cabins will be seen, instead of extensive fields, rich pastures and valuable stock. The latter belong to him who is conscious that what he ploughs is his own, and will descend to those he loves; never to the man who does not know by what tenure he holds his miserable dwelling . . . [T]here is a strong motive in reference to ourselves for encouraging individual ownership. The history of the world proves that distinct and separate possessions make those who hold them averse to change. The risk of losing the advantages they have, men do not readily encounter. By adopting and acting on the view suggested, a large body will be created whose interest would dispose them to keep things steady. They would be the ballast of the ship.<sup>23</sup>

That Indians held their lands in common was an essential element of the reformers' story. According to that story, tribal societies were "communist," recognizing no private property rights in land. Indians, the story went, were crying out to be saved by the transformative power of private property.<sup>29</sup> According to the reformers, civilization was impossible without the incentive to work that came only from individual ownership of a piece of property.<sup>30</sup> Without the right to enjoy the exclusive fruits of their own labor on the land and to pass the improved land onto their heirs, Indians would have no incentive to abandon the chase and adopt the civilizing course of agriculture and home industry. As an agent to the Sioux put it in 1858, "the common field is the seat of barbarism; the separate farm the door to civilization."<sup>31</sup> A decade later, the Commissioner of Indian Affairs wrote:

Where everything is held in common, thrift and enterprise is rendered very improbable, if not impossible. The starting-point of individualism for an Indian is the personal possession of his portion of the reservation. Give him a house within a tract of land whose cornerstones are plainly recognized by himself and his neighbors and let whatever can be produced out of this landed estate be considered

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28. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, NOV. 25, 1838, Doc. No. 9, PUBLIC DOCUMENTS OF THE SENATE OF THE UNITED STATES, 25th Cong., 3d Sess. 454-55 (1839).

29. OTIS, *supra* note 23, at 54-55; William T. Hagen, *Private Property, The Indian's Door to Civilization*, 3 ETHNOHISTORY, Summer 1996, at 126. Allotment opponents were similarly quick to see "communism" in the different property rules governing Indian societies. OTIS, *supra* note 23, at 11; see also H. R. REP. 1576, 46th Cong., 2d Sess. (1880) (Views of the Minority, by Rep. Russell Errett), reprinted in WILCOMB E. WASHBURN, *THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887*, at 37-39 (1975).

30. PRUCHA, *supra* note 14, at 227-28, 244; Merrill E. Gates, *Land and Law as Agents in Educating Indians* (1885), in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 51; Hiram Price, *Allotment of Land in Severalty and a Permanent Land Title*, in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 94-95. For Thomas Jefferson, an early proponent of individual ownership, giving an Indian landowner the right to leave his property to his wife and children when he died was particularly important in "civilizing" the Indians. PRUCHA, *supra* note 14, at 228.

31. Hagen, *supra* note 29, at 126 (quoting Joseph W. Brown, 1858).

property in his own name, and the first principle of industry and thrift is recognized.<sup>32</sup>

Along with contending that private ownership would instill the individualism essential for Indians to become civilized, the Eastern reformers also argued that providing individual titles was the only way to protect what little remained of Indian land from encroachment by white settlers.<sup>33</sup> Whether Indians had been removed from their lands in the East to lands further west, or had been confined to reservations established by treaty, the federal government repeatedly failed to stop—and not infrequently encouraged—white settlement of Indian lands. Instead of removing whites who invaded Indian lands, the Federal government had repeatedly negotiated treaties of cession from the Indians and effectively ratified the invasions, even when the lands being taken had been reserved by the Indians under previous treaties.<sup>34</sup>

Fee title, allotment advocates argued, would protect Indians' land from confiscation by the government and occupation by settlers. This need for a "white man's paper" to keep Indian lands from being taken by white settlers was the basis for the frequent assertion that the Indians were clamoring for allotment.<sup>35</sup> Security of title and possession, the story went, would give Indians the assurance they needed to invest time and effort in improving themselves and their property. As Merrill Gates, President of Amherst College and a member of the Board of Indian Commissioners, wrote in 1885:

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32. Langone, *supra* note 6, at 552 (quoting Commissioner of Indian Affairs Smith, 1871).

33. Letter of Ezra A. Hayt, Commissioner of Indian Affairs, to Carl Schurz, Secretary of the Interior (Jan. 24, 1879), reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 81.

34. See generally ARRELL MORGAN GIBSON, *THE AMERICAN INDIAN: PREHISTORY TO PRESENT* 309-12 (1980); REGINALD HORSMAN, *EXPANSION AND AMERICAN INDIAN POLICY: 1783-1812*, at 101-05 (1967). Chief Justice John Marshall created the legal rationale long used to justify the insecurity of Indian land title in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). The "Friends of the Indian" read that case to stand for the proposition that "Discovery" and "Conquest" gave the United States ultimate control and ownership of all the land within its borders. Hence, the Indians' title was something less than fee simple and so lacked protection under the law. See, e.g., Henry S. Pancoast, *The Indian Before the Law* (1884), reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 157-58. The modern Supreme Court adopted this view in 1955, holding that aboriginal Indian title could be taken by the United States without just compensation. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). For critiques that this understanding of *Johnson v. M'Intosh* is wrong, see RUSSEL LAWRENCE BARSH & JAMES YOUNG-BLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 45-49 (1980), and Milner Ball, *Constitution, Court, and Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 25-29 both cited in Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 42 n.167 (1991).

35. Carl Schurz, ANN. REP. OF THE SECY OF INTERIOR, NOV. 1, 1880, reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 84.

There is no way [of] reaching the Indian so good as to show him that he is working for a home. Experience shows that there is no incentive so strong as the confidence that by long, untiring labor, a man may secure a home for himself and his family. The Indians are no exception to this rule. There is in this consciousness of a family-hearth, of land and a home in prospect as permanently their own, an educating force which at once begins to lift these savages out of barbarism.<sup>33</sup>

The allotment owner, Gates urged, "shall hold [the land] by what the Indians who have been hunted from reservation to reservation pathetically call, in their requests for justice, 'a paper-talk from Washington, which tells the Indian what land is his so that a white man cannot get it away from him.'"<sup>37</sup>

In addition to its ideological commitment to private property and its humanitarian impulse to protect Indian lands, the reformers' story depicted allotment as an ideal means to destroy the Tribe as an institution. Gates in particular argued that the tribe was a political anomaly, an "*imperio in imperio*," that interfered with and frustrated the Indians' civilization and assimilation:

The rigid tyranny of tribal custom, . . . the intense emphasis with which tribal life demands of the individual absolute conformity to its customs and standards, and insists upon uniformity of action and feeling on the part of all . . . these features of savage life are familiar . . . [I]f civilization, education and Christianity are to do their work, they must get at the individual . . . The deadening sway of tribal custom must be interfered with. The sad uniformity of savage tribal life must be broken up! Individuality must be cultivated . . . we must get at them one by one . . . [W]e must break up the tribal mass, destroy the binding force of savage tribal custom, and bring families and individuals into the freer, fuller life where they shall be directly governed by our laws, and shall be in touch with all that is good in our life as a people . . . [T]his law is a mighty pulverizing engine for breaking up the tribal mass.<sup>38</sup>

In breaking up the tribal mass, the reformers' story prefigured the sale of "surplus" Indian lands to white settlers. Once the Indians were settled on small farm tracts, so the story went, they would be more willing to part with their lands "in lots or in bulk, for a fair equivalent in money or in annuities" which could then be used to finance their education and improvement.<sup>39</sup> In this manner, the Indians would be freed from the danger they faced while standing in the way of "the development of the country," as newly

36. Gates, *supra* note 30, at 51-52.

37. *Id.* at 51.

38. Merrill E. Gates, *Addresses at the Lake Mohonk Conferences (1900)*, reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 339-40, 342. At least some allotment advocates acknowledged a citizen's right to hold and control property together with others, but believed that until tribal ownership was disbanded, Indians were doomed to the fraud, capriciousness, and tyranny of Indian agents. Charles C. Painter, *The Indian and His Property (1889)*, reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 118-20.

39. Gates, *supra* note 30, at 56; Carl Schurz, *Present Aspects of the Indian Problem (1881)*, reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 20.

discovered minerals and agricultural lands became increasingly attractive to whites moving west.<sup>40</sup> Opening the reservations for white settlement on the Indians' "surplus" lands would remove the provocation that so much "unused" land represented to land-hungry white settlers and avoid the encroachments that had "led to so much cruel injustice and so many disastrous collisions."<sup>41</sup> Moreover, as white settlers moved onto the previously Indian-owned lands, the allotted Indian farmers would benefit from the civilizing influence of their new neighbors.<sup>42</sup>

This last part of the story contained within it the seed of the coalition of Western land interests and Eastern humanitarian reformers which ultimately made allotment law.<sup>43</sup> Powerful white land-seekers resented the Indians' huge reservations, seeing them as unjustifiable obstacles to the inevitability of western settlement. Homesteaders, land speculators, and at least some railroad companies saw in allotment a legal way to open wide areas of Indian lands for survey, sub-division, and settlement. Nor, according to their story, was allotment by any means unjust. Rather, as one of the leading Eastern reformers wrote, "[t]he Indians did not occupy this land. A people do not occupy a country simply because they roam over it . . . . The Indians can scarcely be said to have occupied this country more than the bisons and the buffalo they hunted."<sup>44</sup>

It was this characterization of the Indian that made the reformers' story coherent. They created an Indian to be saved and

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40. Schurz, *supra* note 39, at 25. This particular rationale recalls the La Fontaine fable of the hungry Wolf and the temerous Lamb. See Robert A. Williams, Jr., *The Algebra Of Federal Indian Law: The Hard Trial Of Decolonizing and Americanizing The White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 288 n.265 (citing Michal Serres, *The Alegbra of Literature: The Wolfs Game*, reprinted in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM (Josue V. Havari ed., 1979)). A leader of the "Friends of the Indian" from Philadelphia anticipated a more felicitous fate for the lamb: "What happy result can there be to the lamb, but in absorption, digestion, assimilation in the substance of the lion. After this process he will be useful—as part of the lion." Philip C. Garrett, *Indian Citizenship* (1886), reprinted in AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 62.

41. Carl Schurz, *Recommendation of Land in Severalty* (1880), reprinted in AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 85.

42. Richard H. Pratt, *The Advantages of Mingling Indians with Whites* (1892), reprinted in AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 269-70; see also Gates, *supra* note 30, at 54-56 (advocating special inducements and subsidies to white farmers willing to serve as "object-teachers" to their new Indian neighbors).

43. OTIS, *supra* note 23, at 20-32, and Samuel Taylor, *The Origins of the Dawes Act of 1887 23-45* (1927) (unpublished thesis, Harvard University), present evidence about the important support of western land interests for allotment. See also HENRY E. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890*, at 211 (1981).

44. Lyman Abbott, *Criticism of the Reservation System* (1885), reprinted in AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 33-34.

civilized by the division of his communal lands. The fictive image of a vanishing Plains Indian chief adorned in buckskins and war bonnet,<sup>45</sup> wild and free, caring not at all for property, personified the object of their reformatory zeal. By instilling individualism in the wild Indian, allotment would bring to him the incentive to work and acquire. With private property would come salvation and civilization.

### III. INDIGENOUS PRIVATE PROPERTY SYSTEMS

Our own systems of law and land tenure are admirably suited to our people. The statements made to you that we, or any of the Indians, are communists and hold property in common are entirely erroneous. No people are more jealous of the personal right to property than Indians. The improvements on farms may be, and often are, sold; they may descend in families for generations, and so long as occupied cannot be invaded, nor for two years after abandonment. These farms and lots are practically just as much the property of the individuals as yours are. He who does not wish to keep can sell to all lawful citizens. The only difference between your land systems and ours is that the unoccupied surface of the earth is not a chattel to be sold and speculated in by men who do not use it.<sup>46</sup>

D.W. Bushyhead  
Principal Chief of the Cherokee Nation  
Letter to the Congress of the United States  
1881

Indians' stories about property are harder to find. Their stories have been destroyed, confused, and forgotten, when they were known by outsiders at all. Yet historical accounts, anthropological reports, and modern Indian property laws make clear that the story the reformers told about Indian property was wrong. Indians did not hold all their land in common. Rather, Indian societies have had myriad different property systems, varying widely by culture, resources, geography, and historical period. Many of them have recognized property rights in land and have done so in ways that provided for transfer of land, rational inheritance, and legal change.<sup>47</sup>

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45. See, e.g., poster of "Iron Tail, America's Representative Indian Chief," promoting the 101 Ranch Wild West Show, reprinted in Robert F. Berkhofer, Jr., *White Conceptions of Indians*, in 4 HANDBOOK OF NORTH AMERICAN INDIANS 539 (Wilcomb E. Washburn ed., 1988). Although from 1913, the poster captures the image that defined Indians for European Americans in the late nineteenth century as well. See generally ROBERT F. BERKHOFFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* (1978); BRIAN W. DIPPIC, *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* (1982).

46. D. W. Bushyhead, P. N. Blackstone, and George Sanders, Cherokee Delegation to Congress of the United States (Jan. 17, 1881), in SEN. DOCS., 49th Cong., 1st Sess., Serial 2362, vi.

47. This Article uses "private property" to mean a legal regime where a limited number of people has access to a given resource and hold the right to exclude others from that access. See Demsetz, *supra* note 11, at 354; Ellickson, *supra* note 11, at 1322. This definition is consistent



Many continue to do so today. Indian property systems did differ in important ways from the Anglo-American property regime. Given the central importance of the land to native societies—indeed to most native peoples' very identities—it is not surprising that almost all Indian property systems restricted the decision to transfer land rights outside the tribe to tribal leaders. This led many outsiders, including nineteenth- and twentieth-century reformers, to conclude that title to Indian lands was invariably held by the tribe in common.<sup>48</sup> While perhaps appropriate vis-à-vis Europeans, this conclusion ignores the wide variation and complexity of native property systems governing land rights among Indians themselves. This Section surveys various tribal societies in an attempt, however imperfect, to recover Indians' own stories about property.<sup>49</sup>

### *A. Indians' Historical Property Systems*

Despite the precarious status of Indian property under the United States system, tribes' own legal systems have recognized property rights since before European contact.<sup>50</sup> All known tribes'

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with Melville Herskovits' use in his comprehensive anthropological work. MELVILLE J. HERSKOVITS, *ECONOMIC ANTHROPOLOGY: A STUDY IN COMPARATIVE ECONOMICS* 323-26 (1952). Unlike its use by Ellickson, "private property" as used here includes property held by families or clans that may include more than a dozen or so members, as long as they do not include all members of the society in question.

48. See, e.g., Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1024 n.258 (1981). William Cronon is one of the few to avoid this pitfall:

[T]here are really two issues involved in the problem of Indian property rights. One is individual *ownership*, the way the inhabitants of a particular village conceived of property vis-à-vis each other; and the other is collective *sovereignty*, how everyone in a village conceived of their territory (and political community) vis-à-vis other villages. An individual's or a family's rights to property were defined by the community which recognized those rights, whereas the community's territorial claims were made in opposition to those of other sovereign groups.

WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 58 (1983).

49. This survey relies substantially on anthropological accounts and historical observations of tribal societies by outsiders. Such reliance must be undertaken cautiously. As former Hoopa Tribal Chair David Reisling warned, relying on outsiders for information about a people can be risky. He recalled his father's friends intentionally misleading pioneering anthropologist Alfred Kroeber. Presentation to class on Native American Common Law and Legal Institutions, Stanford Law School (Mar. 29, 1993).

50. This has been recognized since not long after anthropology developed as a discipline. See, e.g., E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN LEGAL COMPARATIVE DYNAMICS* 67-256, 316-17 (1954). Unfortunately, evidence of pre-contact Native land tenure is particularly scarce, relying almost entirely on interpretations of historical oral accounts by non-Native observers.

property systems recognized individual rights in personal goods.<sup>51</sup> Agricultural tribes recognized exclusive rights in land.<sup>52</sup> Some hunting and gathering cultures found property rights less necessary,<sup>53</sup> while others developed complex ownership systems governing particular land areas and resources.<sup>54</sup> Societies whose members ranged over vast territories were the least likely to recognize property rights in land, although even these tribes recognized property rights in cultivated lands.<sup>55</sup> As one writer described it, the Indian had property rights adequate to meet his needs.<sup>56</sup> Moreover, Indian property institutions, like property rules under English common law, were able to change and adapt to meet new social and economic challenges and conditions.

### 1. Indian Property Systems in New England

In his study of the ecology of colonial New England, William Cronon writes, "[t]he difference between Indians and Europeans was not that one had property and the other had none; rather, it

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51. See generally HAROLD E. DRIVER & WILLIAM C. MASSEY, 47 *TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY: COMPARATIVE STUDIES OF NORTH AMERICAN INDIANS* 333-94 (1957). Many tribes have long recognized property rights in intangible goods, prefiguring the development of intellectual property law. For example, Trickster tales were owned by talented individuals among the Winnebagos and descended through generations. Personal names were owned by clans among the Haudenosaunee Confederacy and those not in use were assigned by the clans. WILCOMB E. WASHBURN, *THE INDIAN IN AMERICA* 36, 53 (1975) (citing PAUL RADIN, *THE TRICKSTER: A STUDY IN AMERICAN INDIAN MYTHOLOGY* 115-16 (1956) and Elisabeth Tooker, *Clans and Moieties in North America*, XII *CURRENT ANTHROPOLOGY* 358 (1971)).

52. See *infra* text accompanying notes 58, 78-81, 105-08, 127-49, 154-56, 178-84.

53. See *infra* text accompanying notes 172-76.

54. See *infra* text accompanying notes 62-67, 92-103, 152-53, 161-67.

55. See *infra* text accompanying notes 172-79.

56. Hagen, *supra* note 29, at 133-34. Anthropologist Ralph Linton wrote in 1942:

The North American continent presented a tremendous range of natural environments while its aboriginal inhabitants included hunters, fishers, plant gatherers, and agriculturists . . . Each of these environments and technologies was favorable to certain forms of land tenure and unfavorable to others, but none of them limited the possibilities to a single form. Different tribes developed different solutions for the land problem, and by the time that Europeans arrived these had achieved a bewildering variety. Any generalization that will fit North American landholding as a whole will also fit landholding anywhere in the world.

Ralph M. Linton, *Land Tenure in Aboriginal America*, in *THE CHANGING INDIAN* 42 (Oliver La Farge ed., 1943). Imre Sutton's comprehensive bibliography includes many early twentieth century anthropological studies documenting property rights among agrarian tribes, California hunters and gatherers, and Northwest fishing tribes. IMRE SUTTON, *INDIAN LAND TENURE: BIBLIOGRAPHICAL ESSAYS AND A GUIDE TO THE LITERATURE* 23-27 (1975). A short, easily accessible summary of Indian land tenure is found in R. DOUGLAS HURT, *INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT* 65-76 (1987).

was that they loved property differently."<sup>57</sup> Southern New England Indian families had exclusive use of their cultivated fields (usually planted in corn) and the land their homes occupied. Maintenance of these property rights depended upon continued use of the land and was subject to periodic abandonment as intensive cultivation exhausted old fields and families cleared new land. Any member of the village could generally use non-agricultural lands, such as clam banks, fishing ponds, berry-picking areas, and hunting territories. Any member could use a village's territory to collect wild plants, cut wood for canoes, or gather sedges for mats, but sites used for fishing nets and weirs or hunting snares and traps could be owned by an individual or family.<sup>58</sup> Property rights in land could become quite complicated, since they might include an exclusive right to take certain scarce resources from a particular place at a particular time (e.g. to trap deer in the winter) but not the right to exclude other villagers from taking a plentiful resource from that same place at a different time (e.g. to hunt migratory birds in the spring or fall).<sup>59</sup> "Property rights," Cronon notes, "shifted with ecological use." Although Cronon prefers the term "usufruct" in describing New England Indians' property rights, the important observation is that their systems recognized exclusive rights in land, even if those rights required continued use, were rarely traded in a market, and were more finely "sliced" than the typical bundle of European property rights.<sup>60</sup>

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57. CRONON, *supra* note 48, at 80.

58. *Id.* at 62-64.

59. *Id.* Similarly complicated property rights have been described in the customary law governing 97 percent of the land in Papua New Guinea. See Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 L. & SOC'Y REV. 759, 768 n.21 (1991) (citing W.L. Dickson, *An Introduction to Land Registration*, Papua New Guinea Univ. of Tech., Dept. of Surveying and Land Stud. (May 1986)).

60. CRONON, *supra* note 48, at 62-67. Just how finely these systems sliced property rights is evident in a 1636 deed from the Agawam village in central Massachusetts to a non-Indian fur trader. In addition to reciting a price (eighteen each of coats, hatchets, hoes, and knives), the deed reserved to the Indians the right to continued use of all planted ground and "to take Fish and Deer, ground nuts, walnuts akornes and sasachiminesh or a kind of pease." *Id.* at 67. In preferring "usufruct" over ownership, Cronon follows anthropologist Melville Herskovits who applied the term to various Indian property systems. HERSKOVITS, *supra* note 47, 362-64 (1952). The distinction does not weaken the argument that Indian societies recognized private property rights in land. As Robert Ellickson suggests, potentially infinite inheritance and transfer of use rights extend owners' planning horizons and ameliorate usufruct owners' temptation to underinvest in improvements or overexploit the land. Ellickson, *supra* note 11, at 1367-68. Isleta Pueblo scholar Theodore S. Jojola argues that tribal land tenure is distinguished by continuous ownership of specific lands over successive generations, leading to an ethic of stewardship that sustains the productivity of the land for those who will inherit it. Theodore S. Jojola, *Indigenous*

## 2. Algonquian Property Systems

Less agricultural societies often provided for private hunting rights in land. Northern Algonquian tribes, which ranged west into the Great Lakes and north into Canada and included Cree, Montagnais, Neskapi, and Ojibwa<sup>61</sup> (Chippewa) Indians, appear to have developed family territory systems to govern hunting rights in land. In the early twentieth century, Aleck Paul, of the Temagami band of Chippewa at Bear Lake, Ontario, told an anthropologist, "[t]his division of the land started in the beginning of time, and always remained unchanged."<sup>62</sup> According to Paul, his grandfather had parceled out the family hunting ground between his two sons, Paul's father and uncle, before his grandfather died:

We were to own the land so no other Indians could hunt on it. Other Indians could travel through it and go there, but could not go there to kill the beaver. Each family had its own district where they belonged and owned the game. That was each one's stock, for food and clothes. If another Indian hunted on our territory, we, the owners, could shoot him . . . I remember about twenty years ago some Nipissing Indians came north to hunt on my father's land. He told them not to hunt beaver. "This is our land," he told them; "you can fish but must not touch the fur, as that is all we have to live on." Sometimes an owner would give permission for strangers to hunt for a certain time or on a certain tract. This was often done for friends or when neighbors had had a poor season.<sup>63</sup>

These systems recognized exclusive hunting rights on lands within each families' boundaries, usually marked by rivers, ridges, lakes, or other natural landmarks such as swamps and clumps of cedars or pines.<sup>64</sup> The property systems governing these territories seemed to have included inheritance within families, rules and sanctions against trespass, and the right to recover furs taken by non-owners.<sup>65</sup> A lively anthropological debate stretched throughout much of the twentieth century over the issue of whether the family property system was "aboriginal" or developed in response to the

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*Planning and Community Development*, TRADITIONAL DWELLINGS SETTLEMENTS REV. 1 (forthcoming 2001).

61. Ojibwas in the United States are commonly known as Chippewas (e.g. Minnesota Chippewa Tribe), but in their own language, they are *Anishinaabeg*. GERALD VIZENOR, *THE PEOPLE NAMED THE CHIPPEWA: NARRATIVE HISTORIES* 13 (1984).

62. Frank G. Speck, *The Family Hunting Band as the Basis of Algonkian Social Organization*, 17 AM. ANTHROPOLOGIST 289, 295 (1915).

63. *Id.* at 294-95.

64. Dean R. Snow, *Wabanki "Family Hunting Territories"*, 70 AM. ANTHROPOLOGIST 1143, 1146 (1968); see also GERALD VIZENOR, *FUGITIVE POSES: NATIVE AMERICAN INDIAN SCENES OF ABSENCE AND PRESENCE* 178 (1998).

65. Harold Hickerson, *Some Implications of the Theory of the Particularity, or "Atomism," of Northern Algonkians*, CURRENT ANTHROPOLOGY, Oct. 1967, at 313 (citing work by Frank Speck in 1914 and 1915).

European fur trade.<sup>66</sup> Anthropologist John Cooper evaluated the evidence in 1939 by examining the property system of a representative Cree band in Quebec, Canada.<sup>67</sup> He found that the land was held more in the individual than in the family, that it could be permanently alienated by gift or devise, usually within the family, and that it could be loaned temporarily on a good will basis. Cooper did not observe a practice of selling or renting the land, but he did report that the property system provided for permanent exclusive possession, use, and enjoyment. He concluded that the family hunting territories were in their main lines pre-colonial, but that the fur trade may well have intensified the private property system.<sup>68</sup>

Such claims about specific Indian property systems are open to dispute. Modern *Anishinaabe* cultural critic Gerald Vizenor views characterizations by anthropologists as distorted and inaccurate. Instead, he points to evidence supplied by visual stories, totemic creations, and other "mappery" of the Ojibwa, to argue that the native sense of motion and use of the land in the northern woodlands did not embrace inheritance or tenure of territory.<sup>69</sup> This particular disagreement reflects the larger difficulty of reconstructing native property systems in the midst of imperfect records—written and oral—and after centuries of socio-economic change, cultural exchange, and colonial assault. Anthropologists and historians have often extrapolated from limited data and observations in formulating conclusions about pre-contact societies.<sup>70</sup> But while the available data may be inadequate to conclude exactly what *Anishinaabe* property laws were at specific times, they do strongly suggest that Ojibwa communities developed systems rec-

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66. For a summary of the debate, see Snow, *supra* note 64, at 1149. For the argument that the hunting territory system was a response to the fur trade, see generally Eleanor B. Leacock, *The Montagnais' 'Hunting Territory' and the Fur Trade*, 78 MEMOIRS AM. ANTHROPOLOGICAL ASS'N (1954). Anthony Wallace summarized a similar debate over tribal land ownership (what Cronon calls sovereignty, *supra* note 48, at 58) which concluded that northeastern agricultural tribes had exclusive ownership of their territories vis-à-vis other tribes. See generally Anthony F. C. Wallace, *Political Organization and Land Tenure Among the Northeastern Indians, 1600-1830*, 13 SW. J. ANTHROPOLOGY 301 (1957).

67. John M. Cooper, *Is the Algonquian Family Hunting Ground System Pre-Columbian?*, 41 AM. ANTHROPOLOGIST 66 (1939) (describing the property system of the Tête de Boule Cree band of the upper St. Maurice River, Quebec).

68. *Id.* at 89-90.

69. VIZENOR, *supra* note 64, at 178.

70. Historian Daniel K. Richter describes one technique, "upstreaming," as the interpretation of historical sources in light of ethnological and folkloric materials collected in later periods. DANIEL K. RICHTER, *THE ORDEAL OF THE LONGHOUSE: THE PEOPLES OF THE IROQUOIS LEAGUE IN THE ERA OF EUROPEAN COLONIZATION* 5 n.7 (1992).

ognizing property rights in land, perhaps before European contact and without doubt in the centuries after contact but before allotment.<sup>71</sup>

In some cases, contact with European settlers led Indians to define new property rights. The Eastern or Coastal Algonquians, including Micmac, Passamaquoddy, Penobscot, and Abenaki, seem to have crystallized family territories in response to the fur trade.<sup>72</sup> Both Micmac and Penobscot families marked boundaries and trails with blazings on trees, owners' totems, and simpler markings. According to an eighteenth century fur trader, Indians in present day Maine had parcelled out hunting grounds to particular families and had adopted conservation rules allowing a beaver hunt every third year which killed two-thirds of the animals while leaving the remaining third to breed.<sup>73</sup> Penobscot territories in 1910 were reported to be held by an elder male in the family and passed by inheritance to a son, nephew, or son-in-law.<sup>74</sup> Much earlier and further south, Algonquians in seventeenth century Virginia cleared and farmed land intensively,<sup>75</sup> apportioned specific parcels among themselves,<sup>76</sup> and sold land to colonists.<sup>77</sup>

### 3. Iroquois Property Systems

In the fertile areas of upstate New York, extending into Canada, the nations of the *Haudenosaunee*,<sup>78</sup> known as the Iroquois

71. See, e.g., Harold Hickerson, *Land Tenure of the Rainy Lake Chippewa at the Beginning of the 19th Century*, 2 SMITHSONIAN CONTRIBUTIONS TO ANTHROPOLOGY, No. 2 (1967).

72. The Passamaquoddy Tribe and the Penobscot Nation settled land claims relying on evidence of their land use in the Maine Indian Claims Settlement Act, 25 U.S.C.A. §§ 1721-1735 (1994). For an accessible account of the litigation surrounding their claim, see PAUL BRODEUR, *RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND* (1985). Members of the Western Abenaki Tribe were unsuccessful in claiming aboriginal land rights in Vermont. The Vermont Supreme Court held that the tribe's claims were extinguished by "the increasing weight of history." *Vermont v. Elliott*, 616 A.2d 210, 218 (Vt. 1992), cert. denied, 507 U.S. 911 (1993). For a sharp critique of the court's decision, see Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994).

73. BRODEUR, *supra* note 72, at 1149.

74. *Id.*

75. Dussias, *supra* note 16, at 665-66.

76. POTTER, *supra* note 24, at 195 (citing HELEN C. ROUNTREE, *POCAHONTAS'S PEOPLE: THE POWHATAN INDIANS OF VIRGINIA THROUGH FOUR CENTURIES* 128 (1990)).

77. *Id.*

78. The Iroquois League is estimated to be at least 400 years old and initially included the Mohawk, Oneida, Onondaga, Cayuga, and Seneca nations. See Robert B. Porter, *Building a New Longhouse: The Case for Government Reform with the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 807-08 (1998). *Haudenosaunee*, which means "people of the longhouse" or

League, long recognized exclusive property rights in agricultural fields and homes. Ownership of cleared land was held by individual families and clans and was maintained by continued use.<sup>79</sup> Ownership included rights to control the use of a particular field and the disposition of the crops grown, both of which were held by women "matrons" in each family.<sup>80</sup> According to one prominent anthropologist, an individual woman could, if she wished, own a small patch of corn or an orchard by herself.<sup>81</sup> Similarly, Jesuit Father Joseph Lafitau wrote in 1724 that "the land, the fields, and their harvest all belong" to the women.<sup>82</sup>

Scholars have argued over the character and importance of property rights in Iroquois cultures. Like Cronon regarding Indian property in colonial New England, scholar Elisabeth Tooker has emphasized that Iroquois property ownership rested on use, not on transferable legal title.<sup>83</sup> This distinction is significant insofar as it emphasizes that a woman holding a family's exclusive right to use a

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"people building a house" in the Seneca language, referred metaphorically to the Five Nations who first formed the Great League of Peace, probably in the fifteenth or sixteenth century. They became the Six Nations in the eighteenth century when they were joined by the Tuscarora nation from the south.

79. Dussias, *supra* note 16, at 660-61 (citing Ann Eastlack Shafer, *The Status of Iroquois Women*, in IROQUOIS WOMEN: AN ANTHOLOGY 71, 83 (Wm. Guy Spittal ed., 1990)).

80. *Id.* at 661 (citing Judith K. Brown, *Economic Organization and the Position of Women Among the Iroquois*, 17 ETHNOHISTORY 151, 162 (1970)). In U.S. oil and gas law, the right to make decisions over property use, specifically drilling, is known as the "executive" right and is treated as any other property interest. See generally RICHARD W. HEMINGWAY, *THE LAW OF GAS AND OIL* 37-38 (3d ed., 1991).

81. Roback, *supra* note 12, at 17 (citing ANTHONY C. WALLACE, *THE DEATH AND REBIRTH OF THE SENECA* 24 (1970)). Wallace argues that there was little incentive for a woman to take land by herself since such strong pressures existed to share any resulting surplus during winter shortages. *Id.*

82. Brown, *supra* note 80, at 153 (citing JOSEPH F. LAFITAU, 1 MOEURS DES SAUVAGES AMERIQUAINS, COMPAREES AUX MOEURS DES PREMIERS TEMPS 66-67 (1724)). Brown notes that it is not certain whether Lafitau was describing the Iroquois, the Huron, or both. During negotiations in 1791, Iroquois spokesman Red Jacket, speaking on behalf of Iroquois women, insisted on their status as "the owners of the land." George S. Snyderman, *Concepts of Land Ownership Among the Iroquois and Their Neighbors*, 149 BUREAU AM. ETHNOLOGY BUL., No. 2, at 20 (ca. 1948, 1951), cited by Dussias, *supra* note 16, at 656. Professor Robert Porter, former Attorney General of the Seneca Nation, has explained that their status as owners was correct in the sense that the women owned the land as trustees for the creator, on behalf of future generations of Iroquois. Their consent was necessary to cede land. Personal communication with Robert Porter (Feb. 14, 2001) (on file with author).

83. Compare CRONON, *supra* note 48, at 62-67 with Elisabeth Tooker, *Women in Iroquois Society*, in EXTENDING THE RAFTERS: INTERDISCIPLINARY APPROACHES TO IROQUOIAN STUDIES 116 (Michael K. Foster et al. eds., 1984). Property rights, Tooker argues, carried less importance in Iroquois societies than European ones because Iroquois families tended to move every twenty years or so as they exhausted the resources around a particular site. *Id.* at 115. Property, she argues, was much less important than reciprocal obligations among individuals in determining survival and prosperity amidst the contingencies of life and death. *Id.* at 118-19.

particular plot of cleared land did not hold the right to transfer use of the land outside the village or, especially, outside the League to non-Iroquois. As George Snyderman, an early anthropologist, noted, "the land belonged to all the people who inhabited it. No individual could enforce a personal claim to a specific piece of land. Neither could any individual by his own right and desire legally 'sell' lands."<sup>84</sup> Moreover,

the land belonged not only to the present generation, but to all future generations . . . . The present generation, it was believed, had no power to sell lands, for obviously the future generations could not express their wishes in council. The present generations acted as custodians of the land for the unborn; they could only utilize the land during the period of their actual existence.<sup>85</sup>

This lack of an individual right to alienate land outside the society did not negate the *Haudenosaunee* property system. Rather, it helped assure that land remained under *Haudenosaunee* control.

Property rights among the *Haudenosaunee* were not, of course, static during the Confederacy's 400-year existence. Like those of many other Indian cultures, the Five Nations' property systems had to adjust to rapid socio-economic change, severe epidemics and depopulation, years of warfare, and the ever increasing challenge of European and later American colonizers. But the dislocations affecting the *Haudenosaunee*—frequently caused and exacerbated by them—in turn resulted in severe dislocations to other native peoples, and led to alterations in other tribes' property systems. In the mid-seventeenth century, for example, expansion by the Five Nations pushed other tribes, including Algonquians and Huron, off their lands and onto new territories in the upper Midwest.<sup>86</sup> By the late 1600s, 15,000 to 20,000 refugees had settled around Green Bay and an additional 18,000 to 20,000 at Starved Rock further south in Illinois country.<sup>87</sup> In these less fertile and soon over-populated lands around the western Great Lakes, Hurons, Winnebagos, Ottawas, Potawatomis, Fox, Sauks, Kickapoos, Miamis, and many others who had fled Iroquois attacks found

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84. Snyderman, *supra* note 82, at 18-19.

85. *Id.* at 17. Obviously, the Iroquois did, under pressure, make land transfers outside the League. Snyderman reports an incident in which a League spokesman explained publicly that the Council required an exchange of Wampum in order to confirm a land sale by individuals to buyers outside the League. Similarly, a Mohawk speaker contested the legality of a land sale when it had not been agreed to by the village. Both incidents suggest that individual or village agreement was necessary but not sufficient to alienate land outside the League. *Id.* at 19-20. I am indebted to Thomas Mucci for pointing out this interpretation of Snyderman's recounting.

86. RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815*, at 1-2 (1991).

87. *Id.* at 14, 18.



themselves suddenly sharing towns and territories, with inter-tribal boundaries difficult or impossible to establish.<sup>88</sup> Yet almost all these people were horticulturalists and, with game increasingly scarce, naturally farmed for survival, almost certainly establishing property rights in their cultivated fields.<sup>89</sup> While the reconstruction of stable property systems would not have happened instantly, there is evidence that over time such systems were re-established by the refugees. Writing 200 years later on the Wyandots, a nation formed from the remnants of those fleeing the *Haudenosaunee*,<sup>90</sup> John Wesley Powell reported that they held specific parcels of farmland which were assigned by the tribal council to a particular clan. The clan lands were in turn divided among family households for cultivation and living space.<sup>91</sup> Among the Illinois tribes, which had centuries of agricultural traditions before the refugees arrived, women cultivated the land, holding property rights in the crops they grew.<sup>92</sup>

#### 4. Inuit Property Systems

Much further north, in present-day Canada and Alaska, Inuit peoples, hunting and fishing societies, had extensive and well-regulated systems of property rights in land.<sup>93</sup> Bands, each commonly known by a geographical name followed by the prefix *-miut* meaning "the people of," held specific land areas.<sup>94</sup> The band (and in some instances the larger "tribe" or regional grouping) maintained the right to use its territory through use and occupancy.<sup>95</sup> At the

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88. *Id.* at 11.

89. See John M. Cooper, *Land Tenure Among the Indians of Eastern and Northern North America*, 8 PENN. ARCHAEOLOGIST 55, 59 (1938) (describing individual garden plot ownership as a function of sedentary agriculture).

90. RICHTER, *supra* note 70, at 62.

91. Major John Powell, *Wyandot Government: A Short Study of Tribal Society*, in 11 CONG. REC. 1061-62 (1881). Certain names were also said to be the exclusive property of certain clans.

92. Dussias, *supra* note 16, at 668-69.

93. Inuit lands were never allotted, but like Indian lands in the continental United States, they have been subject to Canadian encroachment, confiscation, and regulation. See generally Peter J. Usher, *Property as the Basis of Inuit Hunting Rights*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 10, at 41-65.

94. *Id.* at 46-47.

95. Because Inuit property rights arise and are maintained through use, "those who cannot demonstrate knowledge of an area (expressed through stories based on personal experience and the fund of lore and legend based on the collective experience) do not have rights in it." *Id.* at 47. Functionally similar devices developed in Anglo-American land law: "Monuments set upon the land and words pronounced upon the air, written on a piece of paper, or set down in a book of public record, provided the means of establishing and registering title and perpetuating a right

band level, the Inuit system of property rights included the right for individual band members to use the land, the right for the band to exclude others from the land, and the right to allow others to use the land.<sup>96</sup> An established system existed for determining which community members were entitled to use the land (including processes for incorporation of outsiders into the community). They even possessed means to alienate some uses to outsiders. Moreover, bands formally granted use rights to non-Inuit communities, including Moravian settlers and Newfoundland fishing families.<sup>97</sup> Band members and their neighbors also recognized the particular landmarks and transition zones that separated one band's lands from the lands of neighboring groups.<sup>98</sup>

As Peter Usher writes, throughout Inuit lands, bands and individuals exercised rights to hunt, fish, and travel outside their particular band's lands, but only after negotiated entry and with respect for the Inuit code of behavior which governed the use of the land and its resources. Within a group's lands, a collective system governed use and occupancy of the land. Individuals or partners could have use rights to a particular trapline or fishing spot as long it was in use and could convey such rights to another community member. Families maintained rights to particular dwellings, again as long as they were in use.<sup>99</sup> In general, Inuit land tenure incorporated two conflicting principles. Although permission was needed to use another's land, no one could deny another permission to make a living off the land.<sup>100</sup>

The Inuit property system also incorporated rules and customs governing land use, often expressed in religious and spiritual

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to a given piece of land." VERNON CARSTENSEN, *Introduction to THE PUBLIC LANDS: STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN* xv (1963).

96. Usher, *supra* note 93, at 49.

97. *Id.* at 47-48.

98. *Id.* at 48 (citing E.S. BURCH, JR., *THE TRADITIONAL ESKIMO HUNTERS OF POINT HOPE, ALASKA: 1800-1875*). According to Burch,

[t]he members of Point Hope Society owned a clearly delimited territory. By "owned" I mean that they were the only people who had a legitimate right to use any land with its boundaries for any purpose. The fact was clearly understood by the members of neighboring societies, whose own territories were similarly defined and controlled. Foreigners crossed the boundary either by invitation or else armed and prepared to fight. Any uninvited outsider discovered on Point Hope land was regarded as a hostile intruder and was just as automatically met with armed force.

*Id.* at 61 n.18 (citing BURCH, *supra*, at 61).

99. Usher, *supra* note 93, at 48.

100. *Id.* at 49.

terms.<sup>101</sup> More specifically, band members observed a complex set of rules about how, when, and where to hunt and, more importantly, not to hunt.<sup>102</sup> Each member of the community enjoyed the right to hunt and fish on the group's lands, but only in accordance with these long held rules. In effect, Inuit lands were held *communally*, meaning they were subject to the community's governance, but not *in common*, which implied they were available without limit to the first appropriator.<sup>103</sup> This system ensured that the individual members of the band used the land and its resources in harmony rather than in conflict and so as not to endanger the group's security. The system's longevity and stability over generations is evidence of the system's usefulness.<sup>104</sup>

### 5. Property Systems in the Five "Civilized" Tribes

The heavily agricultural Five "Civilized" Tribes (as non-Indians named the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles) are often described as historically having had a communal land system, with individuals prevented from obtaining absolute title to the land.<sup>105</sup> Close examination, however, shows that the Tribes recognized property rights in land—formally and informally—before and after they adopted written constitutions and statutes. Before the Chickasaws, Choctaws, and Creeks were forced from their lands in the southeast, they tended private gardens (Creek women, as with the Iroquois, controlled these plots) close to individual families' homes. While fields outside the village were often cleared and tended communally, each family's plot was divided from the others and crops were gathered and stored sepa-

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101. Chief Justice Robert Yazzie of the Navajo Nation Supreme Court has pointed out similar traditional Navajo land use regulation involving, for example, prohibitions, expressed through winter stories, on hunting certain species during particular times, marked by the changing constellations.

102. Usher, *supra* note 93, at 50.

103. *Id.* Usher contrasts this view of property with the Anglo-American conception. The Inuits see communal lands as owned by everyone; the contemporary western conception sees them as owned by no one. *Id.*

104. *Id.* at 49.

105. *See, e.g.*, JOHN PHILLIP REID, A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION 130 (1970) (quoting critically R.S. COTTERILL, THE SOUTHERN INDIANS: THE STORY OF THE CIVILIZED TRIBES BEFORE REMOVAL 13 (1854)); THE SOCIAL HISTORY OF THE CHOCTAW NATION 65 (James C. Milligan & L. David Norris eds., 1987) (published by the Choctaw Nation of Oklahoma); Norman Arthur Graebner, *The Public Land Policy of the Five Civilized Tribes*, 23 CHRON. OKLA. 107, 107 (1945).

rately.<sup>106</sup> Long before removal west, Cherokees recognized extensive and well-developed rights in personal property—including in slaves, black and Indian alike.<sup>107</sup> As for property in land, legal scholar John Phillip Reid concluded that communal property had little importance for pre-constitutional Cherokees, except for hunting grounds.<sup>108</sup> Agricultural fields, crops, and homes all were owned individually and, Reid believed, usually by women.<sup>109</sup>

Even the United States acknowledged that the Tribes recognized private property rights in land. In the removal Treaty of May 6, 1828, the United States promised to compensate each head of a Cherokee family for “property that he may abandon” after agreeing to emigrate west.<sup>110</sup> The U.S. Attorney General interpreted the quoted phrase to mean “fixed property, ‘that which he could not take with him; in a word, the land and improvements which he had occupied.’”<sup>111</sup> In 1842, after the U.S. Army had removed the Cherokees to Oklahoma, hundreds of Cherokee farmers filed claims for compensation for improvements to their lands and personal goods lost or taken during the relocation.<sup>112</sup> Typical claims were for small plots (usually less than 20 acres) of corn, sweet potatoes, cabbage, or cotton, for land “under good fence,” for “good bottom land,” for land “unvalued,” for fruit trees, or for rent for land occupied by “citizens of the States.” At least by the time of removal, Cherokee farmers had a well-developed sense of ownership in their improved lands.

After the United States forced the Five Tribes across the Arkansas River to what is now Oklahoma, the tribes re-created property systems. Article I of the Cherokee Constitution of 1839 declared that “[t]he Lands of the Cherokee nation shall remain common property . . . .”<sup>113</sup> Nonetheless, the statutes and practices es-

106. See ANGIE DEBO, *THE ROAD TO DISAPPEARANCE 18-20* (1941) (regarding the Creeks); RICHARD WHITE, *THE ROOTS OF DEPENDENCY: SUBSISTENCE, ENVIRONMENT, AND SOCIAL CHANGE AMONG THE CHOCTAWS, PAWNEES, AND NAVAJOS 20-21* (1983) (citing JAMES ADAIR, *THE HISTORY OF THE AMERICAN INDIANS* (1775) regarding the Choctaws and Chickasaws).

107. REID, *supra* note 105, at 125-30.

108. *Id.* at 133.

109. *Id.* at 140.

110. FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW 54* (1942, reprinted 1971) (citing 7 STAT. 156) [hereinafter, COHEN'S *HANDBOOK*].

111. *Id.* (citing 2 OP. ATT'Y GEN. 321 (1830)).

112. See, e.g., 1842 *CHEROKEE CLAIMS TAHLEQUAH DISTRICT* (Marybelle W. Chase, compiled from Tennessee State Library and Archives, 1989). The claims filed in 1842 included requests for compensation for acts dating back at least as far as 1819. I thank Lucille Beals for bringing these materials to my attention.

113. CONST. & LAWS OF THE CHEROKEE NATION art. 1, § 2 (1839), reprinted in I CONSTS. & LAWS OF THE AM. INDIAN TRIBES 5 (1975). The full clause reads: “The lands of the Cherokee

tablished by the Five Tribes recognized and protected private property rights in land. The Cherokee and Choctaw nations both passed laws in 1839 prohibiting anyone from settling on public lands within a quarter mile of the "house, field, or other improvements" of another without the latter's consent.<sup>114</sup> The Chickasaw Nation later passed a similar trespass statute. Citizens could "open a farm" in any part of the public domain, provided that it did not encroach upon the property of another citizen. Moreover, they could hold the land during its agricultural uses, but if abandoned, the land reverted to the Nation and it became available for new settlement.<sup>115</sup> A survey of Choctaw law reveals various provisions recognizing ownership rights in land, including statutes allowing appointment of a guardian to sell "real estate" for an orphan's benefit,<sup>116</sup> precluding payment for destruction of "their crops" by another's livestock unless a proper fence was in place,<sup>117</sup> and declining to compel parties to a divorce to divest themselves of "title to real estate."<sup>118</sup>

An 1857 deed from the Cherokee Nation reads "to F.H. Nash and his heirs, to his and their use forever," the first clause echoing English common law's fee simple absolute and the second foreshadowing the subsequent restriction on sale, assignment, or transfer to any persons not citizens of the Cherokee Nation.<sup>119</sup> The public policy supporting the theory of communal property in Cherokee law was no more than a restriction on alienation to non-Cherokees.<sup>120</sup> An opinion by U. S. Judge Isaac Parker in an 1891 condemnation proceeding describes Cherokee property law:

While citizens of the Cherokee Nation do not have a fee to the lands they occupy, they can hold them forever, and fully enjoy the profits arising from them, and this

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nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them . . ." It then restricts the right to dispose of such improvements outside the Nation. *Id.*

114. CONST. & LAWS OF THE CHEROKEE NATION, *supra* note 113, at 26; CONST. & LAWS OF THE CHOCTAW NATION 74 (1869), *reprinted in* XI CONSTS. & LAWS OF THE AM. INDIAN TRIBES (1973).

115. ANGIE DEBO, RISE AND FALL OF THE CHOCTAW REPUBLIC 110 (1934). The Chickasaw Nation provided that a claim was abandoned after two years. Act Approved Sept. 24, 1887, CONST. & LAWS OF THE CHICKASAW NATION (1899), *reprinted in* II CONSTS. & LAWS OF THE AM. INDIAN TRIBES 200 (1973). The Muskogee Nation, also known as the Creeks, waited five years. CONST. & LAWS OF THE MUSKOGEE NATION 57 (1892), *reprinted in* XVIII CONSTS. & LAWS OF THE AM. INDIAN TRIBES 57 (1973).

116. CONST. & LAWS OF THE CHOCTAW NATION, *supra* note 114, at 101.

117. *Id.* at 70.

118. *Id.* at 225.

119. REID, *supra* note 105, at 132-33.

120. *Id.* at 133.

right may be granted to their heirs or may descend by inheritance. Practically they get all the productions of the land, the same as though they held it in fee. If there is any peculiar value to the land, it attaches to the right of possession, and the occupant gets the benefit of it . . . . [W]hile they do not hold the fee to the land, I think their interest is so great as to entitle them, as perpetual occupants, to compensation for the additional servitude cast upon their lands.<sup>121</sup>

A 1905 ejectment action (filed in federal court after the U.S. had usurped tribal court jurisdiction) produced evidence that a Chickasaw woman had purchased land, recorded its title, traded it to her son for a piece of property previously given to him, and confirmed the transfer in her last will and testament, all exclusively under Chickasaw law.<sup>122</sup> The court applied Chickasaw law to uphold the actions.<sup>123</sup>

The existence of private property rights in land soon resulted in tremendous differences in the amount and value of the acreage held by particular landowners. Small farmers, typically "full-bloods," held small, hand-cultivated fields, while more acculturated citizens, often non-Indians who had married into the tribe, amassed much larger holdings, frequently in the hundreds or even thousands of acres.<sup>124</sup> These ambitious farmers used five to ten-year tenants or hired laborers to extend their farming of the public domain, depending upon whether the law allowed leasing to non-citizens.<sup>125</sup>

As encroachment on tribal lands increased, the tribes engaged in an on-going effort to regulate and restrict use of the land, particularly its lease to non-citizens for timber, mining, and grazing.<sup>126</sup> For example, in 1889 the Muskogee Nation authorized the head of every Creek family to enclose one square mile of pasture. A year later, it allowed a landowner to petition the voters of an electoral district for the right to secure a three-year, renewable lease on a large pasture. This led to prominent Creek families obtaining leases on tens of thousands of acres which they then sub-leased to Texas cattle ranchers. The Chickasaw Nation fought a continuing ineffectual battle to prevent such illegal, often secret, leases to non-citizens. The Choctaw Nation used statutes to more effectively pre-

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121. *Payne v. Kansas & A.V.R. Co.*, 46 F. 546, 559 (W.D. Ark. 1891), *rev'd on other grounds*, 49 F. 114 (8th Cir. 1892).

122. *Gooding v. Watkins*, 142 F. 112, 113 (8th Cir. 1905).

123. *Id.*

124. DEBO, *supra* note 115, at 110-12; Graebner, *supra* note 105, at 109-11.

125. DEBO, *supra* note 115, at 110-12; Graebner, *supra* note 105, at 109-11.

126. DEBO, *supra* note 115, at 110-12; Graebner, *supra* note 105, at 109-11.

clude non-citizen farmers and cattle ranchers from monopolizing use of the land held by its citizens.<sup>127</sup>

## 6. Indian Property Systems in the Southwest

Private property rights among other agricultural tribes further west were common and, in most instances, persist today. In the Southwest, the *Akimel O'odham* (Pimas) received farm plots assigned by the village headman and council in return for assisting in irrigation canal construction and maintenance. These plots could be passed to heirs and loaned to others, though they were not generally sold or traded.<sup>128</sup> Families among the *Tohono O'odham* (Papagos) held perpetual use rights to specific farm plots within the village field system. These rights rested on continuous farming, but were inheritable from generation to generation.<sup>129</sup> The Mohave people, who presently live on the Colorado River Indian Reservation, divided their aboriginal lands by clan, with each clan having songs to identify clan territory.<sup>130</sup> Clan lands were in turn staked out with markers into family farming areas. Arguments over boundaries between farms were settled by a contest call "Thopirk," literally "strength against strength," amounting to a pushing contest similar to a tug-of-war.<sup>131</sup> Families left without farm areas when the river shifted or when a particular area could not be flooded would be lent space in another family's garden, marked off with posts, or, sometimes, two corn stalks, to designate that the land was being used by someone other than the family controlling the area.<sup>132</sup>

The Rio Grande and Western Pueblos have long recognized private property rights in both homes and farming plots.<sup>133</sup> A 1935 federal government survey of the centuries-old system operating among pueblos in New Mexico concluded that individuals possessed and used the land, with parcels inherited by children or extended

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127. ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 14-17 (1940).

128. Carlson, *Learning to Farm*, *supra* note 10, at 70.

129. DAVID RICH LEWIS, *NEITHER WOLF NOR DOG: AMERICAN INDIANS, ENVIRONMENT, AND AGRARIAN CHANGE* 124 (1994).

130. Affidavit of Pete Homer, Sr., Joe Sharp, and Herman D. Laffoon, Sr. speaking as elders for the Mohave people of the Colorado River Indian Tribes 1-3 (Mar. 1, 1985) (on file with author).

131. *Id.* at 5.

132. *Id.* at 6.

133. JOE S. SANDO, *PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY* 43 (1992).

family. Property could be exchanged with another member of the Pueblo and could be confiscated as punishment by the Pueblo government. The report noted specifically that the system avoided the confusion of heirship and "checker boarding" that characterized allotment.<sup>134</sup>

Early anthropologist Frank Hamilton Cushing described a lawsuit brought before a Zuni council in the 1880s in which a dead man's heirs disputed the deceased's will and the subsequent inheritance of a peach orchard.<sup>135</sup> He noted the construction of elaborate boundary lines and markers establishing individual ownership of unused agricultural lands.<sup>136</sup> Modern anthropologist Charles Lange has described private ownership of houses, agricultural lands, and other real property at Cochiti Pueblo. He notes that such property was exchanged through gift, trade, purchase, and inheritance, and that shares of jointly inherited houses were exchanged for other property to keep estates in usable units.<sup>137</sup> Another anthropologist describes individual ownership of agricultural land and houses at Taos Pueblo (but with communal ownership of pasturage).<sup>138</sup> Real property descends equally among the owners' heirs, a system which by the 1970s had resulted in a problem of "fractionization" which interfered with agricultural endeavors as parcels got too small to be of efficient use.<sup>139</sup>

Almost all the Rio Grande Pueblo property systems provide for family ownership of homes and agricultural plots, with grazing lands available for common use.<sup>140</sup> San Juan Pueblo anthropologist Alfonso Ortiz, writing in the 1970s about his own pueblo, described a property system in which individuals and families enjoyed "use rights" to particular plots of farmland, to house sites, and to the

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134. INDIAN LAND TENURE, *supra* note 5, at 24.

135. FRANK HAMILTON CUSHING, ZUNI BREADSTUFF 132-66 (1920).

136. *Id.* Zuni anthropologist Edmund Ladd noted decades later that in case of divorce, "quarrels over ownership of property, including land litigations, are a normal part of the pattern." Edmund Ladd, *Zuni Economy*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS 494 (Alfonso Ortiz ed., 1979).

137. CHARLES H. LANGE, COCHITI: A NEW MEXICO PUEBLO, PAST AND PRESENT 65 (1959) (reporting conclusions based on field observations and informant interviews).

138. Bernard J. Siegel, *Suggested Factors of Culture Change at Taos Pueblo*, in ACCULTURATION IN THE AMERICAS, PROCEEDINGS & SELECTED PAPERS, 29TH INTERNATIONAL CONGRESS OF AMERICANISTS 138 (Sol Tax ed., 1967), cited in SUTTON, *supra* note 56, at 191.

139. John J. Bodine, *Taos Pueblo*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST 261 (Alfonso Ortiz ed. 1979). This is one of the few examples of the fractionation problem occurring in a tribal property system. Cf. text accompanying notes 311-16.

140. See, e.g., Nancy S. Arnon & W.W. Hill, *Santa Clara Pueblo*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST, *supra* note 139, at 303.



communal grazing area.<sup>141</sup> He noted that most families had fruit trees on their land, but that any wild plants could be freely gathered, even if growing in an otherwise cultivated field.<sup>142</sup> The Pueblo's governing council has the rarely exercised authority to confiscate a family's land for serious and sustained misconduct. Both men and women inherit land.<sup>143</sup> By the time of Oritz's writing, most agricultural lands lay fallow, with some rented by individual families to outside Hispanic farmers.<sup>144</sup>

At Isleta Pueblo, similar property rules governed. Prominent anthropologist Florence Hawley Ellis observed that "[a]s in other Pueblos, land farmed for a year or more could be sold to other Isletans, though never to outsiders."<sup>145</sup> Land and water rights generally passed from father to son, with some families raising fruit trees and grapes. All the community members could use Isleta-owned lands outside the irrigated valley for gathering wood, wild plants, and herbs and for limited grazing.<sup>146</sup>

At Hopi Pueblo, anthropologists have reported that each autonomous village has its own lands which are assigned to that village's matrilineal clans.<sup>147</sup> Boundary stones, set at the corners of each field formerly marked each clan allotment. Within each clan, fields are assigned to women of the clan and are inherited matrilineally.<sup>148</sup> Beyond the clan lands, any man may establish a field as long as he cultivates it and may assign his field to another. Grazing is done in common.<sup>149</sup> The Hopi-Tewa, descended from immigrant Tano families from the Rio Grande who settled at Hopi First Mesa in 1700, hold their lands in a similar fashion. Each clan holds roughly 40-60 acres, although the amount held does not relate to the size of the clan. Women are considered the actual owners of the land and houses, with rights descending matrilineally. Men moving

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141. Alfonso Ortiz, *San Juan Pueblo*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST, *supra* note 139, at 290. Once crops were harvested, the families' farmlands were opened to communal grazing as well, *id.* at 289, a practice shared by northern New Mexico Hispanic communities. Personal communication with Emlen S. Hall, Professor of Law, University of New Mexico.

142. Ortiz, *supra* note 141, at 289.

143. *Id.* at 290.

144. *Id.* at 292.

145. Florence Hawley Ellis, *Isleta Pueblo*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST, *supra* note 139, at 355.

146. *Id.*

147. Edward A. Kennard, *Hopi Economy and Subsistence*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST, *supra* note 139, at 554.

148. *Id.*

149. *Id.* at 555-56.

off clan lands can hold tribal council-leased land and these non-clan lands may pass to a man's own daughters or sons, rather than to the nieces in his sister's line.<sup>150</sup>

### 7. Indian Property Rights in California and the Pacific Northwest

Diverse property systems also flourished on the Pacific coast. In California, even tribes that were not primarily agricultural recognized some family property rights,<sup>151</sup> including, for instance, a woman's right to devise a particular oak tree to her daughter. The value of the transfer lay in the gathering of acorns, a diet staple of many California Indians.<sup>152</sup> Among tribes in what is now northern California, along the Klamath River and the nearby Pacific coast, property was held in individual private ownership and included ownership rights in other tribes' territories. For example, Hupas owned property inside Yurok territory. Ownership could be divided over time, with several individuals each having rights to the same fishing spot at different times of the year.<sup>153</sup> As one scholar notes, "[i]ndividual Hupas held the rights to specific hunting, fishing, and gathering grounds as privately owned property. These rights gave them the privilege of controlling use, rental, alienation, and inheritance, as well as liability for damages incurred on the property . . . Individuals without land rights rented their use from others."<sup>154</sup>

In much drier areas further south, the native peoples recognized property rights of various kinds at the time of Spanish contact. According to anthropologist Florence Connelly Shipek, southern California Indians, including Luiseño and Kumeyaay bands, recognized family or individual ownership of "fields of grain-grass or other annuals, perennials, various shrubs, oak and other trees, cactus patches, cornfields and other resources such as clay beds, basket-grass clumps, quarries, and hot and cold springs."<sup>155</sup> Individuals owned widely varying amounts of land and often maintained land in several different areas.<sup>156</sup> Ownership normally meant

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150. Michael B. Stanislawski, *Hopi-Tewa*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST, *supra* note 139, at 594.

151. SUTTON, *supra* note 56, at 25.

152. Linton, *supra* note 56, at 48.

153. Bruce L. Benson, *Customary Indian Law: Two Case Studies*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 10, at 28-29 (citing Hoebel, Kroeber, and Goldsmid).

154. LEWIS, *supra* note 129, at 75.

155. FLORENCE CONNOLLY SHIPEK, PUSHED INTO THE ROCKS: SOUTHERN CALIFORNIA INDIAN LAND TENURE, 1769-1986, at 15 (1987), cited in Ellickson, *supra* note 11, at 1370 n.271.

156. *Id.* at 15-16.

that the individual's family had labored to develop and maintain the resource. When a Kumeyaay owner, usually the father of a family, died, his lands might be inherited by the youngest child or whichever child had cared for the parents in their old age. If direct heirs had no immediate need for the land, the family could lend or rent the land to a member of another family until it was needed by the owning family.<sup>157</sup>

Individuals engaged in shamanism and the control of supernatural powers had special ownership rights to medicinal plants, rock crystals, and other non-food resources which might overlap within another recognized ownership area and which could be inherited by an individual trained by the shaman in the use of the resource.<sup>158</sup> Intellectual property such as songs, dances, stories, legends, and curing rituals were privately owned and did not survive their owner, unless given to an apprentice.<sup>159</sup> Certain important sacred lands were held by the entire band, but only leaders and shamans had access.<sup>160</sup>

Among salmon fishing tribes of the Northwest coast—Tlingit, Tsimshian, Haida, Nuxalk, Kwakiutl, Nootka, Coast Salish, and Chinoo—property rights were well-defined long before Europeans arrived.<sup>161</sup> Anthropologists have concluded that production rights to specific hunting, gathering, and, especially, fishing grounds on the Northwest coast belonged to clan-houses, with stewardship, namely the right and obligation to direct resource production resting in the house's leader.<sup>162</sup> Northwest Indians told ethnologists in the nineteenth and twentieth centuries that specific people owned particular fishing-sites and had to give permission in order for extended

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157. *Id.* at 16-17.

158. *Id.* at 16.

159. *Id.*

160. *Id.* at 14.

161. A good summary of the anthropological conclusions can be found in D. Bruce Johnson, *Property Rights, Salmon Husbandry and International Change Among Northwest Coast Tribes* (George Mason Univ. Sc. of Law, Working Papers in Law & Econ., Working Paper No.#00-14, Sept. 1999), at [http://papers.ssrn.com/paper.taf?abstract\\_id=213816](http://papers.ssrn.com/paper.taf?abstract_id=213816). Robert Higgs argues convincingly that the transformation of indigenous property rights into a commons regime where the salmon "belonged" to all the citizens of Washington collectively" required further imposition of inefficient regulation which resulted in a harvest a fraction of what it was when it was managed by Indian fishing-site owners. Robert Higgs, *Legally Induced Technical Regress in the Washington Salmon Fishery*, in 7 RESEARCH IN ECONOMIC HISTORY 55 (Paul Uselding ed., 1982).

162. Johnson, *supra* note 161, at 15-16; see also Philip Drucker, *Rank, Wealth, and Kinship in Northwest Coast Society*, 41 AM. ANTHROPOLOGIST 55-64 (Jan.-Mar. 1939), reprinted in INDIANS OF THE NORTH PACIFIC COAST 139-40 (Tom McFeat ed., 1967).

family members to use the site.<sup>163</sup> D. Bruce Johnsen has relied upon anthropological reports to hypothesize that the well-established security of the clan-houses' property rights and the house leader's stewardship right allowed the house leaders to manage the fishery over many years in order to maximize salmon production.<sup>164</sup> The house leader's "executive right" descended according to local rules of inheritance, to the owner's eldest son in some areas, to his sister's eldest son in others.<sup>165</sup> Franz Boas reported that among the Kwakiutl, primogeniture held regardless of whether the first born child was male or female.<sup>166</sup> The house leader's rights generally descended to a single individual to avoid excessive division of the land among the leader's children.<sup>167</sup> Indians' property rights to these salmon fishing spots were recognized in treaties signed with the Northwest tribes in the 1850s and are still exercised today.<sup>168</sup>

In addition to real property rights, Northwest coast tribes have long recognized extensive ownership rights in personal property, both tangible and intangible. In particular, intellectual property has been extremely important in Pacific coast cultures, with families holding exclusive rights to the use of particular names, carvings, paintings, and crests connected with the family's history.<sup>169</sup> Violation of these rights—apparently the equivalent of copyright—could result in violence and bloodshed.<sup>170</sup> Personal property in tangible goods was extremely important as well and, according to anthropologists, the potlatch ceremony developed as an important means for establishing social rank, providing social in-

163. Drucker, *supra* note 162, at 139 (noting that he never received any reports that such permission was withheld and concluding that the individual held the stewardship right but that the local family group held exclusive use right).

164. Johnsen, *supra* note 161.

165. Drucker, *supra* note 162, at 140.

166. Helen Codere, *Kwakiutl Society: Rank without Class*, 59 AM. ANTHROPOLOGIST 473-84 (June 1957), reprinted in INDIANS OF THE NORTH PACIFIC COAST, *supra* note 162, at 149 (citing Franz Boas, *The Social Organization of the Kwakiutl*, in FRANZ BOAS, RACE, LANGUAGE AND CULTURE 360-61 (1940)).

167. Drucker, *supra* note 162, at 140.

168. See generally *United States v. Washington*, 384 F. Supp. 312 (1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (upholding fishing rights of Hoh, Lummi, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, Quinault, Sauk-Suittle, Skokomish, Squaxin, Stillaquamish, Upper Skagit River, and Yakima tribes).

169. Edward Sapir, *The Social Organization of the West Coast Tribes*, in 9 PROCEEDINGS AND TRANSACTIONS OF THE ROYAL SOCIETY OF CANADA, § 2, Ser. 3, at 355-74 (1915), reprinted in INDIANS OF THE NORTH PACIFIC COAST, *supra* note 162, at 32. For a fascinating description of the illegal sale of names by fractional owners in the 1930s, see Ronald L. Olson, *Black Market in Prerogatives Among the Northern Kwakiutl*, 1 KROEBER ANTHROPOLOGICAL SOC. PAPERS (1950), reprinted in INDIANS OF THE NORTH PACIFIC COAST, *supra* note 162, at 108.

170. Sapir, *supra* note 169, at 355-74.

surance, and maintaining a level of distribution of wealth.<sup>171</sup> The potlatch was even used as a means of resolving disputes over ownership of fishing sites, with the party giving away or destroying the most property obtaining good title to the spot.<sup>172</sup>

### 8. Indian Property Rights on the Great Plains

Tribes on the Great Plains who, after obtaining horses, hunted buffalo over large areas, recognized few property rights in land before the United States reduced their territories to a fraction of their previous size.<sup>173</sup> For example, neither the Comanches nor the Cheyenne recognized property rights in land as they ranged widely across the plains, but both recognized extensive individual property rights in moveable goods.<sup>174</sup> Professors Karl Llewellyn and E. Adamson Hoebel documented extensive Cheyenne law on private property inheritance—both testate and intestate—and gifts.<sup>175</sup> Private property in horses became the primary source of wealth among tribes in the horse culture and buffalo-hunting economy.<sup>176</sup> Horses were owned by men, women, and children and the number of horses owned varied widely by individual.<sup>177</sup>

Generally, tribes dependent upon the buffalo for their economy recognized no more than temporary property rights in seasonally occupied villages.<sup>178</sup> Yet even some of these tribes seem to have

171. Johnsen, *supra* note 161, at 18-22; see also H. G. Barnett, *The Nature of the Potlatch*, 40 AM. ANTHROPOLOGIST 349, reprinted in INDIANS OF THE NORTH PACIFIC COAST, *supra* note 162, at 81-91.

172. Johnsen, *supra* note 161, at 20 (describing a property dispute, citing PHILIP DRUCKER, CULTURES OF THE NORTH PACIFIC COAST 19 (1965)).

173. For an example of the United States' reduction of a Plains tribe's lands, see United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938) (reciting how a treaty the United States entered into with the Shoshone tribe in 1863 reserved 44 million acres for the tribe, a reservation that was reduced to 3 million acres in a treaty five years later).

174. Benson, *supra* note 153, at 34 (relying on E. Adamson Hoebel, *Law-ways of the Comanche Indians*, in LAW AND WELFARE (Paul Bohannon ed., 1967)); see also KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASELAW IN PRIMITIVE JURISPRUDENCE 232-33 (1941).

175. LLEWELLYN & HOEBEL, *supra* note 174, at 212-38.

176. JOHN C. EWERS, THE HORSE IN BLACKFOOT INDIAN CULTURE 20-23 (1955).

177. *Id.* at 28-32.

178. For example, according to one summary, the Shoshone and Bannock tribes placed on the Ft. Hall Reservation established property rights only in the fruits which they reaped from the land. Sally Jean Laidlaw, *Federal Indian Land Policy and the Ft. Hall Indians* 1-2 (Occasional Papers of The Idaho State College Museum, No. 3, 1960) (citing Stephen C. Cappannari, *The Concept of Property Among Shoshoneans* 6 (unpublished manuscript, n.d.) & Sven Liljebblad, *Indian Peoples in Idaho* 36 (manuscript, on file with Idaho State College, 1957)). See generally GIBSON, *supra* note 34, at 241-44; ALICE B. KEHOE, NORTH AMERICAN INDIANS: A

recognized private property rights in land cultivated as individual family garden plots.<sup>179</sup> The Pawnees, who had a mixed horticultural and hunting economy, recognized property rights in garden plots assigned to women by the village chief. Rights to these tilled fields (and their produce) were respected—even when the village had de-camped for the summer camp—as long as the tiller wished, but reverted to the village for reassignment at her death.<sup>180</sup>

The agricultural tribes of the Upper Missouri—Hidatsa, Mandan, Arikara, and Omaha, among others—depended upon corn and, like other agricultural tribes, established property rights in cultivated lands. Writing in the late 1800s, early ethnologists Alice Fletcher and Francis La Flesche described agriculture among the Omahas:

Garden patches were located on the borders of streams. Occupancy constituted ownership and as long as a tract was cultivated by a family no one molested the crops or intruded on the ground; but if a garden patch was abandoned for a season then the ground was considered free for anyone to utilize.<sup>181</sup>

George F. Will reported in 1917 that the Hidatsas had marked their fields at the four corners and that disputes among owners, usually women, might be settled by purchase or force.<sup>182</sup> Like much of the ethnographic literature describing native societies, it is sometimes unclear what historical period is being depicted. In this instance, it is not clear whether the Hidatsa informants Will relies upon were referring to the time before or after the Hidatsa, Mandan, and Arikara tribes were assigned to the Ft. Berthold reservation. Washington Mathews described visiting Ft. Berthold in the mid-1800s and seeing fields cultivated by members of the three tribes “in the old way,” meaning one to three acre patches of corn, beans, and squash tended by individual women and marked by fences or natural

COMPREHENSIVE ACCOUNT 290-95 (1981) (Plains Indian's dependence on the bison necessitated a nomadic lifestyle for much of the year).

179. *Readjustment of Indian Affairs, 1934: Hearings on H.R. 7902 Before the House of Representatives Comm. on Indian Affairs, 73d Cong., 2d Sess. 361 (1934)* (statement concerning the Wheeler-Howard Bill by anthropologist Alfred Bowers regarding Mandan, Hidatsas, and Arikaras).

180. WHITE, *supra* note 106, at 159-60 (citing GENE WELTFISH, *THE LOST UNIVERSE: THE WAY OF LIFE OF THE PAWNEE* (1965) and George A. Dorsey & James R. Murie, *Notes of Skidi Pawnee Society*, FIELD MUSEUM NAT. HIST. ANTHROPOLOGICAL SER. 27 (1940)).

181. Alice Fletcher & Francis La Flesche, *The Omaha Tribe, 27th Report*, BUREAU OF AMERICAN ETHNOLOGY 269 (1911).

182. George F. Will & George E. Hyde, *CORN AMONG THE INDIANS OF THE UPPER MISSOURI* 83 (1917, reprinted 1964). Like much of the ethnographic literature describing native societies, it is sometimes unclear what historical period is being described. In this instance, it is not clear whether the Hidatsaa informants were referring to the time before or after the Hidatsa, Mandan, and Arikara tribes were assigned to the Ft. Berthold reservation.

boundaries.<sup>183</sup> Ironically, he contrasted these fields with a larger one, fenced and ploughed at the direction of the Indian Agent and cultivated for the benefit of the Ft. Berthold Agency.<sup>184</sup> In addition, families were assigned plots on which to cultivate potatoes, turnips, and other recently introduced vegetables.<sup>185</sup>

### *B. The Persistence of Indian Property Rights After Allotment*

Even after resettlement or confinement to reservations, many Indians continued to create or modify private property systems to meet their new circumstances. Confinement led some tribes to develop private property rights to manage what little land they had left.<sup>186</sup> At Yakima, whose members had been primarily hunters and fishers, the Indian Agent assigned individual family plots that supported farming without generating land use or inheritance problems.<sup>187</sup> By 1894, twenty years before Congress allotted their reservation,<sup>188</sup> the Indian Agents reported that almost all the Salish and Kootenai Indians who settled on the Flathead reservation lived in their own houses, occupied definite fenced holdings, and cultivated crops of grain, hay, and vegetables and orchards of apples and plums.<sup>189</sup> Sufficient arable land existed to allow each family to fence and use as much as desired.<sup>190</sup> Judges of the recently estab-

183. *Id.* at 98-99 (citing WASHINGTON MATHEWS, *ETHNOLOGY AND PHILOLOGY OF THE HIDATSA INDIANS* 11).

184. *Id.*

185. *Id.*

186. See generally CARLSON, *INDIANS, BUREAUCRATS, AND LAND*, *supra* note 10, at 86-89.

187. *Id.* at 86 (citing James Black Fitch, *Economic Development in a Minority Enclave: The Case of the Yakima Indian Nation 84-85* (1974) (unpublished Ph.D. dissertation, Stanford University)). In a treaty signed in 1855, the Yakimas relinquished their rights to over 11 million acres of land, in return for recognition of a reservation of some 1.2 million acres. *Id.* at 74. Yakima land was allotted beginning in 1898 over widespread and vigorous Yakima opposition. *Id.* at 90. Cognizant of how much land other tribes had when it was declared surplus, Yakima leaders worked to make sure that every bit of Yakima land was allotted to Indians, even Indians from neighboring tribes. As a result of this and later efforts to re-acquire land lost to white ownership, ninety percent of reservation lands are today in Indian ownership, either tribal or individual. *Id.* at 141.

188. The Flathead Reservation was established by treaty in 1855. The treaty ceded some 20 million acres of ancestral homeland to the U.S. government, while retaining 1.3 million acres for use by the Salish, Kootenai, and the Pend d'Oreilles Indians. The reservation was allotted in 1904. By the 1940s, the resident tribes owned 51 percent of the 1.3 million acres originally allotted. TILLER'S GUIDE TO INDIAN COUNTRY: ECONOMIC PROFILES OF AMERICAN INDIAN RESERVATIONS 401 (Veronica E. Tiller ed., 1996) [hereinafter TILLER'S].

189. Ronald Lloyd Trospen, *The Economic Impact of the Allotment Policy on the Flathead Indian Reservation 177* (1974) (unpublished Ph.D. dissertation, Harvard University) (citing Flathead Indian Agent's report in 1894 ANN. REP. OF THE COMM'R OF INDIAN AFFAIRS).

190. *Id.* at 29 (citing 1889 SEC'Y OF THE INTERIOR ANN. REP. 230).

lished Indian court, overseen by the Agent, settled occasional disputes over land ownership.<sup>191</sup> Higher officials at the Department of Interior also acknowledged individual ownership at Flathead by compensating thirty Indian farmers for construction of the Northern Pacific Railroad through land that they fenced, cultivated, and improved.<sup>192</sup>

The Oneida Indians of Wisconsin, once part of the Haudenosaunee Confederacy in the Northeast, re-established a property rights system for land after they moved from New York in the mid-1800s.<sup>193</sup> By 1900, Oneida farmers typically cultivated three to sixty acres of grain, and most families had their own gardens as well.<sup>194</sup>

Even among some of the tribes once in the buffalo economy, private property rights developed after confinement to the reservations. Santee Dakota Indians who fled Minnesota following suppression of the 1862 revolt<sup>195</sup> were settled on the Santee Sioux Reservation in Nebraska, the Lake Traverse Reservation, on the border between North and South Dakota, and the Devil's Lake Reservation in North Dakota.<sup>196</sup> They began farming and by the mid-1880s were

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191. *Id.* at 178 (citing 1897 COMM'R OF INDIAN AFFAIRS ANN. REP. 166).

192. *Id.* at 161 (citing 1885 COMMISSIONER OF INDIAN AFFAIRS ANNUAL REPORT 128).

193. The Oneida Reservation of Wisconsin was created in the 1820s by purchase of nearly 5 million acres of land from the Menominee Tribe. Shortly thereafter, many Oneidas voluntarily removed from their traditional homelands of New York. Concerned with the size of the reservation, the U. S. Government reduced the reservation to 500,000 acres. In 1838, the U. S. Government further reduced the reservation to approximately 65,000 acres and formally recognized this as the present reservation boundaries of the Oneida Tribe of Wisconsin. Today, the Wisconsin Oneida own less than 10,000 of the 65,000 acres. Those who chose not to remove comprise the Oneida Indian Nation of New York, presently occupying approximately 35 acres of communally owned tribal lands. TILLER'S, *supra* note 188, at 477, 620; see also Jack Campisi, *Oneida*, in 15 HANDBOOK OF NORTH AMERICAN INDIANS 485 (Bruce G. Trigger ed., 1978).

194. CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 10, at 118 (citing *Agriculture on Indian Reservations*, in CENSUS OFFICE, U.S. DEPT OF INTERIOR, TWELFTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1900, CENSUS REPORTS, VOL. V: AGRICULTURE 719-20 (1902)).

195. See generally Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990) ("Between September 28 and November 3, 1862, in southwestern Minnesota, nearly four hundred Dakota men were tried for murder, rape, and robbery. All but seventy were convicted, and 303 of these were condemned to die. After an official review of the trials, the sentences of thirty-eight were confirmed and, on December 26, 1862, these thirty-eight were hanged in Mankato, Minnesota, in the largest mass execution in American history. On November 11, 1865, after three additional trials, two more Dakota followed them to the gallows").

196. The Santee Sioux Reservation in Nebraska was established in 1866 and originally contained nearly 73,000 acres. After allotment in 1885, the land-base shrank to approximately 5,800 acres by 1950, and was occupied by 1210 tribal residents. NATIVE AMERICA IN THE TWENTIETH CENTURY: AN ENCYCLOPEDIA 162 (Mary B. Davis ed., 1994). Lake Traverse Reservation, located on the border of North and South Dakota, was established by treaty in 1867 and originally contained nearly one million acres. Approximately 2,700 tribal members were allotted just over 300,000 acres, the remainder purchased for non-Indian settlement. By 1952, tribal



close to being self-supporting, with individual Indians farming for themselves, protected in the recognition of private property rights to the land they cultivated.<sup>197</sup> In the 1860s, the Indian Agent on the Yankton Sioux reservation had established "a so-called agency farm," but by the next decade, agents described the land "owned" and farmed by individual Indians. By 1888, Yankton landholders complained that allotting agents, in declaring timber public property, violated ownership rights the Yankton had established through 20 years of claiming and protecting the timberland.<sup>198</sup>

### C. Indian Property Rights Today

Tribal legal systems today continue to recognize property rights in land.<sup>199</sup> A prime example is the Navajo Nation. Navajo private property rights in land are fiercely asserted and protected, consistent with a long history of property and individual ownership in *Diné* culture. One early outside observer noted that Navajo common law recognized ownership in five classes of property: hard and soft goods; ceremonial values such as songs, medicines, names, and formulae; wild and domesticated animals; and agricultural or rangeland.<sup>200</sup> Farms were held by both men and women, were marked by posts or fences, and were subject to loss through non-

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members sold all but 117,000 acres of the initial allotment. TILLER'S, *supra* note 188, at 492. Devil's Lake Reservation in North Dakota, also established by treaty in 1867, originally contained 221,000 acres. One-hundred thirty-six thousand acres went into allotment to 1,205 tribal members, 88,000 acres were relegated to "surplus" status for sale to white settlers, and 2,350 acres were set aside for missions and schools. By 1937, Indian allottees had sold over 80,000 of their initial allotments. *Id.* at 489.

197. CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 10, at 118-19.

198. *Id.* at 88 (citing COMM'R OF INDIAN AFFAIRS ANN. REP. 258 (1874)). Philip S. Deloria, Director of the American Indian Law Center, Inc., argues that the embrace of private rights in land today is as strong as ever at the Yankton and Standing Rock Sioux reservations. He notes that residents are well-aware of property boundaries and regularly act to enforce them. Personal communication, Philip S. Deloria (Fall 1999).

199. After interviewing tribal court officials from 37 reservations, Cooter and Fikentscher "found ample evidence of the influence of customary law" on land ownership, with customary law dominating where land allocation among tribal members preceded creation of the reservation and contemporary politics prevailing where allocation followed the reservation. Cooter & Fikentscher, *supra* note 11, at 516-17 (citing evidence from Pueblos, Pascua Yaquis, and White Mountain Apaches). They report on contemporary property laws from a number of tribes, primarily in the southwest. *Id.* Hopi legal scholar Pat Sekaquaptewa has written an important description of modern Hopi jurisprudence, including a extensive discussion of modern Hopi property law. See Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761 (2000).

200. Richard Van Valkenburgh, *Navajo Common Law I: Notes on Political Organization, Property and Inheritance*, MUSEUM NOTES, Oct. 1936, at 17, 20.

use. Stock ranges, springs, and water holes likewise were subject to ownership claims,<sup>201</sup> trespass was recognized as a compensable offense,<sup>202</sup> and land rights were passed through inheritance.<sup>203</sup>

Under Navajo law today, most land is held by families in the form of a "customary use area," a term which refers to the area traditionally inhabited by one's ancestors.<sup>204</sup> As the Chief Justice of the Navajo Nation Supreme Court has stated, every inch of the Navajo reservation is claimed by someone as part of their customary use area, unless it has been formally withdrawn and assigned for another purpose.<sup>205</sup> Navajo land law follows the principle that "one must use it or lose it," applying policies "designed to assure that Navajo Nation lands are used wisely and well, and that those who actually live on them and nurture them" have rights to their use.<sup>206</sup> The courts use customary family trusts<sup>207</sup> and the concept of a "most logical heir" to avoid the fragmentation of land use rights otherwise caused by intestate inheritance.<sup>208</sup>

While original family land claims and inherited use rights persist under Navajo law,<sup>209</sup> in recent years there has been increased use of homesite leases, which are required prior to utility installation.<sup>210</sup> Homesite leases are made by the Navajo Nation government and do not require payment other than the initial proc-

201. *Id.* at 21. Modern scholars echo this early work, but locate ownership of land in family groups, not individuals. See WHITE, *supra* note 106, at 238 (citing works by anthropologists Gary Witherspoon and David Aberle). This is consistent with Navajo common law which recognizes that an individual can hold land rights in a Navajo customary trust for the benefit of the entire family. *Begay v. Keedah*, 19 Indian L. Rptr. 6021, 6023 (Navajo 1991). For the most comprehensive summary of the anthropological literature on evolution and change in Navajo land rights, see generally KLARA B. KELLEY & PETER M. WHITELEY, *NAVAJOLAND: FAMILY SETTLEMENT AND LAND USE* (1989).

202. Richard Van Valkenburgh, *Navajo Common Law III: Etiquette, Hospitality, Justice*, MUSEUM NOTES, June 1938, at 39, 45.

203. *Id.* at 22.

204. *In re Estate of Wauneka Sr.*, 5 Navajo Rptr. 79, 81, 13 Indian L. Rptr. 6049 (1986). "Traditional use area" is another term for the same concept.

205. See generally *Begay*, N.L.R. Supp. 274, 19 Indian L. Rptr. 6021 (Navajo 1991) (traditional use area case); *Catron v. Yazzie*, 1 Navajo Rptr. 253, 1 N.L.R. 77 (Navajo Ct. App. 1978) (ending twenty-year old dispute, involving three generations, over boundary line between two traditional use areas).

206. *Begay*, N.L.R. Supp. 274, 19 Indian L. Rptr. at 6022-23.

207. *In re Estate of Benally*, 5 Navajo Rptr. 174, 179-80 (1987) (citing *In re Estate of Wauneka Sr.*, 5 Navajo Rptr. at 82-83); see also *In Re Estate of Wauneka*, 5 Navajo Rptr. at 82 (citing Trust of Benally, 1 Navajo Rptr. 10 (1969) and *Johnson v. Johnson*, 3 Navajo Rptr. 9 (1980)).

208. *In Re Estate of Wauneka Sr.*, 5 Navajo Rptr. at 83.

209. KELLEY & WHITELEY, *supra* note 201, at 155 (citing Navajo scholar Bahe Billy, *Population, Pollution and Land Use among the Navajo*, (n.d., circa 1975) (unpublished manuscript, on file with Navajo Community College Library, Tsaile, AZ)).

210. *Id.*

essing fee.<sup>211</sup> As of 1989, most such leases were for land already held by the lessee's family through traditional use rights.<sup>212</sup> The Federal government instituted grazing permits, similar to leases and administered by the Bureau of Indian Affairs and Navajo grazing committees, to regulate Navajo range use.<sup>213</sup> In order to graze cattle, sheep, or horses, a Navajo family must have both a grazing permit and ownership or use of a traditional use area.<sup>214</sup> Grazing permits can be bought and sold or exchanged<sup>215</sup> and are subject to Navajo probate law.<sup>216</sup> Some Navajo ranchers also lease grazing rights on recently acquired tribal ranchlands.<sup>217</sup>

Navajo law protects land rights to customary use areas under the Navajo Bill of Rights and the Indian Civil Rights Act.<sup>218</sup> Use areas can only be taken through eminent domain proceedings providing due process and just compensation.<sup>219</sup> In recent years, as the Navajo population has grown, both competition for scarce land and the number of disputes have increased.<sup>220</sup> The Navajo Nation Judicial Branch has made a particular effort to move land disputes, which are frequently complicated, long-standing, and bitter, out of the adversarial court system and into the Peacemaker Division for traditional dispute resolution.<sup>221</sup> In 1996, the United States 10th Circuit Court of Appeals refused to hear a case pitting a Navajo woman asserting individual property rights under Navajo Nation law against a Navajo man asserting allotment rights under federal law, explaining that it lacked the expertise and knowledge needed to apply Navajo property law.<sup>222</sup>

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211. *Id.* (citing Alexander Thal, *Fairness in Compensation Procedures: A Case Study of Navajo Land Acquisition Policies* 31 (1981) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with University Microfilms, Ann Arbor, MI).

212. *Id.*

213. 25 C.F.R. §§ 167.8-11 (2000).

214. SOLICITOR OF THE NAVAJO NATION JUDICIAL BRANCH, *NAVAJO LAND USE AND GRAZING RIGHTS* 5-6 (Navajo Common Law Note, Nov. 19, 1991) [hereinafter *COMMON LAW NOTE*].

215. 25 C.F.R. § 167.8; KELLEY & WHITELEY, *supra* note 201, at 155 (citing ROBERT W. YOUNG, *A POLITICAL HISTORY OF THE NAVAJO TRIBE* 156 (1978) and Thal, *supra* note 211, at 30).

216. *Begay v. Keedah*, N.L.R. Supp. 274, 19 Indian L. Rptr. 6021, 6022 (Navajo 1991).

217. KELLEY & WHITELEY, *supra* note 201, at 155.

218. *In re Estate of Wauneka Sr.*, 5 Navajo Rptr. 79, 81 (1986) (citing 16 N.T.C. § 1402 and Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* (1968)).

219. *Dennison v. Tucson Gas & Elec. Co.*, 1 Navajo Rptr. 95 (1974); *see generally* Thal, *supra* note 211.

220. *COMMON LAW NOTE*, *supra* note 214, at 5-6.

221. *Id.* at 11-12; *see also* Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180-87 (1994) (a discussion by the Chief Justice of the Navajo Nation on ODR: Original Dispute Resolution, the traditional Navajo justice system, which stands in contrast to Anglo-European law).

222. *See United States v. Tsosie*, 92 F.3d 1037, 1042-43 (10th Cir. 1996).

The Ho-Chunk Nation, located in Wisconsin, is laying the foundation to recreate a system of private property. Its recently passed constitution includes provision for purchase of individual members' property through condemnation proceedings, for land use regulation and zoning, and the power "to create and regulate a system of property including but not limited to use, title, deed, estate inheritance, transfer, conveyance, and devise."<sup>223</sup>

In 1999, the Pueblo of Isleta established the Isleta Appellate Court for Land and Property Disputes.<sup>224</sup> The Tribal Council established the Court as a traditional appellate court and directed it to apply traditional law in its decisions. Specifically, the Court was given jurisdiction over some 40 disputes—some originating in disagreements dating back more than 75 years—which the Tribal Council had not decided in its role as the appellate court of general jurisdiction. The Council appointed seven members of the Pueblo to the Court, including three attorneys and four elders.<sup>225</sup> They conduct their proceedings in the Tiwa language. The Court has dealt with both substantive property law issues and traditional procedures for resolving disputes. Among the former have been questions of inheritance of family homes, whether homes can be partitioned, proper ceremonial use of homes, set-back restrictions on property use, and mechanisms for transfer and sale of family property. In deciding both substance and procedure, the Court has heard cases, trusting that the application of traditional legal principles would enunciate a coherent body of property law, much as English common law judges developed property law in medieval England.

Tribal property rights have varied across time, geography, cultures, and resources. Agricultural cultures have had the most extensive private property systems. Hunting and gathering-based economies, in contrast, typically had fewer property rights in land, although even these varied, often depending upon the extent of the area relied upon for food. Most tribes have located property rights

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223. CONST. OF THE HO-CHUNK NATION, art. V, § 2, cl. n-p, reprinted in Richard A. Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 43 n.52 (1995), available at <http://www.ho-chunk.com/Departments/Court/CourtHCNConstitution.htm>.

224. The following information was provided in a personal interview with Judge Christine Zuni-Cruz of the Isleta Appellate Court for Land and Property Disputes (Feb. 23, 2001). For a discussion of her experience as an attorney and judge in her own community, see Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 231-35 (2000).

225. One of the elders has since resigned and a second has become ill. The remaining five members continue to sit. *Id.*

in land in families. Some have recognized rights in extended families, clans, and bands. A few have recognized rights primarily in individuals. Almost all have recognized property rights created by use. Failure to use land, in most instances, has meant that another could take possession and begin using it. Even this generalization does not hold for all tribes; some have allowed land to lie fallow and unused for multiple years. Some tribes have allowed transfers of rights in land, both by sale, license, and lease while others have not. Not surprisingly, some tribes' property systems underwent great change as Europeans entered the economy and, especially, as the United States obtained their lands. This was particularly true for those tribes dependent on buffalo and other game resources. Afterwards, some of these tribes quickly recognized and even embraced property rights in cultivated and improved land, though often at the behest of an Indian Agent. There is little evidence that tribes were paralyzed, or even greatly inconvenienced, by the lack of a means to pass rights in land from one generation to the next or from a non-user to a user. Many tribes today maintain systems of property rights in land with roots stretching back farther than the United States'.

#### *D. The Nature of Indian Property Systems*

Nineteenth century Eastern reformers falsely told a story that Indians recognized no private property in land. In fact, an analogy for almost every significant element of Anglo-American property law is present somewhere in the preceding survey of Indian property systems. Rights to use a specific parcel of land, to exclude others from it, and to allow others access to it were common. Interests similar to easements, licenses, *profits-a-pendre*, life estates, leases, timeshares, condominiums, corporate titles, cotenancies, and defeasible fees can all be found. Mechanisms appear for inheritance and transfer of rights to other Indians. A more accurate, more *true*, story would have been that Indian property systems differed from Anglo-American law in how they recognized and ordered a wide range of property rights in land.

Nonetheless, the reformers were correct that Indians viewed land differently from white settlers. For many Indian tribes, their land was at the core of their identity as peoples. As Vine Deloria, Jr. and Clifford Lytle write:

The idea of the people is primarily a religious conception, and with most American Indian tribes it begins somewhere in the primordial mists. In that time the people were gathered together but did not yet see themselves as a distinct people. A holy

man had a dream or a vision; quasi-mythological figures of cosmic importance revealed themselves, or in some other manner the people were instructed. They were given ceremonies and rituals that enable them to find their place on the continent. Quite often they were given prophecies that informed them of the historical journey ahead. In some instances the people were told to migrate until a special place was revealed . . . .<sup>226</sup>

Once that special place on the continent was revealed, that land was imbued with spiritual meaning and became constitutive of the identity of the people who lived upon it.<sup>227</sup> One piece of land was not equivalent to any other. Land was not fungible. Rather, their specific land was a gift, given to them to live upon, but also given to past and future generations.<sup>228</sup> Accordingly, many Indians felt a strong religious obligation to protect their territory, to safeguard the land that future generations would need to live upon, and to honor the past generations who had in prehistory migrated long distances before arriving where the People were to live. The land could not be sold; one could sell neither the future, nor the past.<sup>229</sup>

A similar view among many Indians has seen the earth as a living being, along with man, the plants, and animals. Two views, one from 1940s Seneca "informants" in upstate New York and the other from Lakota scholar R. Bunge in 1979, are representative. According to the Senecas:

[L]and is neither an item of booty to be won or lost nor a commodity to be bought or sold . . . . [Land is] a gift from the "Maker"—a gift which is necessary for survival. The earth itself is revered as the mother of man for she furnishes sustenance in the form of animals and plants. These plants and animals allow themselves to be taken so that man can continue to thrive and dwell on the earth. Out of the earth's body come the pure springs from which man can refresh himself. Moreover, the earth supports man as he walks over her body—she does not allow him to fall.<sup>230</sup>

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226. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 8 (1984).

227. See *id.* at 8-12. Deloria and Lytle note how allotted tribal land kept its importance in establishing tribal identity even after much of it left Indian ownerships:

[Many allotted Indians] had devised their own criterion of tribal membership . . . . If you had kept your allotment while others sold their, you had kept the faith with the old people who had signed the treaties and later the allotment agreements, and therefore you were a recognized member of the tribe.

*Id.* at 121. For a discussion of the relationship between property and the construction of personhood by a western philosopher, see generally Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

228. See generally George S. Snyderman, *Concepts of Land Ownership Among the Iroquois and Their Neighbors*, 149 *BUREAU AM. ETHNOLOGY BULL.*, No. 149, 16-19 (1951).

229. DELORIA & LYTLE, *supra* note 226, at 10.

230. Snyderman, *supra* note 228, at 15. This Seneca view that to make land a commodity was to profane the sacred prefigures the recent debate over property rights in body parts. Compare, for example, Judge Arabian's concurring and Judge Mosk's dissenting opinions in *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990) (holding that Moore did not have

### According to Bunge:

To the whitepeoples, land is *ground*; to the Lakota, land is *earth* . . . . To the Lakota land is the *mother of all that lives*, the source of life itself—a living, breathing entity—quite literally *a person*. What does any person call a living, breathing person who is the source of one's own life, but mother. In the whitepeoples view, the concept of mother extends only to a mother of the flesh. The Lakota view extends the concept to the mother of earth—the source of all flesh. This Lakota view is not merely fanciful, poetic, mystical, or mythical in the sense of false or untrue; the view can be established as factual by criteria acceptable to the most scientifically-minded non-native scholar. Any soil engineer knows that the earth breathes. And any scientist will acknowledge that the earth is the condition and source of life as we know it.<sup>231</sup>

These and similar views of the land, long articulated at treaty negotiations and often reported to white settlers,<sup>232</sup> fed into the reformers' image of Indians as naive, wild, and free, ignorant of the civilizing institution of private property. When outsiders heard Indians argue that land could not be sold, they concluded that the Indians had no private property in land. The outsiders heard wrong. When Indians denied that land could be sold, they were doing so in reference to sales and cessions outside the tribe,<sup>233</sup> transfers which threatened their very identities as peoples. As Deloria and Lytle write, when land was alienated outside the society, all other forms of social cohesion also began to erode, because land was the context in which the other forms had been created.<sup>234</sup> Indian property systems and their stories about the land reflected the primacy of land to their societies. Accordingly, their property laws resisted the alienation of land to outsiders. Their "Friends" promoting allotment used that resistance to charge them with a deficiency in private property rights. As the next Section demonstrates, Indians tried to tell them differently; but they, and Congress, did not listen.

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property rights in a spleen removed from his body for research and commercial development). As a first year law student observed, Moore is the Indians and his spleen is their land. Roman Romero, Property I, University of New Mexico School of Law, September 12, 2000.

231. R. Bunge, "Land is a feeling," (1979) adapted from a presentation to the Institute of Indian Studies Conference on "Relationships between People and the Land," University of South Dakota and in Rory Fausett, *Indigenous Americans and United States Law* (unpublished class materials prepared for Stanford Law School, Spring 1993) (on file with author).

232. See, e.g., Snyderman, *supra* note 228, at 16-19.

233. One of the first recorded Cherokee trials occurred in London in 1730 when a visiting delegation of chiefs and head warriors considered the death penalty for their interpreter who had acquiesced to the king's claim of their lands as his right and property. STRICKLAND, *supra* note 26, at 76.

234. See DELORIA & LYTLE, *supra* note 226, at 10.

#### IV. THE UNHEARD STORY: INDIAN OPPOSITION TO ALLOTMENT

Before this allotment scheme was put in effect in the Cherokee Nation we were a prosperous people. We had farms . . . Orchards and gardens—everything that promoted the comforts of private life . . . Under our old Cherokee regime I spent the early days of my life on the farm up here of 300 acres, and arranged to be comfortable in my old age . . . When I was assigned to that 60 acres, and I could take no more under the inexorable law of allotment enforced upon us Cherokees, I had to relinquish every inch of my premises outside of that little 60 acres . . . What am I going to do with it? For the last few years . . . I have gone out there on that farm day after day . . . I have exerted all my ability, all industry, all my intelligence . . . to make my living out of that 60 acres, and, God be my judge, I have not been able to do it . . . I am here to-day [sic], a poor man upon the verge of starvation—my muscular energy gone, hope gone. I have nothing to charge my calamity to but the unwise legislation of Congress in reference to my Cherokee people.<sup>235</sup>

D. W. C. Duncan  
Cherokee Farmer  
1906

Like tribal property systems, native people themselves were largely absent from the reformers' vision. The "Friends of the Indian" paid little attention to what Indians thought about allotment. One of the movement's more radical leaders, Rev. Lyman Abbott, bragged proudly in his autobiography that he had never visited an Indian reservation or known more than ten Indians in his life.<sup>236</sup> Native people were replaced by what Gerald Vizenor denominates *indians*, "the simulation of the real" with "no referent, memories, or native stories" present.<sup>237</sup> As the first historian of the allotment policy wrote, "the friends of the Indian . . . espoused the theory in

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235. D.W.C. Duncan, *How Allotment Impoverishes the Indians: Testimony Before a Senate Comm. Investigating Conditions in the Indian Territory, November 1906*, in GREAT DOCUMENTS IN AMERICAN INDIAN HISTORY 287-88 (Wayne Moquin with Charles Van Doren eds., 1973).

236. WASHBURN, *supra* note 29, at 16 (citing Abbott's 1915 autobiography). *But see* PRUCHA, *supra* note 14, at 146-47 (arguing that the most prominent of the humanitarians took special pains to gain firsthand knowledge of Indian Affairs.) Prucha notes that Indian students from Carlisle Indian Industrial School were frequently among the more than 800 people who attended the annual gatherings of the Friends of the Indian at Lake Mohonk, New York from 1883 to 1900. *Id.*

237. VIZENOR, *supra* note 64, at 15. Historian Robert Berkhofer writes:

Native Americans were and are real, but the *Indian* was a White invention and still remains largely a White image, if not stereotype . . . The first residents of the Americas were by modern estimates divided into at least two thousand cultures and more societies . . . By classifying all these many peoples as *Indians*, Whites categorized the variety of cultures and societies as a single entity . . . Whether as conception or as stereotype, however, the idea of the Indian has created a reality in its own image as a result of the power of the Whites and the response of Native Americans.

BERKHOFER, *supra* note 45, at 3.



the first place without great deference to the facts of experience."<sup>238</sup> They proposed allotment based not on actual knowledge of tribes but on their false image of *indians* and on an unwavering belief in the transformative power of private property. Had they listened to the Indians' stories, their reforms might have been different.<sup>239</sup>

The reformers used their humanitarian fervor, prodigious propaganda, and organizing force to mobilize public opinion in favor of allotment. One of several reform organizations, the Women's National Indian Association, begun in 1879, had as many as 83 branches in 28 states, and, at the peak of its advocacy efforts, gathered over 100,000 signatures in favor of allotting Indian lands.<sup>240</sup> The Indian Rights Association, formed three years later, expanded quickly, soon having branches in 27 cities and including leading political figures of the day among its members. It led lobbying efforts to support the reform agenda agreed upon at the annual Lake Mohonk Conference of the Friends of the Indian.<sup>241</sup> This agenda called for the breaking up of tribal relations through the individual allotment of Indian lands, full U.S. citizenship for Indians, and a universal government school system to assure Indians' assimilation into American society.<sup>242</sup>

While the reformers spoke loudest, theirs were not the only voices in the debate over allotment. Although some Indians argued that obtaining fee patents to their lands would give them the same protection the white man had,<sup>243</sup> the overwhelming majority of In-

238. OTIS, *supra* note 23, at 56.

239. See WASHBURN, *supra* note 29, at 8. This enforced silence is repeated in several of the standard histories on allotment. See, e.g., PRUCHA, *supra* note 14, at 227-65. See generally AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 77-145 (including statements from Congressional opponents and the Indian Defense Association, but not tribes); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, at 70-78 (1984).

240. Fifty years later, white women activists were instrumental in efforts to reverse the allotment policy. In 1934, Vera Connolly wrote in *Good Housekeeping* magazine,

Lone Buffalo is one of two hundred thousand Indians ruined by the monstrous allotment system—a system designed, as Indian Commissioner Collier stated to me recently, "To rob Indians under form of law, and to kill their souls while it robs them." And today the system is unchanged. The Indians are doomed unless it is changed. A supreme effort to change it has now been launched. Congress is the arbiter. Will you women of the United States help? "Help us! Help us, white women of America!" . . . the American Indians are crying out to you, readers of GOOD HOUSEKEEPING . . . they desperately need your help.

Vera Connolly, *The End of a Long, Long Trail*, 98 GOOD HOUSEKEEPING, Apr. 1934, at 50.

241. PRUCHA, *supra* note 14, at 138-47; see also Taylor, *supra* note 43, at 17-18.

242. Francis Paul Prucha, *Introduction to AMERICANIZING THE AMERICAN INDIANS*, *supra* note 3, at 6.

243. See, e.g., NATIVE AMERICAN TESTIMONY, *supra* note 6, at 238 (quoting the 1881 Congressional testimony of Xitha Gaxe, an Omaha Indian).

dians opposed dividing tribal lands and breaking up the tribal system.<sup>244</sup> Between 1830 and 1880, Congress approved treaties or agreements that gave 67 different tribes the choice to accept allotment of tribal lands. Fewer than five percent did.<sup>245</sup> Despite Indian agents' reports of enthusiastic approval, many tribes opposed allotment both before and after passage of the Dawes Act.<sup>246</sup> Much of this opposition surfaced in response to proposals to allot specific reservations. Among tribes acknowledged by Indian agents to oppose allotment were the Osage, Flathead, Coeur d'Alene, Cheyenne River Sioux, Kickapoo, Potawatomi, Absentee, Shawnee, Kiowa, Comanche, and Wichita.<sup>247</sup> Resistance lead to other expedients. The agent at the Yankton Sioux reservation used two companies of soldiers to persuade Indians to take allotments, while the agent to the Mexican Kickapoos forged their signatures.<sup>248</sup> A military officer reported that 90 percent of the Sioux opposed allotment because they wanted to hold their land as a stock range and it was useless for agriculture.<sup>249</sup>

Various tribes tried to make their opposition known in Washington, D.C. The nineteen tribes that formed the International Council of Indian Territory voted unanimously against allotment in their resolution to President Grover Cleveland.<sup>250</sup> The Council of the Seneca Nation of New York Indians sent a memorial to Congress opposing allotment:

Under the present system by which the Senecas, with a constitutional form of government, regulate and control all their own affairs, they are rapidly improving in their social condition. Agriculture flourishes, the houses and farms of the Indians are constantly improving, the people are contented and prosperous, and there are no paupers to be a burden on the community. Many have cattle, horses, and crops in abundance . . . [T]his condition of independence and prosperity is largely due

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244. WASHBURN, *supra* note 29, at 8-9.

245. Taylor, *supra* note 43, at 46 (citing statistics presented by Senator Morgan of Alabama, CONG. RECORD, 46th Cong. 3d Sess. 1060-61).

246. OTIS, *supra* note 23, at 88-89.

247. *Id.* at 91-97. The secretary of the Wisconsin Indian Association reported in 1889 that "[t]he best educated among the Oneidas are afraid of allotment." *Id.* at 92.

248. *Id.* at 96-97. In 1892 the Yankton agent reported: "The most intelligent among the Indians have some dread of the day when the unallotted parts of the reserve shall be opened to white settlers. The Yanktons have always regarded their tribe as the primal stem of the Dakota Indians and they look upon the proposition to part with their reserve as a move toward the extinction of the race, which alarms them." CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 10, at 108 (quoting ANN. REP. OF THE COMM'R OF INDIAN AFFAIRS, 473 (1892)).

249. ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 313 (1970).

250. OTIS, *supra* note 23, at 94.

to the system by which the lands are owned in common, controlled by the national councils, and are permanently inalienable.<sup>251</sup>

The Seneca Nation was successful in avoiding allotment,<sup>252</sup> but opposition from the Five "Civilized" Tribes (and, perhaps, the tribes' fee simple patents) allowed them to escape allotment only for a few years.<sup>253</sup> In 1883, Creek Nation delegates submitted a legal brief and policy analysis totaling 60 printed pages to the U.S. House of Representatives.<sup>254</sup> The analysis examined the results of pre-Dawes allotments on the "Kaskaskias, Peoprias, &c.," Miamies, Sacs and Foxes, Ottawas, Kansas, Pottawatomies, Shawnees, Kickapoos, Wyandots, and the allotments promised to Creeks and Choctaws in the removal treaties of the early 1830s. It concluded:

1st, that former experiments in allotment have had the effect in most instances of reducing the great body of the community subjected to the trial to a state of pauperism and beggary;

2d, that in several instances the experiments have affected injuriously the vitality of the Indians upon which they were tried; that is, that during the period of allotment, the death-rate in the bodies referred to increased and that it was diminished among the same Indians after their return to the tenure in common. In other words, it will be found that more than half of the Indian communities who have tried the experiment, have not only been reduced thereby to extreme destitution, but have actually suffered a considerable reduction in their numbers, caused by greatly increased mortality.

In an appendix the Creek delegates attached to their Memorial, a report from the House Committee on the Territories examined population, agricultural production, and education and concluded that tribes that had been allotted had lower population growth, even declines, inferior crop production, and less education than unallotted tribes.<sup>255</sup> The House Report concluded that "the statistics prove that the only 'real progress in civilization' ever made by any considerable [sic] number of North American Indians has been made by those holding land in common."<sup>256</sup>

251. HOUSE OF REPRESENTATIVES EXECUTIVE DOCUMENT NO. 83, 47th Cong., 1st Sess. 2 (1882), *microformed on Serial Set Vol. 19, 2027* [hereinafter EXECUTIVE DOCUMENT].

252. General Allotment (Dawes) Act, ch. 119, § 8, 24 Stat. 388 (1887).

253. WASHBURN, *supra* note 29, at 8-9. The Five Tribes were allotted under the Curtis Act of 1898 and the Burke Act of 1906. *Id.*

254. HOUSE MISC. DOCUMENT 18, *Memorial of the Creek Nation, Allotment of Lands in Severalty Among Indian Tribes*, 47th Cong., 2d Sess., (1883) (brief submitted by delegates G.W. Grayson and L.C. Perryman), *microformed on Serial Set Vol. 1, 2115*.

255. H.R. REP. No. 45-188 (1879), *reprinted in EXECUTIVE DOCUMENT*, app. A, *supra* note 251, at 51-60.

256. *Id.* at 51.

Indian opposition to allotment showed remarkable prescience. Among varied concerns, tribal leaders feared that legislation might allow the sale of their allotted lands, that their people were not prepared to support themselves from agriculture, that they had insufficient tillable land to support themselves, that water was insufficient for cultivation, that the proposed parcel sizes were economically inadequate, and that they would suffer from white economic and cultural penetration.<sup>257</sup> All their fears came true.

Unfortunately, as historian Wilcomb Washburn writes, in the allotment debate "the Indian Voice was either not heard, not heeded, or falsely reported."<sup>258</sup> When, in 1880, the Commissioner of Indian Affairs reported that "[t]he demand for title to lands in severalty by the reservation Indians is almost universal," one western senator wondered whether "it is possible that the Commissioner of Indian Affairs is trying to deceive Congress and to put off upon the country a lie."<sup>259</sup> Other congressional opponents of allotment indicated the lack of Indian support for the policy and charged the Government with dissembling when it proclaimed Indian enthusiasm for the policy.<sup>260</sup> Even allotment proponents who acknowledged strenuous Indian opposition dismissed it as the self-serving efforts of chiefs and "squaw-men" interested only in tribal funds and maintaining their own dominant positions in tribal governments.<sup>261</sup>

Non-Indian opponents of allotment did raise some of the Indian tribes' concerns during the debate.<sup>262</sup> The scathing House Minority Report on an early version of the Dawes Act is worth quoting in detail because it demonstrates that some Congressmen understood the negative implications of allotment for Indian tribes and recognized the forces combining in support of the policy:

The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indian are but the pretext to

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257. See OTIS, *supra* note 23, at 91-97.

258. WASHBURN, *supra* note 29, at 8. This enforced silence is repeated in several of the standard histories on allotment. See, e.g., PRUCHA, *supra* note 14, at 227-64. See generally AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 77-145 (including statements from Congressional opponents and the Indian Defense Association, but not tribes); HOXIE, *supra* note 239, at 70-78.

259. WASHBURN, *supra* note 29, at 8 (citing Colo. Sen. Nathaniel Hill).

260. H.R. REP. No. 46-1576, at 7-10 (1880), reprinted in AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 123 (views of the minority). Henry M. Teller, from Colorado, made similarly caustic remarks on the Senate floor. See 11 CONG. REC., Pt. 1, 780-81, 783, 934-35 (1881), reprinted in AMERICANIZING THE AMERICAN INDIANS, *supra* note 3, at 130-140. Sen. Teller went on to serve as Secretary of the Interior from 1892-1895. See *id.*

261. Taylor, *supra* note 43, at 60; see also Langone, *supra* note 6, at 523 (citing ANN. REP. OF THE COMM'R OF INDIAN AFFAIRS, 1876).

262. See, e.g., text accompanying notes 249-56.

get at his lands and occupy them. With that accomplished, we have securely paved the way for the extermination of the Indian races upon this part of the continent. If this were done in the name of Greed, it would be bad enough; but to do it in the name of Humanity . . . is infinitely worse . . . .

Whatever civilization has been reached by the Indian tribes has been attained under the tribal system, and not under the system proposed by this bill. The Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, all five of them barbarous tribes within the short limit of our history as a people, have all been brought to a creditable state of advancement under the tribal system. The same may be said of the Sioux and Chippewas, and many smaller tribes. Gradually, under that system, they are working out their own deliverance, which will come in their own good time if we but leave them alone and perform our part of the many contracts we have made with them. But that we have never yet done, and it seems from this bill we will never yet do. We want their lands, and we are bound to have them.<sup>263</sup>

Congressional opponents of allotment were joined by the National Indian Defense Association, an active and, for a time, influential group of reformers who split from the Indian Rights Association and the loosely organized Lake Mohonk conference. The Association opposed immediate allotment, advocating instead gradual assimilation and retention of tribal governments.<sup>264</sup> Historian Jo Lea Wetherilt Behrens argues convincingly that the association's members were part of a large body of the American public, including scholars, intellectuals, and federal administrators, that was opposed to the idea of allotment.<sup>265</sup> Yet this opposition, while more important than most scholars have acknowledged, could not replace absent, unheard, and ignored Indian voices.

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263. H.R. REP. NO. 46-1576, at 10. OTIS, *supra* note 23, at 20-32, and Taylor, *supra* note 43, at 23-45, present evidence in agreement with the Minority Report's conclusions about the important support of western land interests for allotment. See also HENRY E. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890*, at 211 (1981). Congressional opponents of allotment shared the myth that Indians knew no property: "The very idea of property in the soil was unknown to the Indian mind . . . [T]he idea of the separate possession of property by individuals is as foreign to the Indian mind as communism is to us. This communistic idea has grown in their very being, and is an integral part of the Indian character . . . [I]t is folly to think of uprooting it . . ." H.R. REP. NO. 46-1576, *supra* at 8-9.

264. Jo Lea Wetherilt Behrens, *Forgotten Challengers to Severalty: The National Indian Defense Association and Council Fire*, 75 CHRON. OKLA. 128, 129 (1997).

265. Behrens' argument is strengthened by evidence she presents of the National Indian Defense Association's ("NIDA") influence with President Cleveland, the extent of its lobbying and propaganda activities, and the prominence and size of its membership (by the winter of 1887, NIDA was almost as large as the Indian Rights Association). She attributes NIDA's defeat on the allotment bill, specifically the provision allowing allotment without tribal consent, to its main leader's incapacitation during the critical time Congress was considering the Dawes Act. *Id.* at 151-52.

## V. ALLOTMENT AND INDIANS' LOSS OF TITLE

It is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul while pauperizing him, and cast him in so ruined a condition in the final status of a nonward dependent upon the States and counties.<sup>266</sup>

John Collier  
Commissioner of Indian Affairs  
February 19, 1934

The allotment stories all end the same way—Indians lost most of what little land they still held in 1887. But the stories the reformers told then, and scholars, judges, and activists have told since, misconceive why allotment has been so destructive to Indians. Both fail to account for the specific legal mechanisms which, left in place after the end of allotment, have cost Indians effective use of much of the land that remained in their hands when Congress ended allotment in 1934. More importantly, these stories continue to distort analysis of how to end the damage allotment is doing in Indian communities today and begin to repair some of the destruction it has caused over the past century.

When Congress passed the Dawes Act in 1887, Indians owned roughly 138 million acres of land under U.S. law, an area about the size of the state of Texas.<sup>267</sup> Allotment of particular reservations began quickly, "with a speed that frightened Dawes himself."<sup>268</sup> Congress ratified five allotment agreements with different tribes in 1888 and eight more in 1889. A member of the Board of Indian Commissioners estimated that in 1889 Indians owned 104 million acres, reduced to an estimated 92 million acres in 1890 and to roughly 84 million acres in 1891.<sup>269</sup> A study of the pace of allotment suggests that the Indian Office selected particular reservations for allotment on the basis of their agricultural value. Reservations receiving more rain, with more land suitable for commercial farming, and located nearer white population centers were allotted

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266. *The Purpose and Operation of the Wheeler-Howard Indian Rights Bill*, Memorandum from John Collier, Commissioner of Indian Affairs, to the House Committee on Indian Affairs, reprinted in *Readjustment of Indian Affairs: Hearings Before the House Comm. on Indian Affairs on H.R. 7902*, 75th Cong. 18 (1934).

267. INDIAN LAND TENURE, *supra* note 5, at 6 (citing estimate by the Office of Indian Affairs).

268. PRUCHA, *supra* note 14, at 256. After the Act's passage, Senator Dawes warned: "There is no danger but this will come most rapidly—too rapidly, I think,—the greed and hunger and thirst of the white man for the Indian's land is almost equal to his 'hunger and thirst for righteousness.'" *Id.* (citing PROCEEDINGS OF ANN. MEETING OF THE LAKE MOHONK CONF. OF THE FRIENDS OF THE INDIAN 67 (1887)).

269. OTIS, *supra* note 23, at 84-85.

first, making much of their land immediately available to white farmers and homesteaders.<sup>270</sup> By 1934, when Congress passed the Indian Reorganization Act officially ending allotment of reservations, whites had obtained title to 86 million acres of Indian land, leaving Indians with only 52 million acres, less than 40 percent of what they had owned fifty years before.<sup>271</sup> As reform leader Merrill Gates had told the Lake Mohonk Conference, the law was, indeed, "a mighty pulverizing engine for breaking up the tribal mass."<sup>272</sup>

Indians lost title to most of their lands in three ways. First, 60 million acres were transferred to white homesteaders as "surplus lands" left over after each Indian on a reservation had been allotted the amount of land provided for under the Act. Of the 118 reservations allotted, 44 were opened to white homesteaders after the tribe "ceded" surplus lands to the United States.<sup>273</sup> The tribes were paid \$1.25 per acre for most of the land (compared with \$1.00-\$15.00 per acre paid by white homesteaders of the same era).<sup>274</sup> These funds were then distributed in per capita payments to tribal members or spent by the Indian Office, presumably on the Indians' behalf.<sup>275</sup>

Second, 23 million acres were transferred out of Indian ownership through the issue and subsequent alienation of fee patents. The original act imposed a twenty-five year trust on allotted land, during which time it could not be sold, mortgaged, or otherwise alienated. The Burke Act of 1906, however, authorized the Secretary of the Interior to issue a fee patent to any allottee who was "competent and capable of managing his or her affairs."<sup>276</sup> Over the next two decades, the Indian Office experimented with different ways of issuing patents, including passing on landowner applications at the reservation superintendent's recommendation, sending "competency commissions" out to visit and examine Indian landowners, and is-

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270. CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 10, at 43-51, 57-75, 166-67.

271. INDIAN LAND TENURE, *supra* note 5, at 6. The latter figure does not include land owned by individual Indians in fee. All indications are that the amount of such land was negligible. See, e.g., CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 10, at 158. None of the figures includes native owned land in Alaska. *Id.*

272. PRUCHA, *supra* note 14, at 257 (citing PROCEEDINGS OF THE ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF THE FRIENDS OF THE INDIAN 16 (1900)). As Prucha notes, Theodore Roosevelt employed the phrase in his first annual message to Congress. *Id.*

273. INDIAN LAND TENURE, *supra* note 5, at 6.

274. Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, in CARSTENSEN, *supra* note 95, at 323-24.

275. INDIAN LAND TENURE, *supra* note 5, at 6.

276. Burke Act, ch. 2348, § 6, 34 Stat. 183 (1906).

suing "forced fee" patents to any allotment owner of less than one-half "Indian blood."<sup>277</sup>

Regardless of how the fee patents were issued, they almost invariably (and usually immediately) resulted in the transfer of land from Indians to whites, either through sale (often fraudulent), mortgage followed by default and foreclosure, or confiscation for failure to pay state taxes. A 1914 report from the Omaha reservation showed that only thirteen percent of the Indians who had received patents were using their land productively; 80 percent had little or nothing left.<sup>278</sup> Reports from the Winnebago, Santee, Sisseton, Yankton, and Potawatomi reservations showed similar results.<sup>279</sup> A report from the Rosebud Lakota reservation decried the "land sharks" who dogged Indians receiving fee patents;<sup>280</sup> the Yankton superintendent complained that "land buyers, automobile agents and fakers of all kinds were busy almost day and night. The most susceptible were given the most attention. Smooth tongued mixed bloods were employed and given a bonus for each deal made."<sup>281</sup> Longtime Assistant Commissioner Edgar Meritt acknowledged in 1928 that 90 percent of all patentees had lost their land. In general, Indians who received fee patents wound up landless and impoverished.<sup>282</sup>

The third way Indians lost title to their lands under the Dawes Act was through government sale of allotments. In 1902, Congress authorized the Secretary of Interior to permit heirs to sell their lands upon inheritance instead of physically partitioning them.<sup>283</sup> Under the measure, a single "competent" heir could force sale of the entire allotment. Five years later, Congress authorized the sale of lands by original allottees.<sup>284</sup> With other Indians seldom having money to purchase these lands (and with allotments unmortgagable), an additional 3.7 million acres, often of the best lands, passed to non-Indians.<sup>285</sup>

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277. See generally JANET A. MCDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN* 87-110 (1991). This last tactic, instituted administratively in 1917, was not authorized under the Act. It was, however, enthusiastically supported by twentieth century "Friends of the Indian," especially the Indian Rights Association. *Id.* at 104-05.

278. *Id.* at 92.

279. *Id.* at 93.

280. *Id.* at 101.

281. *Id.*

282. *Id.* at 92-93, 119-20.

283. Act of May 27, 1902, ch. 888, § 7, 32 Stat. 245, 275 (1902) (codified at 25 U.S.C. § 379 (2000)).

284. Act of March 1, 1907, ch. 2285, 34 Stat. 1015 (1907) (codified at 25 U.S.C. § 405 (2000)).

285. INDIAN LAND TENURE, *supra* note 5, at 15-16. Indians lost an additional two million acres of prime land in the 1920s when it was sold at the allotment owner's death to pay federal



## VI. THE ENDURING DAMAGE OF ALLOTMENT

Underneath the humanitarian rhetoric of the "Friends of the Indian," allotment was an attempt to establish a land tenure system that would cause Indians to become farmers and begin to produce an economic surplus, leading in turn to their civilization and assimilation into the American economy.<sup>286</sup> Unlike many of the Indians' pre-existing property systems that required continued use to maintain ownership, however, the system the reformers imposed on the Indians had no mechanism for transferring land to more efficient users. When Congress considered a general allotment bill, the United States had been issuing individual patents on Indian lands since the Choctaw Treaty of 1805.<sup>287</sup> By 1885, the federal government had made more than 12,000 allotments to individual Indians under various laws and treaties.<sup>288</sup> The loss of Indian ownership that accompanied the right of individual alienation was well-known by then.<sup>289</sup> George Manypenny, who negotiated several treaties in the 1850s providing individual patents on reservation lands, lobbied against allotment in the 1880s, bemoaning his role in the loss of Indian ownership, the continuing tribal removals, and the impoverishment of Indian landowners.<sup>290</sup> The reformers' response to this widespread and convincing evidence was to propose that Indians' titles to their new farm tracts be inalienable for twenty-five years, "during which the Indians will have sufficient opportunity to acquire more provident habits, to become somewhat acquainted

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irrigation liens. Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1, 25 (1997) (citing *Survey of Conditions of Indians in the United States: Hearings Before a Subcomm. of the Senate Comm. on Indian Affairs*, 71st Cong. 2335 (1930)).

286. This Section draws heavily on economist Leonard Carlson's important work on the effect of allotment on Indian agricultural production and land tenure. See generally CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 10; Carlson, *Learning to Farm*, *supra* note 10, at 70. See also Roback, *supra* note 12.

287. Choctaw Treaty, 7 Stat. 98 (1805).

288. NAT'L CONG. OF AM. INDIANS, HEIRSHIP: A SHORT REPORT 3 (1968) (manuscript available from the National Indian Law Library, Boulder, Colo.) [hereinafter NAT'L CONG. OF AM. INDIANS]. This document is the most complete and accurate account of the General Allotment Act, its implementation, and subsequent modifications to allotment laws and regulations up to 1968.

289. See, e.g., Schurz, *supra* note 39, at 21.

290. George W. Manypenny, *Shall We Persist In A Policy That Has Failed?*, reprinted in WASHBURN, *supra* note 29, at 64-67 (stating "Had I known then, as I know now, what would result from those treaties, I would be compelled to admit that I had committed a high crime."). Carlisle Industrial Indian School Founder Major Richard H. Pratt once advocated immediate and compulsory allotment in fee because, he argued, the Indians would inevitably squander their titles and sheer poverty would force them to work. Hagen, *supra* note 29, at 130.

with the ways of the world, and to learn to take care of themselves."<sup>291</sup> Ironically, by making allotments completely inalienable, the reformers created a property system that precluded the transfer of land to more efficient Indian owners.

Before allotment, in most tribes, an Indian family wanting to start farming, or wishing to expand its use of the land, simply began to farm unused reservation acreage or, among those tribes with property systems recognizing the transfer of use rights, purchased or requested the right to use additional land.<sup>292</sup> After allotment, a family was, for all practical purposes, limited to using the land it had been assigned or purchasing additional acreage in fee.<sup>293</sup> Of course, since the Dawes Act made allotments inalienable, such purchases could not be financed using the land as collateral.<sup>294</sup> Meanwhile allotment owners without the skills, ability, capital, or inclination to farm left their lands idle and their acreage unavailable for use.

Leonard Carlson has demonstrated that the Dawes Act's imposition of a greatly encumbered property right left Indian communities considerably worse off than they were before.<sup>295</sup> The Act prevented Indians from using their own systems for transferring land to productive users. Instead, they were condemned to operate in an economic environment riddled with market imperfections. Indians were far less ready to begin farming for the market than non-Indians, and could obtain capital and skills only at great cost. Allotment made group cooperation and coordination among Indians to capture economies of scale much more difficult. Racial discrimination imposed additional burdens, evident in market transactions and actions by government agencies and courts.<sup>296</sup> While purporting to introduce Indians to private property, the Dawes Act imposed a property system on Indians that lacked what Frank Michelman has described as the economic essence of private property: a market structure aimed at accommodating coordination through contracts among a small number of parties rather than through political decisions or extralegal actions.<sup>297</sup>

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291. Schurz, *supra* note 39, at 21.

292. Such actions were already occurring in Indian Country at the very time the reformers were promoting allotment so aggressively. See *supra* text accompanying notes 185-97.

293. CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 10, at 90.

294. *Id.* at 133-60.

295. *Id.* at 90-92.

296. *Id.* at 91.

297. Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *ETHICS, ECONOMICS, AND THE LAW* 15 (J. Roland Pennock & John W. Chapman eds., 1982).

Once non-Indians were allowed to lease allotted lands (subject to approval of the Secretary of Interior),<sup>298</sup> it became easier for Indians to transfer land to whites, harder for them to transfer it to other Indians, and much more difficult to reorganize Indian land holdings to increase efficiency.<sup>299</sup> Not surprisingly given all this, the rational economic action for Indian allotment owners was to transfer their land to non-Indians. As Carlson concludes in his study,

[a]llotment emerges as a strikingly perverse policy. The reformers were willing to ignore the preference of Indians and accept the suffering of those Indians who lost their land following allotment in order to encourage Indians to become self-sufficient farmers. Yet . . . allotment encouraged Indian farmers to reduce the amount of labor and resources they employed in independent small farming.<sup>300</sup>

The "Friends of the Indian" were able to impose such a perverse policy because of the power of the story they told (and believed) about private property. The right of property had indeed struck their imaginations and engaged their affections, as Blackstone observed, as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."<sup>301</sup> In their eyes, property was the physical ownership of discrete, individually owned things. Before allotment, the law allowed the tribe, the United States, or white settlers to confiscate an Indian's land more or less at will. To the "Friends of the Indians," this meant an Indian enjoyed no private property. Allotment would give the Indian a property right that the tribe, white settlers, and non-Indian governments would have to respect.

The reformers' vision of property followed the Jeffersonian republican tradition that saw property as the basis for individual autonomy, civic virtue, and freedom from domination and hierarchy.<sup>302</sup> To the reformers' mind, pre-allotment Indians were serfs doomed to the feudal tyranny of uncivilized tribes, denied the liberation and civilization that only private property could bring. The idea that property was a market commodity driving the creation of

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298. See generally MCDONNELL, *supra* note 277; NAT'L CONG. OF AM. INDIANS, *supra* note 288, at 7.

299. See CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 10, at 90.

300. *Id.* at 111. Carlson based his conclusion on a statistical model which aimed to measure the incentives for Indian families to apply labor and resources to farming their own land versus transferring or leasing the land to non-Indian farmers. *Id.* at 92-102.

301. 2 WILLIAM BLACKSTONE, COMMENTARIES \* 2. As Robert Ellickson and others have noted, Blackstone himself recognized the hyperbole in this paradigmatic definition. See Ellickson, *supra* note 11, at 1362 n.237 (1993).

302. GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970, at 43-44 (1997).

wealth had begun to creep into some of the rhetoric of the "Friends of the Indian" by the time of allotment, but not sufficiently to persuade them to enshrine market alienability in Indian property laws.<sup>303</sup> A proposal by the Commissioner of Indian Affairs in the 1870s would have restricted alienation except among Indians, but it was not included in the Dawes Act.<sup>304</sup> The reformers never seemed to have realized that the property system imposed on the Indians by the Dawes Act denied them the ability to reap the economic benefits that private property might have offered. The Indians would receive only the cost of the imposition.

In addition to imposing a property system prohibiting land transfers, even among Indians, the Dawes Act replaced the tribes' numerous existing and functioning inheritance systems with a federal system that lacked a rational inheritance scheme. Before the Act, Indian land was inherited according to tribal law.<sup>305</sup> In many instances, inheritance was not an important concern since land ownership was so frequently organized by family or clan instead of by individual.<sup>306</sup> In others, tribal mechanisms passed land to those who could use it most effectively or had some other claim.<sup>307</sup> Section 5 of the Dawes Act, however, provided that allotted lands were to descend to the owner's heirs according to the law of the state or territory where the lands were located.<sup>308</sup> Wills were not authorized for allotted lands until 1910.<sup>309</sup> As a result, a deceased allotment owner's land descended to all his or her heirs as tenants in common. Under this system, allotted land quickly came to be held by

303. See generally AMERICANIZING THE AMERICAN INDIANS, *supra* note 3.

304. REP. OF THE COMM'R OF INDIAN AFFAIRS, 1876-1877, at 387. In 1842, the Commonwealth of Massachusetts decided that lands on Cape Cod belonging to the Mashpee Indians should be divided among the individual members of the community, but that they would be allowed to sell the parcels only to other members. Gerald Torres & Kathryn Milun, *Translating Yonnonndio by Precedent and Evidence: The Mashpee Indian Case* 1990 DUKE L.J. 625, 640.

305. See generally *Jones v. Meehan*, 175 U.S. 1 (1899); see also *Jefferson v. Fink*, 247 U.S. 288, 291 (1918) (the Original Creek [allotment] Agreement, provided for the allotment in severalty of the lands of the Creeks and revived their tribal law of descent and distribution (later repealed)); *In Re Kansas Indians*, 72 U.S. 737 (1866) (tribal lands are not subject to State inheritance laws); *Brown v. Steele*, 23 Kan. 473, 474-75 (1880) (descent of lands patented to a Shawnee Indian under the treaty of May 10, 1854, 10 Stat. 1053, is to be determined by the laws and rules established by the tribe).

306. See *supra* text accompanying notes 29-45.

307. See *supra* text accompanying notes 105-08.

308. General Allotment (Dawes) Act, ch. 119, § 5, 24 Stat. 388 (1887); see also COHEN'S HANDBOOK, *supra* note 110, at 230-31.

309. Act of February 14, 1913, ch. 55, § 2, 37 Stat. 678 (1913) (codified at 25 U.S.C. § 373 (2000)); Act of June 25, 1910, ch. 431, 36 Stat. 855, 856 (1910).

multiple owners, with some allotments so "fractionated" as to be unusable.<sup>310</sup>

An example of application of tribal versus state inheritance laws appears in a U.S. Supreme Court case, *Jones v. Meehan*, ruling on a 1872 inheritance of 640 acres owned by Monsimoh, one of the principal chiefs of the Red Lake band of Chippewa.<sup>311</sup> The Court ruled that the allotment, made in a treaty prior to the Dawes Act, had descended intact to the chief's eldest son according to the "laws, usages, and customs of the Chippewa Indians."<sup>312</sup> The record included uncontroverted testimony about *Anishinaabeg* law confirming that primogeniture, as in much of Europe at the time, was the applicable rule of descent. By contrast, the Interior Department had argued that the land should pass according to the law of Minnesota, descending instead to Monsimoh's general heirs as tenants in common, in this case to as many as six of his children and grandchildren.<sup>313</sup> The Dawes Act made the Interior Department's losing position law.

As early as 1892, Indian Agents were reporting problems of fractionated heirship to their superiors in Washington, D.C. The agent on the Puyallup Reservation near Tacoma reported that:

upon the death of the original grantees the right to the land gets so divided and subdivided that no one has sufficient preponderance of property in the land to make it to his interest to improve it. After a few subsequent deaths of the heirs the title becomes so interminably mixed that it is next to impossible to clear it up. Not being alienable there can nothing be done.<sup>314</sup>

The problem, of course, worsened with each passing generation. Horror stories of highly fractionated titles are commonplace in writings about allotment.<sup>315</sup> Yet an example is instructive. In 1957, the Army Corps of Engineers and the Bureau of Indian Affairs ("BIA") surveyed a 116-acre agricultural allotment on the Yankton Sioux Reservation in preparation for flooding by the Pick-Sloan Project. The parcel was owned as a tenancy in common by 99 heirs of the original allottee. The largest interest, owned by Walking

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310. See *supra* text and accompanying notes 311-16.

311. *Meehan*, 175 U.S. at 4-8. The Red Lake Reservation of Minnesota was allotted under the Dawes Act in 1889. After ceding some 2.9 million acres to the U.S. Government, approximately 840,000 acres was allotted as the Red Lake reservation. The Red Lake Band of Chippewa Indians now possess nearly 157,000 acres of tribally owned land in northern Minnesota in addition to the reservation ares. TILLER'S, *supra* note 188, at 389.

312. *Meehan*, 175 U.S. at 31.

313. See *id.* at 29.

314. 1892 ANN. REP. OF THE SEC'Y OF THE INTERIOR 193.

315. See, e.g., Langone, *supra* note 6, at 537; Lawson, *supra* note 4, at 85-87.

Many Arrows, was approximately seven percent and, if partitioned, would have been roughly equivalent to eight acres, assuming similar value across the entire parcel. The interest was appraised at \$586. The smallest interest, owned by Francis Hairy Chin, was slightly more than 0.005 percent or, if partitioned, about the size of an average American living room. It was appraised at \$0.37. The other owners' interests ranged in value from \$0.47 to \$384. The least common denominator used to calculate the interests was 54,000,000,000,000.<sup>316</sup> In practice the parcels in such highly fractionated allotments were almost never physically partitioned. Instead, highly fractionated parcels were leased, almost invariably to white farmers and ranchers, or left underused or idle. Francis Hairy Chin probably did not farm a 253 square foot parcel, but there is little doubt that co-owners then, as they do today, reached accommodations allowing some uses of the land.

The difficulties that must have confronted the co-owners in the above example occur to a greater or lesser degree on many fractionated allotments.<sup>317</sup> Indeed, that allotment would not be among today's most highly fractionated allotments in which hundreds of interests are not particularly unusual. Obtaining participation, cooperation, and agreement among even small numbers of multiple co-owners can be hard; it is likely to be near impossible—and extremely costly—among dozens.<sup>318</sup> Fractionated ownership greatly increases the difficulty of developing land, both for co-owners seeking to use the land for their own purposes and for tribal communities seeking to provide infrastructure and services across allotted lands. Putting in utilities, establishing roads, harvesting forestry and mineral resources, developing commercial uses, and obtaining homesite leases for residences all become increasingly ex-

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316. MICHAEL L. LAWSON, DAMMED INDIANS: THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX 141 (1982) (citing 103 CONG. REC. 12393-94). Walking Many Horses' fractional share was 4,199,168,967,628 divided by 54,000,000,000,000. Francis Hairy Chin's share was 2,887,967,628 divided by the same number. *Id.*

317. See GEN. ACCOUNTING OFFICE, PROFILE OF LAND OWNERSHIP RESERVATIONS 12 (Feb. 1992) (briefing report to the Chairman, Select Comm. on Indian Affairs, U.S. Senate, 102d Cong., 2d Sess. (1992)); *Babbit v. Youpee*, 519 U.S. 234, 237 (1997); *Hodel v. Irving*, 481 U.S. 704, 706-07 (1987).

318. Michael Heller has described this situation, in which co-owners must agree in order to use the land fully and can block each other from doing so, as a limited-exclusion anti-commons likely to result in underuse of the resource. Co-owners hold their allotments in anti-commons form vis-à-vis each other, but as private property vis-à-vis the outside world. See Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1196-98 (1999); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 660-79 & n.172 (1998) (drawing on the work of Frank Michelman, *supra* note 297, at 3).

pensive in time, money, and effort as fractionation grows. Not surprisingly, disagreement among co-owners often strains family relationships.<sup>319</sup>

The story allotment proponents told to justify the Dawes Act did not anticipate the problem of fractionated title. Unlike most of the Act's other shortcomings, fractionation does not appear to have been identified before the law's enactment. The story the reformers told did not imagine that Indians would still be inheriting allotments a century later. Under the Act, allotments were to remain in trust for twenty-five years, after which the Indian owner was to receive a patent in fee simple absolute.<sup>320</sup> Allotment proponents expected that, by the time the trust period expired, individual Indian landowners would have learned how to work and manage their lands and have integrated themselves into mainstream American society. Instead, the trust period was extended repeatedly when it became clear that Indian fee owners were losing their land to white "land sharks," local non-Indian taxing authorities, and poor management. As long as allotments are held in trust, landowners have little ability or incentive to avoid fractionated title and few tools to cure it after it develops.<sup>321</sup>

Under the Dawes Act, fractionation grows worse with each owner's passing as ownership is divided among another generation. Occasionally, an owner will have made provisions to pass his or her interest to a single family member. More often, however, allotment interests pass through intestate succession. Some owners have long since left the reservation, if they ever lived there, or have lost ties that their families once had. Many owners have such small interests that it is not worth their time or energy to address the question of inheritance of their interests. Among owners still connected to their reservations, some native cultures discourage people from

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319. For a discussion of the co-ownership trouble a law professor's three aunts had in a non-Indian context, see Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331.

320. General Allotment (Dawes) Act, ch. 119, § 5, 24 Stat. 388 (1887).

321. Title to land owned in fee rarely becomes highly fractionated for two reasons. First, any co-owner has the ability, as of right, to go to court and demand a partition, either through physical division or sale and division of proceeds. Second, most fee land is subject to foreclosure for nonpayment of state and local taxes. Co-owners thus have an incentive to consolidate title or title is consolidated at a tax sale. See generally JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 321-24, 340-51 (4th ed. 1998). For a description of fractionated title and its affect on African-American farmers in the American South, see Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001).

making wills or other estate plans.<sup>322</sup> Many other owners lack the information, understanding, and access to legal resources to prevent the problem from worsening with the following generation. Even allotment owners wanting to make wills often face obstacles in obtaining necessary ownership information from the BIA. Allotment owners face similar obstacles in consolidating ownership interests themselves.

From the federal government's perspective, the worst aspect of fractionated ownership is the expensive administrative burden that it places on the BIA, the institution primarily responsible for carrying out the United States' trust responsibilities on Indian land. Late last year, the Assistant Secretary of the Interior for Indian Affairs, himself an allotment owner, estimated that the BIA spent fifty to seventy-five percent of its \$33 million realty budget to administer fractional interest in allotted lands.<sup>323</sup> In addition to maintaining ownership records, the BIA must approve all sales, gifts, leases, exchanges, rights of way, and mortgages of allotted lands. There are interminable delays in obtaining such approvals, some related to obtaining agreement among myriad owners and others related to the BIA's inability to process such transactions promptly. The Department of Interior is also responsible for administering agricultural, commercial, and mineral leases, overseeing lumber sales, monitoring right-of-ways, and collecting and distributing income from these activities to the appropriate allotment owners. The multi-billion dollar class action suit against the Interior and Treasury Departments on behalf of individual allotment owners is largely due to the government's failure to collect and distribute accurately income from allotted lands. A three judge panel of the D.C. Circuit Court has recently upheld the district court's ruling that the federal government has breached its fiduciary obligations to allotment owners and is liable to provide an accounting of mismanaged funds.<sup>324</sup> Plaintiffs in the class action suit claim that as much as \$10 billion may have been mismanaged.<sup>325</sup>

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322. Interview with Patricia McDonald, Administrative Law Judge, and Janet Yazzie, Staff Attorney, Department of Interior, Office of Hearings and Appeals (Apr. 2001) (regarding Navajo cultural taboos discouraging estate planning).

323. *Joint Hearings of the House Resources Comm. and the Senate Comm. on Indian Affairs on S. 1536*, 106th Cong., 1st Sess. (1999) (statement of Kevin Gover, Assistant Sec'y of the Interior for Indian Affairs), available at 1999 WL 1022946.

324. *Cobell v. Norton*, 2001 WL 173299, at \*29 (D.C. Cir., Feb.23, 2001).

325. Bill McAllister, *Appeals court backs ruling for Indians on trust accounts*, DENVER POST, Feb. 24, 2001, at A-06; see also *Cobell v. Babbitt*, 52 F. Supp. 2d 11 (D.D.C. 1999).



One of the worst legacies of the Dawes Act was that it deprived tribal societies of the ability to adjust their own laws governing property. As any law student exposed to the Statute of Uses, the Rule in Shelley's Case, or the Rule Against Perpetuities can attest, the hallmark of the Anglo-American common law of property is its evolutionary nature. Indeed, the paradigmatic example of English common law reasoning may be the development of the rules regulating the ownership and inheritance of land.<sup>326</sup> Anglo-American property law developed as a dance between judges and legislatures, each at different times balancing property owners' desires to control family property and avoid taxes against society's interest in the marketability of land and collection of taxes. The Dawes Act deprived Indian societies of the power to balance an interest in the free alienability of land against the loss of governmental authority that sale outside the tribe caused under U.S. law.<sup>327</sup> To the "Friends of the Indian," private property was a fixed concept, and the allotment was the means by which it could be "given" to the Indians to bring them to civilization. Unfortunately, the Dawes Act imposed on Indians a particular version of private property, perverted by complete restrictions on alienability. In doing so, it denied Indians the adaptability and ingenuity that made the Anglo-American common law of property work. Instead, Indian property law was effectively ossified, dependent on the occasional meddling of Congress and regulation-writing officials in Washington for change.<sup>328</sup> It remains so today.<sup>329</sup>

## VII. CONCLUSION

It seems to violate the spirit of storytelling to declare a story "wrong." Yet stories are powerful, and the stories told about allot-

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326. See generally A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* (2d ed. 1986); David A. Thomas, *The Growth of the English Common Law of Real Property*, in 1 THOMPSON ON REAL PROPERTY 105 (David A. Thomas ed., 1994).

327. An example of Indian judges developing property is the articulation of the customary trust and "most logical heir" by Navajo courts to address the problem of fractionated descent of grazing permits. See *supra* text accompanying note 207-208.

328. See NAT'L CONG. OF AM. INDIANS, *supra* note 288, for the history, up to 1968, of most of these changes.

329. President Clinton signed the Indian Land Consolidation Act Amendments of 2000 into law on November 11, 2000. Pub. L. No. 106-462. The law represents a significant departure from previous efforts at reform in that it attempts to reconcile tribal, landowner, and BIA interests. Discussion of the bill's specific provisions and the history of its development is beyond the scope of the this effort, but will be addressed in a forthcoming article titled *Repealing Dawes?: Recovering from the Legacy of Allotment*.

ment for the past century have been wrong. Indians did not own all their land in common before allotment and the Dawes Act did not replace common property with private property, an institution previously unknown to Indians. The true story is that Indians had many different, functional, and evolving property systems, many of which recognized private property rights in land. Far from replacing common ownership with private property, the Dawes Act allowed the federal government to replace these multiple, functioning property systems with a single, dysfunctional system, one that failed to provide for property transfers and rational inheritance.

While these stories all agree that allotment devastated Indian societies, they differ in the solutions that they imply. The stories told by the "Friends of the Indian," their modern successors, and some Indian activists today have implied that the land problems can be resolved by one of two opposite policy choices: either allotted lands should be returned to tribal ownership, or they should be taken out of trust status and their owners issued patents in fee. The first solution makes sense, according to the storytellers who favor it, because tribal ownership is the system that flourished before allotment. The second solution is preferable, other storytellers will assert, because allotment failed by not going far enough in imposing private property. Each solution promises to end the problem of fractionated title, the former by vesting complete title in the tribe and the latter by subjecting the land to partition sales and property taxes. Both would alleviate the federal government's responsibility to administer allotment leasing and maintain accurate ownership records.

In 1938, New Deal Commissioner of Indian Affairs John Collier called top BIA officials to a summit at Glacier Park, Montana to seek solutions to the problem of fractionated title.<sup>330</sup> His preferred approach, as reflected earlier in his original proposal for the Indian Reorganization Act, was to return allotted lands to the tribes. Since then, there have been myriad schemes proposed in Congress and by the BIA to address fractionation.<sup>331</sup> Until the most

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330. William Zimmerman, Jr., *Resume of Proceedings: Conference on Indian Allotted and Heirship-Land Problem* (August 14-17, 1938) (available from the National Indian Law Library).

331. For a bibliography of Congressional hearings and bills to address fractionation, see Jo Ann Di Giulio, *For the Benefit of Indian Peoples: An Analysis of Indian Land Consolidation Policy*, 84-88 (1994) (unpublished M.A. thesis, University of Arizona) (on file with University of Arizona Libraries). See NAT'L CONG. OF AM. INDIANS, *supra* note 288, for a useful discussion of the proposals during the 1960s. The Rosebud Sioux Tribe has the longest experience trying to address fractionation caused by allotment. In 1943, the Tribe used provisions of the Indian Reorganization Act to establish a Tribal Land Enterprise, which allows owners of fractional allotment interests to exchange those interests for shares in the Enterprise and an allocation of an

recent Congress, all the reform plans have followed one of these two paths exclusively, proposing either to return allotments to tribal ownership or to issue fee patents. Unfortunately, each solution is flawed. The first, tribal ownership, ignores the interests some individual allotment owners have, often intensely felt, in maintaining their ownership, even of small shares.<sup>332</sup> Allotment owners have been able to resist, so far, wholesale transfers of allotment interests to tribal ownership. The second solution, already proposed and rejected, was the basis for the policy of the 1950s and early 1960s that sought to "terminate" tribes. It faced stiff opposition and was repeatedly defeated by tribal opposition, though often just barely.<sup>333</sup> But while allotment owners have managed to defeat tribal ownership and tribes have managed to defeat fee patents, neither group has been able to obtain a solution.<sup>334</sup>

The story of allotment as told here offers such a solution. Indian societies have recognized property rights in land in the past and continue to do so today, both formally and informally. The solution to the problem of fractionated title is not transfer to tribal ownership or fee status. Rather, the solution lies in tribal governments working with allotment owners to re-create functioning property systems to govern the transfer and inheritance of allotted lands, systems that meet local needs, address questions of facilitating efficient use and inheritance, and evolve to meet future conditions. This will not be an easy task. Developing any new property system is complicated at best. Having to create systems that can overcome highly fractionated titles will be tremendously difficult. Moreover, a century of federal policy has left many tribal govern-

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integrated block of land. See Ethel J. Williams, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 WASH. L. REV. 709, 731 (1971). The program has faced significant difficulties over the years, but continues to work to consolidate allotted interests. *Fractionated [sic] Ownership of Indian Lands: Hearing Before the Select Comm. on Indian Affairs*, 102d Cong., 2d Sess. 209-15 (1992) (testimony of Ben Black Bear, Board Member, Rosebud Tribal Land Enterprise, on Fractional Title Interest in Trust Held Property).

332. Owners of small shares have been helped by the U.S. Supreme Court's decisions that recognized tiny, fractional allotment interests as fully protected under the Fifth Amendment. See *Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997) (holding that section 207 of the Indian Land Consolidation Act (25 U.S.C. § 2206) is an unconstitutional taking under the Fifth Amendment); *Hodel v. Irving*, 481 U.S. 704, 704 (1987). For the first analysis to consider both Indian property law and takings jurisprudence in a sophisticated manner, see generally Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595 (2000).

333. See generally NAT'L CONG. OF AM. INDIANS, *supra* note 288.

334. Recently passed amendments to the Indian Land Consolidation Act, Pub.L. 106-462, are an initial step towards facilitating such a solution. It is, of course, too early to see if this initial step will lead to significant reform.

ments and allotment owners mistrustful and resentful of one another. Developing systems that address the issues fairly will be an additional challenge. The federal government, Congress in particular, has a special burden in this task. After all, it was Congress that created the problem of fractionated title on Indian property. It seems only just that Congress should provide the technical assistance and resources to tribes and allotment owners seeking solutions to the problems allotment created.

He rubbed his belly.  
I keep them here  
[he said]  
Here put your hand on it  
See, it is moving.  
There is life here  
for the people.  
And in the belly of this story  
the rituals and the ceremony  
are still growing.  
*What She Said:*  
The only cure  
I know  
is a good ceremony,  
that's what she said.

*Leslie Marmon Silko*<sup>335</sup>

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335. SILKO, *supra* note 1, at 2-3.

