

# Transforming Property: Reclaiming Indigenous Land Tenures

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*This Article challenges existing narratives about the future of American Indian land tenure. The current highly-federalized system for reservation property is deeply problematic. In particular, the trust status of many reservation lands is expensive, bureaucratic, oppressive, and linked to persistent poverty in many reservation communities. Yet, for complex reasons, trust property has proven largely immune from fundamental reform. Today, there seem to be two primary approaches floated for the future of reservation property. The first is a “do the best with what we have” strategy that largely accepts core problems with trust, perhaps with some minor efficiency-oriented tinkering, for the sake of the benefits and security it does provide. The second is a return to old, already-failed reform strategies focused on “liberating” American Indian people with a forced transition to state-based fee simple property. Both strategies respond, sometimes implicitly, to deep impulses about how property should work, especially in a market economy. But both of these approaches also neglect sufficient respect for the true potential of more autonomous Indigenous property regimes.*

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*This Article engages property theory and related work on adaptation and change in complex systems, like property, to make the case for more radical institutional land reform as a realistic alternative choice. Such an alternative is possible even in the complex and multi-layered environment of existing reservations. Property systems are full of dynamic, pluralistic potential, and property powerfully shapes the contours of both human communities and physical landscapes. This Article unearths this existing potential and charts a series of alternative steps, driven by respect for tribal governments' own actions and choices, to reclaim new, modern versions of Indigenous land tenures within reservation spaces.*

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“So accustomed are we to concentrating . . . on the conclusory nature of legal categories that we tend to forget how channeled we are by nothing more than a conceptual structure. . . . There are limits to the movement of our minds, shared boundaries for which there is no better name in legal analysis than ‘concepts’—conclusions that we could question but choose not to, premises for ordered thought and communication. Certainly, analysis of property interests has had limits beyond which we have chosen not to stray.”<sup>1</sup>

“Creating space is hard work . . . .”<sup>2</sup>

#### INTRODUCTION

The future of American Indian land tenure is at a crossroads. Throughout history, the federal government has used the power of property law to control and transform Indigenous Peoples’ lives for colonial ends.<sup>3</sup> Today, reservation property systems are still defined by a complex land tenure landscape, including a unique federal trust status that originated in this colonial history and, in many cases, perpetuates colonial hierarchies.<sup>4</sup> The federal government continues to act as trustee, holding legal title to more than fifty-six million acres of land owned

1. JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 24 (1978).

2. Richard Thompson Ford, *Law and Borders*, 64 ALA. L. REV. 123, 127 (2012).

3. See, e.g., LEONARD A. CARLSON, *INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING* 80 (1981) (“[Reformers] were convinced that private property by itself would transform the Indians.”).

4. See, e.g., Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 132–33 (2013); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 49 (1995).

by both American Indian tribes and individual American Indian citizens.<sup>5</sup> This special trust status is notoriously restrictive, expensive to maintain, and highly bureaucratic.<sup>6</sup> The overlay of federal land management on nearly every land use decision, including a comprehensive federal restraint on alienation, has impeded economic development on reservations and, more fundamentally, limited the freedom of Indigenous nations to reflect essential land-related values through their own cohesive property definition and regulation.<sup>7</sup>

Although American Indian tribes are experiencing a powerful self-governance renaissance across numerous domains, many of the most challenging aspects of the federal land tenure system have remained uniquely immune from meaningful institutional reform.<sup>8</sup> After all this time, and with all these layers of entrenched property law, it is simply hard to imagine anything else.<sup>9</sup>

Instead, frustrated with the seemingly intractable challenges of this persistent trust status, echoes of an old idea are surfacing again: that privatized and freely alienable fee simple property ownership is *the* answer for the modern challenges of regulation-raddled reservation economies.<sup>10</sup> Both popular and academic discourses increasingly argue that the silver-bullet solution may be to “free Indian people” by “giving” them fee simple property rights.<sup>11</sup> These

5. See U.S. DEP’T OF THE INTERIOR, INITIAL IMPLEMENTATION PLAN: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 6 (2012), <https://www.doi.gov/sites/doi.gov/files/migrated/buybackprogram/upload/Initial-Implementation-Plan-508.pdf> [<https://perma.cc/6SN7-L74W>] [hereinafter INITIAL IMPLEMENTATION PLAN].

6. See generally Jessica A. Shoemaker, *Complexity’s Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487 (2017) (analyzing in detail the many challenges of the current trust status) [hereinafter Shoemaker, *Complexity’s Shadow*].

7. See *infra* Parts I.B.1, I.B.3.

8. In 2012, the Bureau of Indian Affairs, the agency within the Department of the Interior charged with primary responsibility for many aspects of the federal-tribal relationship, did update some of its leasing regulations for trust lands. Overall, these updates are intended to streamline and modernize leasing procedures, but they do not fundamentally change any of the parameters of the trust status. See Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162 (2018)) (final rule); see also Bureau of Indian Affairs, *Mission Statement*, U.S. DEPT. OF THE INTERIOR, <https://www.bia.gov/bia> [<https://perma.cc/Z24E-K6PP>] (describing the agency’s “role . . . as a partner with tribes to help them achieve their goals for self-determination”); *infra* Part II.B (discussing some specific examples of these leasing rule changes).

9. See *infra* Part III.A.

10. In general, the fee simple denotes the strongest and most complete set of property rights recognized in law. JESSE DUKEMINIER ET AL., PROPERTY 214 n.7 (8th ed. 2014). In contrast to current Indian trust land ownership, a fee simple owner holds title to land directly (without the federal government intervening as trustee) and enjoys the most unrestricted rights recognized in law to sell, gift, devise, use, possess, and exclude others from the subject property. See Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1458–59 (2016).

11. See, e.g., NAOMI SCHAEFER RILEY, THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS 14–15 (2016); Terry Anderson, *Epilogue*, in UNLOCKING THE WEALTH OF INDIAN NATIONS 295 (Terry L. Anderson ed., 2016) [hereinafter UNLOCKING THE WEALTH] (“[T]he first key to unlocking the wealth of Indian nations is to free tribes and their members from trusteeship.”); Ray Martin, *Guest Post — Ray Martin on the AEI Panel with Rep. Bishop and Naomi Riley*, TURTLE TALK BLOG (Feb. 1, 2017), <https://turtletalk.wordpress.com/2017/02/01/guest-post-ray-martin-on-the-aei-panel-with-rep-bishop-and-naomi-riley> [<https://perma.cc/7HXF-WVWH>]

strategies suggest liberating American Indian people from the trust with a forced (or, in some proposals, opt-in) transition to existing state-based fee simple property systems. These ideas have now reached the highest levels of the Trump administration.<sup>12</sup> One author recently went so far as to claim that fee simple private property is “*an almost magical force*” and argued that the only problem with prior (now-rejected) federal policies bent on assimilating indigenous people with forced private property reforms was that those policies did not go far enough.<sup>13</sup>

The central animating idea in these fee simple proposals is the assumption that more productive reservation resource use will follow naturally from resources being owned in a more straightforward and unconstrained bundle of property rights.<sup>14</sup> With fee simple ownership, the theory goes, these resources could and would be exchanged more efficiently to the economic benefit of current American Indian landowners. Thus, fee simple ownership would lift entire reservation communities out of poverty while simultaneously freeing American Indian citizens from the paternalism of the federal trust.

Despite the rhetoric of magical fee simple property, these forced-fee proposals have caused widespread concern across Indian country.<sup>15</sup> They sound

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(summarizing panel discussion in which two speakers “attack[ed]” the federal trust status of Indian lands); see also Tom Flanagan & Christopher Alcantara, *Individual Property Rights on Canadian Indian Reserves*, 29 QUEEN’S L.J. 489, 530 (2004) (concluding that land on Canadian First Nation reserves “will never yield their maximum benefit to Canada’s native people as long as they are held as collective property subject to political management”); Malcolm Lavoie, *Property Law and Indigenous Self-Government*, 64 MCGILL L.J. (forthcoming 2019), <http://dx.doi.org/10.2139/ssrn.3054686> [<https://perma.cc/Z3P8-49FW>].

12. See, e.g., Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-Rich Indian Reservations*, REUTERS (Dec. 5, 2016), <http://www.reuters.com/article/us-usa-trump-tribes-insight-idUSKBN13U1B1> [<https://perma.cc/G73G-V5NQ>] (reporting on comments by two Trump administration transition advisers that appeared to advocate privatizing at least some American Indian lands); Mark Wolf, *Interior Secretary Pledges Advocacy for Tribes*, THE NCSL BLOG (May 2, 2017), <http://www.ncsl.org/blog/2017/05/02/interior-secretary-pledges-advocacy-for-tribes.aspx> [<https://perma.cc/J2RC-5B6Z>] (reporting on comments by new Secretary of the Interior Ryan Zinke suggesting that “it’s time” to discuss “an off-ramp” to trust land status and speculating that “tribes would take” an option to “leav[e] the Indian Trust lands”). In response to concern about these comments, the Trump administration stated that no such action is planned “[a]t this time,” and no such proposal would be pursued without tribal input. Letter from James Cason, Deputy Sec’y, U.S. Dept. of the Interior, to Jacqueline Pata, Exec. Dir., Nat’l Cong. of Am. Indians (May 5, 2017), <https://turtletalk.files.wordpress.com/2017/05/cason-to-ncai.pdf> [<https://perma.cc/6D3B-36BV>].

13. SCHAEFER RILEY, *supra* note 11, at 14–15 (“The truth of the matter is that Dawes was right – private property is *an almost magical force*.”).

14. These fee simple proposals are also sometimes referred to as efforts to privatize trust lands. See, e.g., *infra* note 18. In this sense, privatization refers broadly to a suite of legal reforms intended to eliminate the federal trust status of Indian lands. The resulting lands may be owned by the individual or the tribe, depending on how any changes were actually implemented, but the common thread is the removal of the federal trust status in favor of more direct, fee simple ownership.

15. See Donald Trump, and Indian Country’s Termination Fears, TURTLE TALK BLOG (May 8, 2017), <https://turtletalk.wordpress.com/2017/05/08/donald-trump-and-indian-countrys-termination-fears> [<https://perma.cc/G5L6-LP54>]; see also Matthew L.M. Fletcher, *Second Commentary on TNTOT: Chapter 1 – “Turning Indian History against Indians,”* TURTLE TALK BLOG (Sept. 8, 2016),

a lot like historic termination and allotment policies, which are now associated with terrible Indigenous land loss and an ugly colonialist history of manipulating and controlling Indigenous land tenures.<sup>16</sup> These proposals are also based on overly simplistic ideas about the economic effects of property institutions on their own, without regard to related factors like resource endowments, location, and other market forces. In addition, as Angela Riley and Kristen Carpenter have recently demonstrated, many of these privatization arguments falsely assume that economic development is the primary objective of American Indian property systems.<sup>17</sup> These forced-fee arguments lack sufficient concern for the fundamental connection between land preservation—the central benefit of the restrictive trust status—and the continued existence of essential Indigenous group identities.<sup>18</sup>

These issues are complex and multilayered, and there is tremendous diversity across Indian country. Nonetheless, Carpenter and Riley are surely correct that noneconomic concerns deeply matter to many American Indian people. Take, for example, the Sioux tribes that refuse to accept the over \$1 billion currently set aside for them for the federal government's unconstitutional taking of the Black Hills more than a hundred years ago.<sup>19</sup> Although many of the now-fragmented Sioux reservations encompass some of the poorest places in the nation,<sup>20</sup> the tribes have refused to quantify or accept the loss of the Black Hills. According to the Sioux, "Pe' Sla, a location in the heart of the Black Hills," is

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<https://turtletalk.wordpress.com/2016/09/08/second-commentary-on-tntot-chapter-1-turning-indian-history-against-indians> [<https://perma.cc/K7GD-2HRJ>] (commenting on Naomi Schaefer Riley's privatization proposals in particular); Matthew L.M. Fletcher, *Sixth Commentary on TNTotT – Chapter 5: "Taking Indian Kids Away from Their Homes and Families."* TURTLE TALK BLOG (Sept. 28, 2016), <https://turtletalk.blog/2016/09/28/sixth-commentary-on-tntot-chapter-5-taking-indian-kids-away-from-their-homes-and-families> [<https://perma.cc/YQH3-B6LA>] (providing links to additional commentaries on Naomi Schaefer Riley's writings, including her book, "The New Trail of Tears: How Washington is Destroying American Indians").

16. See *infra* Parts I.A, II.A for a discussion of this history.

17. Kristen A. Carpenter & Angela Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791 (2019).

18. See *id.*; see also Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 348, 350–55 (2008) (emphasizing the importance of "tribal relationships with sacred sites" to Indigenous "peoplehood"); Malcolm Lavoie, *Why Restrain Alienation of Indigenous Lands?*, 49 U.B.C. L. REV. 997, 1052 (2016) (explaining that some tribes restrict individual land sales to protect "the group's cultural identity"); Robert J. Miller, *Sovereign Resilience: Reviving Private Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1390 (2019) (rejecting land privatization proposals as historically and culturally "tone-deaf" and suggesting alternative non-property policies to foster private sector economic development in Indian country).

19. See Francine Uenuma & Mike Fritz, *Why the Sioux Are Refusing \$1.3 Billion*, PBS NEWSHOUR (Aug. 24, 2011), [https://www.pbs.org/newshour/app/uploads/2013/11/blackhills\\_08-23.html](https://www.pbs.org/newshour/app/uploads/2013/11/blackhills_08-23.html) [<https://perma.cc/QNN2-CGH8>]; see also *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980) (holding that Congress had unconstitutionally taken the Black Hills from the Sioux Nation in 1877).

20. See Ryan Lengerich, *Nation's Top Three Poorest Counties in Western South Dakota*, RAPID CITY J. (Jan. 22, 2012), [https://rapidcityjournal.com/news/nation-s-top-three-poorest-counties-in-western-south-dakota/article\\_2d5bb0bc-44bf-11e1-bbc9-0019bb2963f4.html](https://rapidcityjournal.com/news/nation-s-top-three-poorest-counties-in-western-south-dakota/article_2d5bb0bc-44bf-11e1-bbc9-0019bb2963f4.html) [<https://perma.cc/SH7G-92X5>]; Uenuma & Fritz, *supra* note 19.

both “a basis for . . . star maps” and “a sacred site where ceremonies must be observed each year . . . to keep the Universe in harmony and preserve the well being of all, Native and non-Native alike.”<sup>21</sup>

It is also true that the maligned trust status has real benefits. When two sizeable tracts of Pe’ Sla were put up for sale on the open market by their non-Indian owners, four of the current Sioux tribes came together, against significant odds, to raise enough funds to purchase the tracts, taking back more than two thousand acres of the Black Hills.<sup>22</sup> The irony of purchasing lands that the Sioux claim were stolen from them—and for which compensation continues to sit untouched in the federal treasury—is thick. But the tribes did not stop there. They asked the Department of the Interior (DOI) to take Pe’ Sla into trust for their benefit, and although some local non-Indians objected to this trust acquisition,<sup>23</sup> the tribes ultimately prevailed.<sup>24</sup> With the land now in trust, the tribes are not focused on getting the most economic return on the land, but on preserving and restoring the land, with goals to “bring back to [sic] Buffalo and the spirituality in our youth through camps and keep [the land] as natural as possible.”<sup>25</sup>

The Sioux tribes sought to move this sacred land into the federal trust for several reasons. Many Indian-owned fee lands, even within reservation boundaries, are subject to state property taxes, state recording requirements, and

21. Ruth Hopkins, *Black Hills Auction: Saving Pe’ Sla*, INDIAN COUNTRY TODAY (Aug. 15, 2012), <https://indiancountrymedianetwork.com/news/opinions/black-hills-auction-saving-pe-sla> [<https://perma.cc/G5YC-S54T>].

22. The tribes purchased the first 1,900 acres of Pe’ Sla in 2012 for \$9 million. Vincent Schilling, *Pe’ Sla Owners Accept \$9M Offer from Tribes*, INDIAN COUNTRY TODAY (Sept. 12, 2012), <https://indiancountrymedianetwork.com/news/pe-sla-owners-accept-9m-offer-from-tribes> [<https://perma.cc/HE4Y-AGJL>]. They purchased the final 437 acres in 2014 for another two million dollars. Andrea J. Cook, *Tribes Buy Final Piece of Pe’ Sla*, RAPID CITY J. (Dec. 3, 2014), [http://rapidcityjournal.com/news/local/tribes-buy-final-piece-of-pe-sla/article\\_7b584d77-d2a0-5184-98c5-81396f76bc4e.html](http://rapidcityjournal.com/news/local/tribes-buy-final-piece-of-pe-sla/article_7b584d77-d2a0-5184-98c5-81396f76bc4e.html) [<https://perma.cc/KH3J-XMQB>].

23. Non-Indian neighbors complained that the tribes would build a casino in the middle of the Black Hills, and even though they had no legitimate basis for thinking so, the tribes still had to work to convince their neighbors that there were no plans for a casino on the sacred site. See Stewart Huntington, *Tribes Win Federal Trust Status for Pe Sla Property in Black Hills*, KOTA TV (Mar. 24, 2017), <http://www.kotatv.com/content/news/Tribes-win-federal-trust-status-for-Pe-Sla-property-in-Black-Hills-417068793.html> [<https://perma.cc/S2AU-XFSK>]. In addition, South Dakota Governor Dennis Daugaard controversially revealed at a Rosebud Sioux council meeting that he opposed the acquisition of these lands into trust for the tribes because, in his words: “You have many tribal members who have needs here on the reservation, and if grandma needs housing, or if grandma needs food, or if grandma needs transportation, grandma doesn’t need you to spend tribal resources on a parkland setting 200 miles away for religious use or for buffalo agricultural use.” James Nord, *Sioux Tribes Push to Protect Sacred Black Hills Site Pe’ Sla*, ARGUS LEADER (May 12, 2016), <https://www.argusleader.com/story/news/2016/05/12/sioux-tribes-push-protect-sacred-black-hills-site-pe-sla/84287678> [<https://perma.cc/Y9AN-UXGJ>].

24. See *South Dakota v. Great Plains Reg. Dir. (Pe’ Sla Property)*, decision by Asst. Sec. Larry Roberts, 18 (Dep’t of Interior Dec. 2, 2016) (affirming DOI’s decision to accept Pe’ Sla in trust).

25. Huntington, *supra* note 23. Three Alaska Native villages also fought for and received—after lengthy litigation with the state of Alaska—recognition of their right to have lands taken into this same federal trust. See *infra* note 123 and accompanying text.

other state property regulations.<sup>26</sup> By moving the land into trust, the federal government assumes title-maintenance burdens without cost to the Indigenous landowners, and the land is free of state property tax.<sup>27</sup> Thus, the trust helps ensure a preserved land base both by eliminating Indian landowner costs (and associated risks of loss), as well as by imposing an outright restraint on any future alienation of the land.<sup>28</sup>

Land preservation is uniquely important in this context because under current federal law, American Indian land ownership is a prerequisite to many tribal regulatory authorities.<sup>29</sup> If a non-Indian comes to own land, even within reservation boundaries, it is very difficult for the tribal government to assert any jurisdiction over that space or the conduct that occurs there.<sup>30</sup> Thus, forced-fee proposals present serious risks to tribal sovereignty in Indian country to the extent that they may result in more land transfers to non-Indians and associated jurisdictional loss.<sup>31</sup>

Though the Black Hills example demonstrates that American Indians can sometimes benefit from moving their lands into federal trust, the trust status also limits the autonomy of the tribal government. The Sioux tribes that purchased Pe' Sla were able to take possession and make their own direct land use choices about the property because they were the sole owners of the beneficial interest in that land.<sup>32</sup> Under other circumstances, however, the trust status would limit tribal choices. For example, if the tribes wanted to make alternative arrangements for the use of the property, such as long-term permissions for tribal citizens or others to improve, graze, or otherwise use that property, they would need to navigate the federal bureaucracy, follow federal procedures, and, in many cases, get federal approval.<sup>33</sup> And if an individual Sioux citizen owned the land in trust, rather than the tribes, federal law would preempt most of the tribes' rights to

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26. See, e.g., *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110–15 (1998) (explaining that reservation lands are often subject to state and local taxes when Congress makes the land alienable).

27. See Jessica A. Shoemaker, *Emulsified Property*, 43 PEPP. L. REV. 945, 976–94 (2016) [hereinafter Shoemaker, *Emulsified Property*].

28. See 25 C.F.R. § 152.22(b) (2018) (limiting conveyance of tribal trust lands).

29. See, e.g., *Montana v. United States*, 450 U.S. 544, 565–67 (1981) (acknowledging that a tribe can sometimes regulate non-Indian conduct on trust lands, but narrowing tribal rights to regulate non-Indian conduct on reservation lands owned in fee by non-Indians).

30. See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (holding that a tribe court cannot restrict the sale of reservation land owned in fee by non-Indians, even as part of a lawsuit in which the previous Indian owners are alleging that illegal discrimination led to their loss of the land and to the current non-Indian owner's claim to the property).

31. See, e.g., Philip Marcelo & Felicia Fonseca, *Land-Trust Case Raises Red Flags Across Indian Country*, U.S. NEWS (July 4, 2018), <https://www.usnews.com/news/best-states/massachusetts/articles/2018-07-04/land-trust-case-raises-red-flags-across-indian-country> [<https://perma.cc/28DL-P9QG>] (describing the Mashpee Wampanoag tribe's struggle to preserve their land's trust status).

32. See, e.g., *infra* Part II.B.1 (discussing legal frameworks that tend to limit tribal autonomy and tribal governance rights to tribally-owned lands).

33. See *infra* Parts I.B.1, II.B.



define and regulate that trust property.<sup>34</sup> When tribal land is held in trust, tribal governments are also significantly limited in their ability to collect government revenue from real property assets—especially through property tax.<sup>35</sup> If the landowner wishes to develop the site, the economic effects of the current trust status cause economic difficulties, and the federal costs of maintaining the trust apparatus are considerable and, in many cases, unsustainable.<sup>36</sup>

Ultimately, by overlaying a single, federal property system on top of Indigenous lands, the trust subjects all of the diversity of Indian country to federalized definitions of how land rights are defined, allocated, and regulated with reservation spaces. Tribes lose critical freedom to manifest distinct social relationships and cultural connections to land through a unique land tenure system.<sup>37</sup> Even recent land reforms couched in the language of self-determination actually tend to force tribal governments to mirror federal priorities or otherwise further aggrandize the overarching federal bureaucracy.<sup>38</sup>

In many ways, modern Indigenous communities live in a kind of property purgatory: unable to reintroduce truly pluralistic Indigenous property regimes from their own inherent authorities because of the modern federal trust-property regulatory overlay, but at the same time not part of the more flexible state-law fee property system that frequently operates with better economic outcomes outside of Indian country. Instead, these lands seem stuck in a uniquely ill-designed middle space of mostly complicated federal rules and some overlapping tribal (and sometimes state) property jurisdiction. This Article considers a third property-reform possibility: actual reclamation of modern Indigenous land tenures, not the same as the original systems displaced by colonization, but a new imagining of diverse, tribally-driven property law innovations in the modern legal landscape.

One of the greatest risks of the current forced-fee rhetoric is not that such extreme proposals will come to fruition, but that this debate will force tribal governments into a defensive posture of accepting the trust as it is currently offered to them. Property law and property systems are much more dynamic and pluralistic than current debates appreciate. This Article is a roadmap to more creativity in American Indian land tenure conversations. It proceeds in five parts. Part I explores the power of property to shape not only economic but also social structures across human landscapes. After reviewing the intentional use of

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34. See *infra* Parts I.B.3, II.B.1.

35. See MIRIAM JORGENSEN, NATIVE NATIONS INSTITUTE, ACCESS TO CAPITAL AND CREDIT IN NATIVE COMMUNITIES 38 (2016) [hereinafter JORGENSEN, ACCESS TO CAPITAL], [https://nni.arizona.edu/application/files/8914/6386/8578/Accessing\\_Capital\\_and\\_Credit\\_in\\_Native\\_Communities.pdf](https://nni.arizona.edu/application/files/8914/6386/8578/Accessing_Capital_and_Credit_in_Native_Communities.pdf) [https://perma.cc/X2JG-89YP] (noting that tribal trust status prevents tribes from using taxes to generate revenue).

36. See *infra* Part I.B.1.

37. Cf. Carpenter & Riley, *supra* note 17, at 856–62 (discussing tribal priorities of “self-determination” and “sustainability”).

38. See *infra* Part II.B.

property as a colonial tool in the history of federal Indian law, this Part demonstrates the many ways the current trust system continues to entrench and reinforce otherwise-rejected colonial hierarchies. Part II engages directly with the current American Indian land tenure debate, illuminating in more detail why neither forced privatization nor recent trust reforms are sufficient to satisfy the mutual demands of economic prosperity and tribal sovereignty.

Part III engages directly with property theory and the literature of property system change to make the case that radical institutional land reform is feasible, even in the complex and multilayered environment of existing reservations. This Section unearths deep tensions between standardization and stability demands in property design on the one hand, and the reality of pluralism and dynamism on the other. Implicit assumptions about how property should work, especially in a market economy, help explain the motivations of both current reform strategies, but this analysis also unearths a much more dynamic potential of pluralistic property law than is currently appreciated. After recognizing some of the unique challenges of land reform in the Indian country context, Part IV builds on this discussion, and on related work on adaptive change in complex systems, to emphasize the need for creating more flexible spaces for iterative experimentation and innovation at the local reservation level.

Finally, Part V begins to chart a series of specific steps tribal governments could pursue to intentionally reclaim a broader and more liberated land tenure domain. There is great value in having a wider range of land tenure models across reservation landscapes, and this should warrant our collective investment. Yet there tends to be a dearth of imagination when it comes to conceiving of a full range of alternative arrangements. The unfortunate reality is that this is hard work, and unlike the fantasy of the “magical force” of a fee simple prescription, there is no automatic or even unilateral solution.

Given the long history of outsiders seeking to experiment with Indigenous land reform, this Article is intentionally not prescriptive. The fundamental premise of this entire work is that tribal governments have the capacity, skill, and unquestioned right to make these choices directly and to follow a property trajectory of their own design. Many tribal governments are already pursuing innovative land tenure reforms, and ultimate choices for these efforts reside entirely within the authority of these sovereign governments. Instead, this Article focuses on naming possibilities. The goal is to imagine as concretely as possible a new and dramatically more flexible legal space where tribal governments, as governments, can pursue a real process of local property reforms and reclaim the richness of modern Indigenous land tenures over time.

## I.

### THE AMERICAN INDIAN LAND TENURE CHALLENGE

The lived experience on many American Indian reservations today is a lesson in the transformative power of property law. By defining and regulating

who gets what with respect to a society's most valued resources, property law literally constructs our physical, economic, and social relationships.<sup>39</sup> By informing how we talk about, think about, define, and understand these relationships, property law also forms a common language that creates deep internal categories and concepts that we use to understand our world.<sup>40</sup> Like any language, property law is an organizing structure that can fundamentally shape—and even limit—what we do and do not see in the world around us.<sup>41</sup> Colonial reformers sought to use these property powers as tools, aiming to “substitute white civilization for . . . tribal culture” and “shrewdly sens[ing] that the difference in the concepts of property was fundamental in the contrast between the two ways of life.”<sup>42</sup>

This Section introduces this history of colonial property reforms and, more importantly, analyzes key consequences of the resulting modern trust status. Understanding both this history and the depth of the current challenge sets the stage for future reform discussion. The trust status limits both economic and self-determination opportunities and teeters under an unsustainable federal bureaucracy. In addition, this pattern of perverse (and often unintended) consequences flowing from past top-down land reforms also reminds us that trying to control such complex systems with dramatic unilateral federal actions is futile, especially without the consent and collaboration of the affected parties.

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39. See A. Irving Hallowell, *The Nature and Function of Property as a Social Institution*, 1 J. LEGAL & POL. SOC. 115, 120, 133 (1942) (“[P]roperty rights are not only an integral part of the economic organization of any society; they are likewise a coordinating factor in the functioning of the social order as a whole.”).

40. See VINING, *supra* note 1, at 24 (discussing limiting effects of fundamental cognitive categories inherent in property law design); Ford, *supra* note 2, at 129 (exploring how legal boundaries can create mental boundaries); Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. 1, 3–11 (2006) (exploring inherently “expressive aspects of property law”).

41. See, e.g., Lera Boroditsky, *How Language Shapes Thought: The Languages We Speak Affect Our Perceptions of the World*, SCIENTIFIC AMERICAN, Feb. 2011, at 63; Basel Al-Sheikh Hussein, *The Sapir-Whorf Hypothesis Today*, 2 THEORY & PRAC. LANGUAGE STUDIES 642, 645 (2012) (“The fact that language plays a role in shaping our thoughts, in modifying our perception and in creating reality is irrefutable.”); see also *infra* notes 102–97 and accompanying text (collecting examples of both oral languages and property systems shaping social and cultural organizations and understandings). With respect to property in particular, consider how fee simple ownership speaks to an owner’s rights of perpetual dominion, exclusion, control, and individual autonomy to alienate or otherwise extract value from the land as a productive asset. Other land tenure designs alternatively emphasize interconnectedness, stewardship, and ideas of shared access or more conditional possession and control. See *infra* notes 44–46 (exploring indigenous traditions of land tenure); see also Kirsten Anker, *Aboriginal Title and Alternative Cartographies*, 11 ERASMUS L. REV. 14, 21–29 (2018) (reflecting similar differences in how Indigenous and non-Indigenous orders understand and communicate place-based connections and property claims through maps).

42. *Readjustment of Indian Affairs: Hearing on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 428–30 (1934) (statement of D.S. Otis, Professor, Columbia University) [hereinafter Otis Statement] (describing the views of colonial-era activists who successfully promoted allotment land reforms within reservation territories).

### A. *The Power of Property*

Prior to contact with Europeans, the Indigenous nations of this continent had their own social and legal systems for the allocation of land and other natural resource rights within their respective territories.<sup>43</sup> These systems were diverse and often reflected differences in tribal cultures that had evolved over many generations and responded with nuance to the demands of diverse physical landscapes.<sup>44</sup> These systems had varied mechanisms for dispute resolution, enforcement of rights and responsibilities, asset transfers, and the allocation of individual and group use and possession rights.<sup>45</sup> Many of these systems also incorporated wholly different understandings of the relationships between humans, communities, and land, often reflecting a unique sense of humans' collective privileges and responsibilities as stewards of particular, often sacred, spaces.<sup>46</sup>

The story of colonialism is largely the story of how Europeans dismantled Indigenous land tenure systems. To justify many of its most imperial acts, America needed a singular view of human progress, a view that foresaw “a single continuum of development” through which differences in Indigenous societies (and particularly Indigenous property systems) were considered reflections of Indigenous groups' places on an otherwise preordained development trajectory.<sup>47</sup> The places where Indigenous orders deviated from European

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43. See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1572–73 (2001) (discussing history of American Indian property systems).

44. See *id.* at 1571.

45. See ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 9–16 (Bruce E. Johansen ed., 2012) (detailing pre-contact Indigenous systems of land and personal property allocations); see also Otis Statement, *supra* note 42, at 432 (exploring how colonists often misunderstood Indigenous property features such as limits on transfers outside the tribal group without the group's permission and usufructuary rights that required ongoing use and possession for maintenance). Of course, Indigenous traditions were not monolithic but represented the diversity of the many inhabitant groups. See, e.g., ALLAN GREER, PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA 27–64 (2018) (detailing wide-ranging Indigenous property systems that existed prior to contact in regions that are now central Mexico, New England, and Quebec); MILLER, *supra*, at 12 (discussing sample of property-system variation between settled agricultural communities and more nomadic groups with recognized property rights in hunting and gathering territories); Bobroff, *supra* note 43, at 1571–93 (explaining that “Indian societies have had myriad different property systems, varying widely by culture, resources, geography, and historical period” and providing historical examples from the United States).

46. In some, but not all, cases, this includes priority for values other than individual wealth maximization and the productive potential of land as an asset. Cf. INTER-AGENCY SUPPORT GROUP ON INDIGENOUS PEOPLES' ISSUES, LANDS, TERRITORIES AND RESOURCES: THEMATIC PAPER TOWARDS THE PREPARATION OF THE 2014 WORLD CONFERENCE ON INDIGENOUS PEOPLES 4 (2014) (discussing the “cultural and spiritual significance” that modern indigenous peoples place on their lands); see also BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND 61–68 (1999) (investigating relationship between place and tribal identity through place-based religious connections).

47. Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 GEO. WASH. L. REV. 329, 336–37 (2007) (describing two cultural views of Indigenous peoples that both

property experiences became justifications for assertions of superiority. Supplanting Indigenous land tenure with European priorities was painted as a generous bestowing of progress, allowing an entire society to move “up” in the preordained development timeline.<sup>48</sup> By reordering property regimes, the colonizer could move the indigenous society “ahead.”

This process of displacing Indigenous land tenure institutions proceeded in two primary steps. First, European settlers used land tenure differences to help justify the acquisition of Indigenous lands, dramatically reducing the physical and legal parameters of the lands remaining under Native nations’ control.<sup>49</sup> In *Johnson v. M’Intosh*, the US Supreme Court emphasized differences between the Christian, “civilized” explorers of Europe and the “savage” Indigenous populations to justify an automatic transformation of Indigenous peoples’ relationship to land and territory.<sup>50</sup> Under US law, European discovery resulted in the automatic conversion of all preexisting Indigenous property rights into an “Indian right of occupancy” that could be extinguished only by the federal government.<sup>51</sup> This meant that Indigenous Peoples retained important possessory property rights, but US courts would not recognize any transfer of property rights by Indigenous inhabitants to anyone other than the federal government.<sup>52</sup> This original federal restraint on alienation remains a key part of current federal Indian law today.<sup>53</sup>

After *Johnson*, treaty negotiations modeled real estate transactions. Tribes ceded or sold large swaths of retained Indian title, often in exchange for guarantees of protected and exclusive “reservations” of a remaining territorial domain where they could exercise continued internal land tenure autonomy and

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influenced American colonialism but concluding that in many respects “Americans . . . were imperialists *par excellence*”).

48. *See id.* at 356, 367–68 (summarizing view that “property regimes both indicate the society’s level of progress and are the instrument of further progress”); *see also* Otis Statement, *supra* note 42, at 431.

49. *See, e.g., Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (explaining how European explorers “asserted the ultimate dominion” and “exercised . . . a power to grant the soil, while yet in possession of the natives . . . subject only to the Indian right of occupancy”).

50. *Id.* at 588, 590–91; *see also* STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 178–90* (2005); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 75–76* (2005); BLAKE A. WATSON, *BUYING AMERICA FROM THE INDIANS: JOHNSON V. MCINTOSH AND THE HISTORY OF NATIVE LAND RIGHTS 290–95* (2012); Kenneth H. Bobroff, *Indian Law in Property: Johnson v. M’Intosh and Beyond*, 37 *TULSA L. REV.* 521, 525 (2001); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 *ALB. GOV’T L. REV.* 1, 18 (2017).

51. *Johnson*, 21 U.S. at 587–88. This special right of occupancy is also called “Indian title” or the “Indian title of occupancy.” *Id.* at 592.

52. *Id.* at 588.

53. *See* Indian Trade and Intercourse Act § 4, 2 Stat. 137, 138 (1790) (codified as amended at 25 U.S.C. § 177 (2012)) (prohibiting sale of Indian land without federal approval).

other self-governance rights.<sup>54</sup> But in the second major colonial land reform, federal policy targeted even these remaining internal tenure systems. With the allotment policy that began in the mid-nineteenth century, federal actors reached in and redistributed tribal lands to individual tribal citizens in the form of restricted trust “allotments” of individual property parcels.<sup>55</sup> Becoming the owner of a westernized version of private property, it was assumed, would be *the* transformative tool for controlling and changing the American Indian from tribal citizen into a westernized, yeoman (individualized, perfectly assimilated, productive) farmer ideal.<sup>56</sup>

Rather than issuing an immediate fee patent, these allotments were put in a newly designed trust status through which the federal government took title and intended to act as a trustee for an initial twenty-five years, overseeing the individual’s land management choices and restricting any transfers.<sup>57</sup> This trust status was to “protect” individual parcels while the Indian allottees completed their intended transformation to farmers and assimilated US citizens.<sup>58</sup>

Allotment was quickly deemed a failure. These reforms failed to erase Indian tribes and unique Indigenous identities, cultures, and relationships. Instead, forced-allotment policies quickly increased reservation poverty, decreased agricultural land production, and expanded the costs of federal interventions.<sup>59</sup> When the federal government stopped allotment, it made the trust status permanent.<sup>60</sup> Allotment, poorly designed and badly implemented, created “an administrative problem in which the federal government was assumed to be the supervisor of how Indian property was to be used.”<sup>61</sup> Reservations were left with a near-permanent regime of federal land management and a modern trust status that continues to define many tribally and individually owned properties within reservations.<sup>62</sup>

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54. See 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.01[1] (Nell Jessup Newton et al. ed., 2012) [hereinafter COHEN’S HANDBOOK].

55. Although functionally a taking of tribally owned land for the benefit of individual Indians, the Supreme Court permitted this as merely a reconfiguration of tribal property consistent with the federal government’s *sui generis* trustee role, such that no just compensation was due. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–68 (1903).

56. See CARLSON, *supra* note 3, at 80.

57. See General Allotment (Dawes) Act of 1887 ch. 119, 24 Stat. 389, § 5 (codified as amended at 25 U.S.C. § 348 (2012)).

58. Otis Statement, *supra* note 42, at 432.

59. See, e.g., LEWIS MERIAM ET AL., INST. FOR GOV’T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 3–8 (1928).

60. See Wheeler-Howard Act § 2, Pub. L. No. 73-383, ch. 576, 48 Stat. 984, 984 (1934) (codified in 25 U.S.C. §§ 461–94a (2012)).

61. Vine Deloria, Jr., *The Evolution of Federal Indian Policy Making*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 239, 247–48 (Vine Deloria, Jr. ed., 1985).

62. See *infra* Part I.B.3.

### B. *Intentional Designs, Unintentional Results*

Today, in light of these and other historic policies, Indigenous Peoples on US reservations face at least three major land-related challenges. These consequences were not foreseen by colonial land reformers, but are felt directly by American Indian people and communities today. First, persistent federal trust restrictions complicate reservation economies and contribute to significant reservation poverty in many cases. Second, this trust system has created a pattern of extreme fractionation (or co-ownership) in many trust allotments, which not only exacerbates economic challenges on reservations but also drains federal resources. And finally, the entire trust framework is part of a complex legal regime that fundamentally limits tribal autonomy, both in land tenure and in other jurisdictional domains.

#### 1. *Economic Effects*

First, the trust system creates economic challenges for Indigenous Peoples. The modern trust status still generally precludes any sale, transfer, use, or possession of trust lands without federal approval and oversight.<sup>63</sup> This means that the federal government, acting as trustee over both tribal trust lands and individual allotted trust lands, has a management role in most trust land uses and transactions.<sup>64</sup> This federal management often requires full federal appraisals, multiple layers of review, and then final decision-making approval before transactions are executed.<sup>65</sup> As a result, trust land is typically more cumbersome and expensive to use than non-restricted titles, which has contributed to persistent poverty on many reservations.<sup>66</sup> Compared to fee property, trust

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63. See, e.g., 25 U.S.C. § 177 (2012) (prohibiting any “purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians” except to the federal government); 25 C.F.R. § 152.22(b) (2018) (requiring federal approval for any conveyance of individual and tribal trust lands); 25 C.F.R. pt. 162 (2018) (federal regulations governing, in great detail, procedures for surface leasing of Indian trust lands); see also COHEN’S HANDBOOK, *supra* note 54, § 16.03[4] (summarizing modern federal restrictions on allotted lands in particular); Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 57–86 (2004) (summarizing modern federal oversight and regulation of Indian lands).

64. See *infra* Part II.B (more detailed discussion of current federal limits).

65. See *infra* Part II.B.

66. See, e.g., Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J.L. & ECON. 427, 448 (1992) (concluding that tribal land tenure systems “tend to increase the costs of land use for modern agriculture”); Gavin Clarkson & Alisha Murphy, *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability*, 12 J.L. ECON & POL’Y 177, 180 (2016) (arguing that trust land status is the “primary impediment for entrepreneurs . . . on the Navajo reservation”); Dwight Newman, *The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study*, 95 NEB. L. REV. 432, 433–34 (2016) (listing “unpredictable governance regimes” and “the complex variety of economically inefficient land-holding systems” as causes of negative economic effects in many Indigenous property systems); Lance Morgan, *Ending the Curse of Trust*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 23, 2005), <https://web.archive.org/web/20160305114715/http://indiancountrytodaymedianetwork.com/2005/03/23/ending-curse-trust-94626> [<https://perma.cc/7DE3-Q8XX>] (arguing that trust restrictions are the reason “[Indians] are land rich, but still dirt poor”); see also UNLOCKING THE WEALTH, *supra* note 11, at 4–7,

property just cannot be as freely and efficiently transferred, used as collateral to access credit, or even improved.<sup>67</sup>

This trust does have benefits for American Indian landowners, and certainly many tribal governments have found economic success through creative business enterprises despite these trust restrictions.<sup>68</sup> But the federal land management regime does add unnecessary economic challenges. For example, many trust resources are simply undeveloped or underutilized. In 2016, the Department of the Interior (DOI) reported that sixty-three percent of jointly owned trust tracts were not generating any income.<sup>69</sup> As a result, some of the poorest people in the country sit on the most valuable energy resources.<sup>70</sup> Many Indian landowners live in food deserts,<sup>71</sup> despite more than forty million acres of Indian agricultural land<sup>72</sup> and fairly widespread recognition that agricultural development represents the best potential development engine for many Indian

18–19, 107–14, 130 (collecting economic analysis of Indigenous property rights by multiple authors). *But see* Randall Akee, *Checkerboards and Coase: The Effect of Property Institutions on Efficiency in Housing Markets*, 52 J.L. & ECON. 395, 406 (2009) (finding roughly equivalent economic outcomes for condominiums built on trust and fee lands in unique high-value urban settings).

67. *See, e.g.*, JORGENSEN, ACCESS TO CAPITAL, *supra* note 35, at 47–48, 52 (summarizing credit-related challenges of trust land status and also noting potential for lengthy delays in simply accessing trust land title records from federal agency). In the context of trust allotments, individual co-owners cannot even take direct possession of their own land, in direct contradiction to the rule of unified and undivided possession outside of Indian country. *See* Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383, 389–95, 435–36 (2015) [hereinafter Shoemaker, *No Sticks in My Bundle*].

68. *See, e.g.*, STEPHEN CORNELL & JOSEPH P. KALT, TWO APPROACHES TO ECONOMIC DEVELOPMENT ON AMERICAN INDIAN RESERVATIONS: ONE WORKS, THE OTHER DOESN'T, 1–3, 11 (Joint Occasional Papers on Native Affairs, No. 2005-02, 2006), [https://www.honigman.com/media/site\\_files/111\\_imgimgjopna\\_2005-02\\_Approaches.pdf](https://www.honigman.com/media/site_files/111_imgimgjopna_2005-02_Approaches.pdf) [<https://perma.cc/H39K-N7TX>] (emphasizing examples of successful tribal nation-building efforts); Terry Anderson, *The Wealth of (Indian) Nations*, HOOVER INST. (Oct. 25, 2016), <http://www.hoover.org/research/wealth-indian-nations-1> [<https://perma.cc/F5M5-9JH5>] (describing how members of the Southern Ute Tribe “are each worth millions and receive dividends every year” from a \$4 billion growth fund).

69. U.S. DEP'T OF THE INTERIOR, 2016 STATUS REPORT: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 10 (2016), [https://www.doi.gov/sites/doi.gov/files/uploads/2016\\_buy-back\\_program\\_final\\_0.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/2016_buy-back_program_final_0.pdf) [<https://perma.cc/5VUG-AC5E>] [hereinafter 2016 STATUS REPORT] (noting that sixty-three percent of the 97,970 trust land tracts with fractional interests subject to purchase in the federal buyback program generated no income in the preceding twelve months).

70. For example, only two of seventeen million viable mineral energy resources in Indian Country are currently developed. Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1066–67 (2008). Some economists have projected tribal energy resources nationwide could be worth as much as \$1.5 trillion. UNLOCKING THE WEALTH, *supra* note 11, at 295.

71. Alysa Landry, *What is a Food Desert? Do you Live in One? 23.5 Million in This Country Do*, INDIAN COUNTRY TODAY (Apr. 28, 2015), <https://newsmaven.io/indiancountrytoday/archive/what-is-a-food-desert-do-you-live-in-one-23-5-million-in-this-country-do-eCuQcy2Sy0K6EQozR3IsDw> [<https://perma.cc/7NCN-T7FU>].

72. ALICIA BELL-SHEETER, FIRST NATIONS DEVELOPMENT INSTITUTE, FOOD SOVEREIGNTY ASSESSMENT TOOL 13 (2004), <https://www.indigenousfoodsystems.org/sites/default/files/tools/FNDIFSATFinal.pdf> [<https://perma.cc/BY6G-3HC8>].



communities.<sup>73</sup> Moreover, Indian landowners routinely lack an adequate place to live.<sup>74</sup> While it is true that economic development is not the only—or even necessarily the most important—land tenure concern for many Indigenous communities, these economics do matter.

## 2. *Unsustainable Fractionation*

Second, the trust is extremely expensive to maintain.<sup>75</sup> The federal government has both a legal and a moral responsibility to preserve these properties by virtue of its self-appointed trustee role.<sup>76</sup> In a world of finite resources, however, excessive federal spending on trust property title maintenance and management necessarily diverts resources away from other Indian country needs. At this point, the infrastructure is unsustainable.

For example, consider the crisis of fractionated trust allotments. One consequence of the trust is a high degree of fractionation—or extreme co-ownership—within individual allotments. Historic federal laws promoted intestate succession of allotments to multiple heirs over multiple generations, and modern rules continue to limit flexible transfer and consolidation.<sup>77</sup> As a result, many allotments are now co-owned by dozens, hundreds, and sometimes even thousands of undivided interest owners.<sup>78</sup> This level of fractionation further

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73. See, e.g., 25 U.S.C. § 3701(3)–(4) (2012) (emphasizing the importance of agricultural development across numerous domains).

74. See, e.g., Press Release, HUD No. 17-012, Dep't of Hous. & Urban Dev., HUD Releases Comprehensive Assessment of Housing Needs of American Indians and Alaska Natives (Jan. 19, 2017), <https://archives.hud.gov/news/2017/pr17-012.cfm> [<https://perma.cc/E637-QJCT>] (noting that “housing conditions are substantially worse among American Indian households than other U.S. households”). Widespread land ownership exists, but according to the National Congress of American Indians, 40 % of on-reservation housing is substandard (compared to 6 % outside Indian Country), less than half of reservation homes are connected to public sewer systems, and 16 % lack indoor plumbing. *Housing & Infrastructure*, NAT'L CONG. AM. INDIANS, <http://www.ncai.org/policy-issues/economic-development-commerce/housing-infrastructure> [<https://perma.cc/8WJX-YQF2>]. Also, the Department of Housing and Urban Development has reported that 5.6 percent of homes on Indian lands lacked complete plumbing and 6.6 percent lacked complete kitchens, nearly four times worse than the national average. *About the National American Indian Housing Council*, NAT'L AM. INDIAN HOUS. COUNCIL, <http://naihc.net/about-2> [<https://perma.cc/EDF4-JF22>]. This same assessment found 12 % of tribal homes lacked sufficient heating. *Id.* In addition, housing on tribal lands is more than seven times as likely as off-reservation housing to be overcrowded, suggesting insufficient supply. *Id.*

75. Even in an era of declining budgets, the Bureau of Indian Affairs received more than \$120 million for the Trust-Real Estate Services program in FY 2017. See U.S. DEP'T OF THE INTERIOR, IA-RES-1, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2019: INDIAN AFFAIRS, [https://www.doi.gov/sites/doi.gov/files/uploads/fy2019\\_ia\\_budget\\_justification.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_ia_budget_justification.pdf) [<https://perma.cc/N7D9-S95L>].

76. For related discussion, see, e.g., Alex T. Skibine, *Using the New Equal Protection to Challenge Federal Control over Tribal Lands*, 36 PUB. LAND & RESOURCES L. REV. 3, 5, 39 (2015).

77. As early as 1933, seven million of the retained individual Indian allotments were already in “heirship status,” or shared among multiple descendants of the original allottee in undivided co-ownership. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 950 fig.11 (1984).

78. The average modern allotment has thirty co-owners, but the average in one location is 149. 2016 STATUS REPORT, *supra* note 69, at 10.

burdens reservation economies by increasing the cost of land use transactions where numerous co-owners must come together to consent. Each of these fractional co-ownership interests in trust also creates a separate land record and land asset that the federal government pays to manage and oversee. Merely keeping track of these numerous tiny interests is overwhelming.<sup>79</sup> For example, the BIA recently estimated that for the fifty-four thousand smallest fractional interests—all valued at less than one dollar each—the future federal probate costs alone will be more than one thousand times their aggregate value (or, it will take \$162 million to probate just \$16,000 in assets).<sup>80</sup> And this does not include all the other federal costs of title maintenance, land administration, and record-keeping during the current and future owners' lives.

In addition, the federal government has settled numerous lawsuits for its own failure (and perhaps inability) to fulfill all these trust responsibilities to every trust beneficiary. In 2010, for example, the government agreed to a \$3.4 billion settlement in the well-known *Cobell* litigation. In that case, a class of individual trust allotment owners successfully argued that the federal government could not even adequately account for who owned what within all allotments.<sup>81</sup> The government has also reached many monetary settlements with tribal governments who have alleged that the federal government mismanaged Indian trust land.<sup>82</sup>

These costs show no sign of decreasing. The current system, despite probate and other reforms, still perversely incentivizes fractionation.<sup>83</sup> In perhaps the saddest reflection of how unsustainable this trust apparatus is, the *Cobell* parties agreed that \$1.9 billion of their settlement should be used to buy back small fractional interests from willing sellers in order to reduce the number of tiny interests and to consolidate more land into more usable ownership arrangements.<sup>84</sup> Recent evaluations of this buyback program reveal that this

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79. These complex co-ownership arrangements were described as early as 1931 as “so involved that no one benefits, while the clerical costs of handling multiple fractionate interests hangs like a deadweight upon the Indian Office.” PRUCHA, *supra* note 77, at 950 fig.11. The problem has only grown exponentially over time. See INITIAL IMPLEMENTATION PLAN, *supra* note 5, at 6 (“Such fractionation has been repeated over successive generations, causing the number of fractional interests to grow exponentially.”).

80. *The Status and Future of the Cobell Land Consol. Program: Oversight Hearing Before the Subcomm. on Indian, Insular, & Alaska Native Affairs of the H. Comm. on Natural Res.*, 115th Cong. 7 (2017) (statement of James Cason, Acting Deputy Secretary, U.S. Dep’t of the Interior) [hereinafter Cason Statement].

81. See Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010); see also *Cobell v. Norton*, 392 F.3d 461, 463–64 (D.C. Cir. 2004) (detailing findings of federal breach of trust).

82. Press Release, U.S. Dept. of the Interior, Attorney General Loretta E. Lynch and Secretary of the Interior Sally Jewell to Announce Settlements of Tribal Trust Accounting and Management Lawsuits (Sept. 26, 2016), <https://www.doi.gov/pressreleases/attorney-general-loretta-e-lynch-and-secretary-interior-sally-jewell-announce> [<https://perma.cc/VQU2-KDN7>].

83. See Shoemaker, *Complexity’s Shadow*, *supra* note 6, at 517–18 (explaining how complexity of land tenure system creates a self-perpetuating cycle that exacerbates fractionation in particular).

84. See INITIAL IMPLEMENTATION PLAN, *supra* note 5, at 1.

investment has preserved the status quo at best. Given rates of ongoing fractionation, current projections estimate that when this buyback program expires in 2022, the number of fractional interests—even at just the subset of reservations where the program actually made purchases—will be right where it started.<sup>85</sup> Indeed, fractional interests, with all their attendant administrative cost and potential drain on reservation economies, are projected to double again in a mere thirty years.<sup>86</sup> New estimates suggest another \$20 billion would be required to consolidate remaining fractional interests.<sup>87</sup>

### 3. *Self-Determination Effects*

Despite these challenges, tribal governments are becoming more powerful self-governing actors across numerous domains.<sup>88</sup> Since the 1970s, the federal government’s focus has been “a new policy of tribal self-determination.”<sup>89</sup> Official federal policy continues to support tribal self-determination,<sup>90</sup> and empirical work routinely finds that, when given the chance, tribal governments make better decisions and manage their resources more prosperously than federal counterparts.<sup>91</sup> International law also broadly recognizes Indigenous rights to self-determination,<sup>92</sup> including particular protections for Indigenous rights to make governance choices about their retained lands and resources and a guarantee of the dominant society’s “due recognition to Indigenous . . . land tenure systems.”<sup>93</sup>

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85. See 2016 STATUS REPORT, *supra* note 69, at 13–14; see also Cason Statement, *supra* note 80, at 5–7, 10 (“After expending a total of \$1.3 billion dollars to date, it is my view that Interior has not been very successful in materially reducing fractional interests. . . . In fact, in my mind, we are almost back where we started 8 years ago, just merely treading water.”).

86. 2016 STATUS REPORT, *supra* note 69, at 13.

87. See Cason Statement, *supra* note 80, at 9.

88. See Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 230–31 (2017).

89. COHEN’S HANDBOOK, *supra* note 54, § 17.01; see also Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564, 565 (statement by President Richard M. Nixon).

90. See, e.g., COHEN’S HANDBOOK, *supra* note 54, § 1.07 (summarizing present-day federal policies to promote tribal “self-determination” and “self-governance”); see also Washburn, *supra* note 88, at 203–07 (summarizing evolution of modern “self-governance” policies).

91. See, e.g., *infra* note 179.

92. See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), at art. 3 [hereinafter UN-DRIP] (recognizing “right to self-determination,” including in “economic, social and cultural development”); *id.* art. 4 (“right to self-determination” includes “right to autonomy or self-government relating to . . . local affairs”); see also International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

93. UN-DRIP, *supra* note 92, at art. 27 (“States shall . . . giv[e] due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems.”); see also *id.* art. 25 (“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories . . . and other resources.”); *id.* art. 26(2) (“Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as

In the United States, however, trust land management has not been radically reformed to meet the goal of tribal self-determination.<sup>94</sup> Although recent efforts to streamline leasing and related procedures have generally made the federal bureaucracy more efficient,<sup>95</sup> the fundamental structure of the property system remains the same. All the diversity of Indian country continues to be funneled through a mostly top-down, federalized property system.<sup>96</sup> These land tenure limits impose critical self-determination costs. Structurally, they limit how flexibly tribal governments can shape and reflect important place-based connections through property law. Practically, they reinforce restrictions on the scope of tribal jurisdiction across reservation landscapes.

*a. Property as a Constructive Language*

First, most fundamentally, the trust overlay precludes tribal governments from manifesting alternative property priorities through a unique and flexible land tenure lens. The comprehensiveness and rigidity of the federal trust is a barrier to alternative visions of tribal identity and self-determination as expressed through unique relationships to specific physical spaces.<sup>97</sup> Tribes have historically understood land tenure in wholly different ways, but the modern trust precludes (or at least conflicts with) most of these visions now.<sup>98</sup> These limits have potentially deep social, political, and cultural effects for Indigenous communities and identities.

There is profound power in a sovereign's rights to name its own property institutions.<sup>99</sup> Property law creates a fundamental language and lens through

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those which they have otherwise acquired.”); *id.* art. 32(1) (“Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”); *id.* at Preamble (noting global “[c]onvict[ion] that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs”).

94. See Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 319 (2006) (“[A]lthough many areas of federal Indian policy have been dramatically reformed in the past 40 years . . . trust management policy has not been one of these areas.”); *cf. infra* note 133 (discussing some limited modern reform efforts).

95. See *infra* Part II.B.

96. There are exceptions, however, where specific tribes enjoy unique federal law exceptions or property law modifications. See, e.g., *infra* note 220 and accompanying text. Nonetheless, these reforms come from federal, not tribal, sources of property law authority and ultimate control.

97. Cf. Mishuana Goeman, *Land as Life: Unsettling the Logics of Containment*, in NATIVE STUDIES KEYWORDS 71, 72–74 (Stephanie Nohelani Teves, et al. eds., 2015) (asserting that federal land laws attempt to contain or cage Indigenous place-based visions).

98. See *infra* Part III.B.1.

99. See WINONA LADUKE, RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING 11–15, 108–12 (2016) (asserting that reclaiming and celebrating traditional Indigenous beliefs and practices, especially in relationship with nature, is part of the path toward community healing after colonization); see also PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY 3 (2014) (arguing whole societies are recognized by their property systems because “property system[s] express[] society’s values”); Hallowell, *supra* note 39, at 133 (describing property systems as “institution[s] extremely fundamental to the structure of human societies as going concerns”).

which we view our relationship to each other and the world around us,<sup>100</sup> and like any language, it can create deep internal categories and concepts that we use to understand the world.<sup>101</sup> Work in other social science disciplines has explored fundamental ways that languages and, by extension, legal categories can limit or define what we do and do not see about that world around us.<sup>102</sup> Property, as our language of shared expectations about resources—and, more fundamentally, our literal place in the world—can have the same limiting or expanding lens effect.<sup>103</sup> Forcing Indigenous governments to mediate and communicate social values exclusively through current majority understandings of property—with its languages of dominion, exclusion, control, fee simples, and alienation—may fundamentally impact how Indigenous landowners themselves perceive and engage with the world around them.<sup>104</sup>

*b. Property-Based Limits on Tribal Jurisdiction*

Land tenure is also interwoven with jurisdictional and self-governance challenges in Indian country. The historic allotment policy caused significant land loss, with roughly sixty percent of retained Indian lands transferring to non-Indian ownership at that time.<sup>105</sup> These losses occurred in two main ways. First, they occurred when the federal government pursued sales of so-called “surplus” lands (i.e., lands not immediately allotted to tribal citizens) to non-Indian homesteaders.<sup>106</sup> Second, they occurred when the federal government deemed an allottee competent to hold property in unrestricted fee or otherwise removed the federal trust status protections, which almost inevitably resulted in transfers to

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100. Hallowell, *supra* note 39, at 133–34 (analyzing property as a social institution).

101. *See supra* notes 40–41 and accompanying text (reflecting on how language and legal categories can funnel and even shape our thoughts).

102. *Id.* For example, a language that orients itself consistently to cardinal directions will shape the speaker’s mind to function like a compass, always recognizing one’s heading direction, while another language speaker using terms like “left” and “right” for orientation is unlikely to develop this same facility. Lera Boroditsky & Alice Gaby, *Remembrances of Times East: Absolute Spatial Representations of Time in an Australian Aboriginal Community*, 21 *PSYCHOL. SCI.* 1635, 1637 (2010). The same can apply to property languages.

103. *See, e.g.,* Sonya Salamon, *Cultural Dimensions of Land Tenure in the United States*, in *WHO OWNS AMERICA? SOCIAL CONFLICT OVER PROPERTY RIGHTS* 159, 164 (Harvey M. Jacobs ed., 1998) (describing relationship between land tenure and culture as an “interpretive framework”); Taisu Zhang, *Cultural Paradigms in Property Institutions*, 41 *YALE J. INT’L. L.* 347, 348 (2016) (arguing cultural differences are “particularly powerful—perhaps indispensable—in explaining large-scale institutional differences between societies” in the “regulation of property use and transfer”).

104. This, of course, was the original idea of the allotment policy—that the imposition of private property, in and of itself, would serve as a transformative tool in Indian peoples’ lives and future identities. *See supra* notes 42, 56, and accompanying text.

105. CARLSON, *supra* note 3, at 18; *see also* PRUCHA, *supra* note 77, at 950.

106. CARLSON, *supra* note 3, at 17–18; *see also* Royster, *supra* note 4, at 13–14 (exploring how loss of sixty million acres in surplus land sales occurred without tribal permission and significantly reduced available land on which future generations of tribal citizens could spread).

non-Indian buyers.<sup>107</sup> Some, but not all, of this land loss resulted in diminished reservation boundaries.<sup>108</sup>

In retained reservation spaces, however, the more prevalent pattern became a checkerboard of mixed land ownership—with non-Indian-owned lands interspersed with Indian allotments and tribal properties.<sup>109</sup> Because non-Indians are not citizens of tribal governments, tribal jurisdiction over these properties becomes more complicated.<sup>110</sup>

The post-allotment reality of mixed Indian and non-Indian land ownership within many reservation territories has created a difficult patchwork of overlapping tribal, state, and federal jurisdictions. Despite historic promises of exclusive tribal control within reservation boundaries, modern rules often require Indian land ownership as a prerequisite for tribal governance rights over specific properties within reservation territories. This kind of checkerboard jurisdiction, where governance rights are often non-contiguous (and ambiguous, uncertain, and overlapping), produces inconsistent results across neighboring properties. It also limits the ability of tribal governments to express cohesive ethics and priorities across reservation spaces.<sup>111</sup>

This jurisdictional incoherence also reinforces reliance on the trust status in perverse ways. Because Indian ownership is often a jurisdictional prerequisite, tribal governments often accept (and even fight to retain) this current system of trust land—with attendant transfer restrictions—in order to secure any remaining physical space for tribal control and group expression.<sup>112</sup> But at the same time, this federalized property system limits tribal expressions of cultural values and other priorities through land tenure. This fundamental paradox forces many tribes to accept the modern trust, despite its limits and negative economic consequences, for the sake of land—and some jurisdiction—preservation.

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107. JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN: 1887–1934*, at 88–93, 97, 100 (1991) (describing how Indian lands were lost through “competency decisions” after which newly acquired fee titles were sold or transferred to land speculators who either effectuated the competency determinations in the first place or pounced soon thereafter to acquire land from unsuspecting (and unprotected) allottees, including through tax foreclosure procedures). In 1935, the federal government concluded that “[t]he granting of fee patents has been practically synonymous with outright alienation,” with “only 3 to 20 percent of fee-patented land . . . remain[ing] in Indian ownership.” U.S. DEP’T OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS, *Indian Land Tenure, Economic Status, and Population Trends*, in SUPPLEMENTARY REPORT OF THE LAND PLANNING COMMITTEE TO THE NATIONAL RESOURCES BOARD 6 (1935).

108. See, e.g., *Nebraska v. Parker*, 136 S. Ct. 1072, 1077–78 (2016) (reiterating that some, but not all, land sales in the allotment era resulted in redrawing exterior reservation boundaries).

109. See, e.g., *Solem v. Bartlett*, 465 U.S. 463, 471–72 n.12 (1984) (describing “checkerboard” land tenure patterns).

110. See Shoemaker, *Emulsified Property*, *supra* note 27, at 962–65, 998–99 (describing jurisdictional challenges of non-Indian land ownership within reservation territories where those non-Indians are not enfranchised participants in the governing tribe and, thus, often not subject to tribal jurisdiction).

111. See also *infra* Part III.A.2 (discussing potential economic costs of investors’ perceptions of uncertain regulatory risks in Indian country).

112. See Lavoie, *supra* note 18, at 1052.

## II.

## THE CURRENT LAND TENURE TRAJECTORY

The challenges of modern American Indian land tenure are intense. Property entitlements are, by nature, sticky and difficult to adjust once allocated, and the challenges of navigating complex and sometimes contradictory value judgments are difficult in the best of cases. Here, we are asking a lot of an ideal reservation property system: a preserved tribal land base for present and future place-based connections and identities, but also property institutions that facilitate economic development (which often must include some property rights transfer) and credit access (which can include a risk of loss when the land is used as collateral); tribal jurisdiction and autonomy to shape group land ethics and values through divergent property law regimes, but also respect for individual rights of both Indian and non-Indian owners and residents; and improved tribal capacities and reduced federal costs, but also a system of meeting and honoring federal responsibilities.

In the current discourse, two primary options have emerged to frame thinking about the future: (1) state-based fee simple property transitions that would simply do away with the whole trust-regime apparatus; and (2) more tinkering with current federal law to make the trust more economically efficient and, in very limited ways, promote more tribal self-determination. Both strategies respond to valid critiques of the current, federalized system, including that it is too heavy-handed on American Indian owners and that it impedes economic prosperity by imposing too many levels of bureaucratic review on any decision about resource use.

On the other hand, both reform strategies miss something important about the nonmaterial functions of property, and tend to sterilize, diminish, or otherwise limit tribal sovereignty.<sup>113</sup> Responding to the perils of colonialism by “finishing the job” with another unilateral, forced federal property “solution” is unacceptable. Likewise, a deeper look at modern federal reforms reveals that most, instead of really supporting self-determination, tend to mold tribal governments in the image of the Bureau of Indian Affairs (BIA). Simply recreating the federal bureaucracy at the tribal level may remove one level of review from land use decisions,<sup>114</sup> but it does not provide sufficient space for creativity, innovation, improvement, or evolution of the institutions themselves. This Section analyzes both primary options in greater depth, with particular

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113. In Schaefer Riley’s words, “[allotment] wasn’t a good test of property rights, because Indians never had them.” SCHAEFER RILEY, *supra* note 11, at 17. Although technically false as a legal matter, *see, e.g.*, Singer, *supra* note 50, at 11–16 (emphasizing that Indian landowners *do* have property), the sentiment that the trust property regime is too weak for economic utility does have merit. The problem is really that this top-down “solution” effectively ignores tribal sovereignty (intentionally, according to some), and assumes there is only one viable property path. *See supra* Part I.B.3.

114. But current reforms are not really even doing this in many instances. *See infra* Part II.B.

focus on a new critique of current federal reforms that say one thing but may actually be doing another.

A. *Fee Simple Rhetoric and Risks*

Given the complexity and perversity of the current system, the idea of supplanting federal property systems with the simple magic of state-defined fee simple titles is appealing. It would be fantastic if one could melt away generations of land tenure challenges with one seemingly simple act. Unfortunately, these forced-fee proposals mirror other already-failed fee-property efforts, perpetuate colonial assumptions of superiority and control, and overlook the complex consequences likely to follow from such a dramatic unilateral change.

After allotment, the United States again experimented with forced-fee property reforms at the end of World War II, when Indigenous assimilation returned as the dominant political philosophy in US-Indian affairs.<sup>115</sup> This resulted in the Termination Era of federal policy, which included a series of legislative efforts designed to transfer specific federal powers over Indians to state authorities, eliminate or reduce federal responsibilities and financial obligations to certain tribes, and generally eliminate Indian difference in favor of assimilation.<sup>116</sup> With termination, the oppressive federal responsibilities would end, and Indian people would be emancipated and integrated to full status equal to any white citizen (typically without their consent).<sup>117</sup>

During this policy era, approximately three percent of tribes were terminated in a series of special legislative acts that ended the federal trust relationship, ended exemptions from state taxes, and effectively sought to end tribal sovereignty.<sup>118</sup> All these specific termination acts also included “[f]undamental changes in land ownership patterns”—either outright sale of former trust lands and distribution of the proceeds to the tribe, or transfers of former trust lands into fee status with either private trust or state-law corporate ownership.<sup>119</sup>

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115. See Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 144–45 (1977); see also COHEN’S HANDBOOK, *supra* note 54, § 1.06 (describing “more than 80 years of legislative whipsawing” between the Civil War and World War II that culminated in a shift to a federal termination policy in approximately 1943).

116. Wilkinson & Biggs, *supra* note 115, at 149–50.

117. See H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953) (articulating national policy “to end [American Indians’] status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizens”). This House resolution also mandated that, as soon as possible, specific American Indians tribes “should be freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians.” *Id.* Termination acts were passed hastily, and while tribal consent was not required, it was often obtained through coercive tactics. Wilkinson & Biggs, *supra* note 115, at 157.

118. Wilkinson & Biggs, *supra* note 115, at 151–53.

119. *Id.* at 152.



Like today's fee simple proposals, termination was promoted as a beneficial opportunity to reduce federal control over Indian affairs and Indian people. In practice, the effects of the termination acts were "devastating."<sup>120</sup> A study prepared for the American Indian Policy Review Commission reported overwhelming negative effects on participants' lives, including increased rates of alcohol and drug abuse, reduced access to health care, and reduced employment.<sup>121</sup> Even tribes that moved land into corporate or private trust ownership forms tended to lose that land in short order, and payments for sold land failed to compensate for other lost federal benefits, the new state tax burdens, the loss of tribal government authority, and, in some cases, "the psychological cost of 'not being an Indian any more.'"<sup>122</sup>

Termination failed, just as the allotment policy had before it. As general consensus about termination's failure grew, policy shifted again.<sup>123</sup> No more tribes were terminated after 1966.<sup>124</sup> Since termination, many of the formerly terminated tribes have been restored to federally recognized status, and at least the Menominee in Wisconsin were able to have retained lands restored to trust status.<sup>125</sup> Other tribes, including, for example, the Ponca in Nebraska, have sought new land-into-trust acquisitions to replace at least some land and sovereignty losses with new trust land rights, but formerly terminated tribes still experience the burden of having lost historic reservation territories.<sup>126</sup>

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120. AM. INDIAN POLICY REVIEW COMM'N., REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIAN TRIBES 1711 (1976) [hereinafter TERMINATION REPORT] (noting that the "results of termination" were "indisputab[ly] . . . 'tragic'"); see also COHEN'S HANDBOOK, *supra* note 54, at 90–91 (describing "tragic" effects of termination, including that "[m]ost terminated tribes ultimately relinquished or lost their land" and "were unable to exercise their governmental powers after losing their land base"); PRUCHA, *supra* note 77, at 1051–56 (describing particular catastrophes in termination of the Menominee and Klamath tribes).

121. See TERMINATION REPORT, *supra* note 120, at 38.

122. Wilkinson & Biggs, *supra* note 115, at 152–54.

123. See, e.g., COHEN'S HANDBOOK, *supra* note 54, § 1.07 (describing policy shift in favor of tribal self-governance starting after the mid-1950s when members of "Congress began to speak out against termination . . . and generally acknowledged the disastrous results of the termination"). One possible vestige of the termination policy's experimentation with corporate ownership of tribal lands did emerge later in the Alaska Native Corporations Settlement Act (ANCSA), which created a specialized corporate status for specific indigenous lands in Alaska only. Pub. L. 92-203, § 6, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. § 1605 (2012)). The ANCSA has arguably been much more economically successful for Alaskan natives than non-trust corporate ownership was for terminated tribes in the lower 48 states. See COHEN'S HANDBOOK, *supra* note 54, § 4.07[3][b][ii][B]. The ANCSA was negotiated in a fully different context, with significant Indigenous participation, but it has still been critiqued for other negative effects on self-governance. See, e.g., Consolidated Complaint at paras. 35, 40, Akiachak Native Cmty. v. Dep't of Interior, No. 1:06-cv-00969-RC (D.D.C. Nov. 09, 2007) (allegations by three federally recognized Alaska Native communities that lack of trust status for retained lands impedes communities' ability to protect lands "for future generations of tribal members" and assert "undisputed jurisdiction" over those spaces).

124. See PRUCHA, *supra* note 77, at 1048.

125. E.g., *id.* at 1051–56.

126. See, e.g., Kevin Abourezk, *Ponca Tribes Reclaim Ancestral Land Along Trail of Tears in Nebraska* (June 12, 2018), <https://www.indianz.com/News/2018/06/12/ponca-tribes-reclaim-ancestral-land-alon.asp> [<https://perma.cc/S9LV-4VGA>].

Current forced-fee proposals echo these termination policies, which exist as a scar on federal Indian policy. Both termination and allotment were associated with terrible Indigenous land loss and an ugly history of manipulating and controlling Indigenous land tenure for colonial ends. One response may be that modern tribal governments are now in a better position to preserve their land if it is in fee status. But the addition of new state tax and other title-maintenance liabilities creates real risks, especially in more remote and impoverished reservations. And for tiny undivided allotted interests, new maintenance and tax costs would almost certainly cause at least some land loss, as expenses could easily exceed the asset's economic value.<sup>127</sup> In this and related ways, much of the rhetoric about “magic” fee simple ownership overlooks on-the-ground realities. Fee simple does not promise economic prosperity on its own. Other factors—including initial resource endowments, location, and owners' own actions—all determine actual wealth creation outcomes.<sup>128</sup>

Further, a unilateral fee simple conversion fails to protect tribal sovereignty. In fact, some proposals may be intentionally opposed to expressions of any preserved tribal identities.<sup>129</sup> At least some of the current advocates for eliminating the trust status are directly hostile to tribal sovereignty.<sup>130</sup> Others are

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127. Cf. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L. J. 1163, 1173 (1999) (“Property taxes and registration fees prove to be powerful, indirect mechanisms that deter excessive fragmentation . . .”); Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 566, 608–09 (2005) (noting that rural Black land loss has occurred through tax sales in the absence of alienation restraints or other trust-status protections).

128. See, e.g., Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 59, 97–104 (2007) (contesting view that formalization of property rights categorically or universally improves social welfare outcomes); Shiri Pasternak, *How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada*, 47 ANTIPODE 179, 190–91 (2015) (discussing the “highly contingent context of wealth creation,” and emphasizing that claims of universal economic success from fee simple institutions ignore the reality of divergent resource demands and location variables). Certainly, the balance between individual liberty and indigenous group identity can be fraught, but the choice should be driven by American Indian peoples themselves, our treaty relationships, and more enlightened modern ideals of the values of diversity, dignity, and indigenous rights. See, e.g., *supra* notes 92–93 and accompanying text.

129. The allotment and termination policies pursued fee-simple transfers specifically to eliminate tribes as nations. See, e.g., COHEN'S HANDBOOK, *supra* note 54, § 1.04, (“Under the federal allotment and assimilation policy, the Native American was to become another lost race in the American melting pot.”); *id.* § 1.06 (“[F]ederal policy dealing with Indian lands and reserves during the termination era focused primarily on ending the trust relationship between the United States and Indian tribes, with the ultimate goal being to subject Indians to state and federal laws on exactly the same terms as other citizens.”).

130. See, e.g., SCHAEFER RILEY, *supra* note 11, at 14–15; Naomi Schaefer Riley, *Protestors Should Be Fighting for Indians' Rights as Citizens, Not the Tribe*, NEW YORK POST (Nov. 5, 2016), <https://nypost.com/2016/11/05/tribal-sovereignty-is-harming-native-americans-more-than-the-pipeline> [<https://perma.cc/5BD9-WY8P>] (“It is time for both the US government and the tribes to stop pretending that [tribes] are like foreign countries negotiating a settlement.”). Schaefer Riley is a vocal opponent of tribal sovereignty, and believes “tribal rights—and the government's attempts to accommodate them—is actually infringing on [constitutional] individual protections for Indians.” *Id.* This assertion is dramatically opposed to on-the-ground experiences and empirical evidence showing that tribal nations

silent on the exact effect on future tribal sovereignty or collective identity, but certainly state-based fee simple regimes will have termination-like effects if they do not include other protective legal reforms for preserved tribal jurisdiction. Under current precedent, any tribal government decision to alienate former trust property to a non-Indian in fee risks extinguishing tribal rights to govern that space, even if the tribe later repurchases the land.<sup>131</sup> Remaining spaces are, in many respects, tribal governments' last stand, and there is no appetite for further loss.

But more broadly, even if a tribe could voluntarily self-organize its own land use arrangements on top of a straightforward state-defined fee simple title, its rights would be at the discretion of the state government. As such, they would be subject to the priorities of a state-defined property system, and without land-based sovereignty to defend against any efforts at property expropriation. Making tribal governments into a kind of quasi-private membership club on top of a state fee simple—subject to the framing power and authority of state governments, which have historically been deemed tribal governments' "deadliest enemies"—is not sufficient tribal sovereignty.<sup>132</sup>

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tend to do best when they make, and are governed by, their own decisions. *See, e.g.*, Cornell & Kalt, *supra* note 68, at 9, 15 (critiquing "governing institutions" that vest non-Indigenous governments with primary authority over the most important decisions impacting Indigenous peoples, and concluding that this paradigm "cripples reservation development efforts and leads, in the long run, to more poverty, more problems, and larger taxpayer burdens").

131. *See, e.g.*, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219–20 (2005) (refusing to restore tribal jurisdiction over reacquired property that had been illegally taken many years prior).

132. *Cf. supra* notes 99–105 and accompanying text (property as performative language). Malcolm Lavoie has argued that several novel aspects of Indigenous property rights in many common law countries—like the prototypical restraints on alienation in Canada and the United States—can be "explained primarily by the functional imperatives of seeking to use property in land as a basis for self-government." Lavoie, *supra* note 11, at 6, 65. Lavoie notes that other non-Indigenous groups, like the *kibbutzim* in Israel, have also used specialized property rules "to govern their communities according to distinct values." *Id.* at 21–22. He goes on to warn, however, that for Indigenous groups, this property-dependent self-governance right "provides a basis for caution in considering reforms that might disrupt this function." *Id.* at 66. The degree to which Indigenous self-governance rights do depend on property, however, varies by country. Canadian jurisprudence, for example, has not clearly recognized the same retained sovereignty of First Nations as the United States has repeatedly recognized for tribal governments, making the two legal contexts different in this important regard. *Cf. FELIX HOEHN, RECONCILING SOVEREIGNTIES: ABORIGINAL NATIONS AND CANADA* 26–27 (2012) (criticizing how Canadian jurisprudence has failed to follow US precedent affirmatively recognizing residual Indigenous sovereignty).

As further context, Canada has also recently experienced political efforts aimed at allowing First Nations to opt out of reserve land status under Canada's Indian Act in favor of a clear fee title to property, and so far, these proposals have also been strongly opposed and rejected. *See, e.g.*, Jeremy J. Schmidt, *Bureaucratic Territory: First Nations, Private Property, and "Turn-Key" Colonialism in Canada*, 108 ANNALS AM. ASS'N. GEOGRAPHERS 901, 902 (2018) (describing and critiquing Canadian political discussions and developments around the First Nations Property Ownership Initiative); *FAQs: Questions about the First Nations Property Ownership Initiative*, INDIGENOUS LAND TITLE INITIATIVE, <http://ilti.ca/en/faqs> [<https://perma.cc/LW56-YEA3>] (explaining more recent version of similar privatization proposals). Meanwhile, related federal efforts in Canada to impose the "English land law model of a fee simple"—with all its colonial and feudal "baggage"—within reserved Indigenous territories have also met sustained resistance from First Nations engaged in modern treaty negotiations

*B. The Limits of Modern Trust Reforms*

Absent a desirable fee simple proposal, the modern assumption seems to be that American Indians and tribes are stuck with some kind of federal trust status for the foreseeable future. Over the last several decades, Congress and the DOI have implemented a series of land tenure reforms in Indian country directed primarily at streamlining bureaucratic land procedures and, in some cases, divesting the BIA of certain land oversight powers in favor of more tribal self-determination. This Section begins with an overview of these recent reforms, which attempt to make the best of the system as it is, but ends with a critique. Rather than really supporting tribal self-determination, these reforms still fundamentally constrain tribal self-governance rights around land and perpetuate a complex system of federal oversight.

The relevant legal reforms have been numerous and varied. Several have focused on streamlining and improving the BIA's internal review procedures. For example, in 2012, the BIA revised its Indian land leasing regulations, with a focus on modernizing approval procedures and reducing lease approval times.<sup>133</sup> These regulations now require the BIA to give greater deference to tribal choices regarding negotiated compensation amounts and land valuation procedures.<sup>134</sup> The regulations also aim to reduce lease decision times by requiring BIA to act more quickly in issuing approval decisions.<sup>135</sup>

Related legal changes and practical developments have helped facilitate more creative solutions for some of the credit issues landowners face in Indian country. For example, the revised federal leasing regulations allow for much more efficient and deferential review of leasehold mortgages, which encumber the lease interest but not the underlying trust title.<sup>136</sup> The inalienability of trust lands mean that Indian landowners typically cannot obtain traditional mortgages

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over unceded Aboriginal title claims in British Columbia. Nicholas Blomley, *Making Space for Property*, 104 ANNALS AM. ASS'N. GEOGRAPHERS 1291, 1293–94, 1296 (2014) (describing how some First Nations negotiators reacted adversely to fee simple language).

133. See Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,440–01 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162 (2018)) (final rule); Kevin Washburn & Jody Cummings, *Explaining the Modernized Leasing and Right-of-Way Regulations for Indian Lands* 2–3 (Univ. N.M. Sch. of Law, Working Paper 2017), [https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1554&context=law\\_facultyscholarship](https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1554&context=law_facultyscholarship) [<https://perma.cc/9PCP-KYTY>] (noting that one of the main goals of the new leasing regulations was to “modernize” the BIA’s leasing approval process and “provide swifter responses”).

134. See 25 C.F.R. § 162.320 (2018) (allowing tribes to negotiate residential leases on tribal lands for compensation below appraised market value where certain conditions are met). Previously, Indian landowners needed an appraisal for every lease decision. See Washburn & Cummings, *supra* note 133, at 2 (explaining how the new leasing regulations “give considerable deference to compensation terms negotiated by tribes in the place of requiring appraisals”).

135. See 25 C.F.R. § 162.340(b)(2) (2018) (imposing thirty-day deadline on issuing BIA residential lease decisions); *id.* § 162.363 (creating appeal process for applicants to compel agency action if BIA does not meet its deadlines).

136. See, e.g., *id.* §§ 162.357–.360 (2018) (outlining new requirements for residential leasehold mortgages).

for lands held in trust by the US government,<sup>137</sup> but leasehold mortgages sidestep some of the inalienability of the underlying trust title. The Section 184 Indian Home Loan Guarantee Program, which is administered by the US Department of Housing and Urban Development (HUD), has also increased residential mortgage lending on reservations.<sup>138</sup> The vast majority of these HUD-guaranteed loans, however, have been on fee simple lands.<sup>139</sup>

Another theme of modern reforms has been to remove, or at least reduce, DOI's oversight over whole categories of tribal land transactions. Traditionally, federal law has required Secretary approval (often with a cumbersome appraisal prerequisite) of every encumbrance or transfer of Indian land, with minor exceptions.<sup>140</sup> For example, Section 17 of the Indian Reorganization Act (IRA) of 1934 allows tribes to form corporations under a federal charter.<sup>141</sup> Tribes may then use these corporations to lease corporate property (including tribal trust land transferred to the corporation) for up to twenty-five years without any federal intervention or approval.<sup>142</sup>

137. See Carpenter & Riley, *supra* note 17, at 832 (explaining how the traditional “standard residential mortgage lending system excluded most reservation-based Indian borrowers”).

138. See JORGENSEN, ACCESS TO CAPITAL, *supra* note 35, at 48–51; Carpenter & Riley, *supra* note 17, at 832–35 (discussing how the Section 184 program has increased mortgage lending on trust lands); see also *Leasing Requirements*, U.S. DEPT HOUSING & URBAN DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/homeownership/184/leasing](https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184/leasing) [<https://perma.cc/PWN3-J34L>] (explaining how Native borrowers can receive a federal loan guarantee for residential leases of tribal trust land).

139. See DAVID LISTOKIN, ET AL., MORTGAGE LENDING ON TRIBAL LAND: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN HOUSING NEEDS iii (2017), <https://www.huduser.gov/portal/sites/default/files/pdf/NAHSG-Lending.pdf> (explaining that, despite Section 184's purpose to overcome barriers particular to credit access on trust lands, “[m]ost Section 184 loans . . . are made for homes on fee-simple land”); see also *id.* at 9 (demonstrating that for period from 1994 to 2015, eighty-eight percent of the number of loans and ninety-one percent of the dollar volume of loans were located on fee simple land).

140. See, e.g., Washburn & Cummings, *supra* note 133, at 2 (explaining that prior to BIA reforms, “an appraisal was required for every lease or right-of-way decision even if the tribe or individual Indian owner was competent to make decisions and clearly desired approval”).

141. See 25 U.S.C. § 5124 (2012) (codifying Section 17 of the IRA). Section 17 corporate charters are subject to federal approval and may only be dissolved by Congress. COHEN'S HANDBOOK, *supra* note 54, at 1326. Tribal corporations chartered under Section 17 are treated “the same as the tribe” for tax purposes, which means they are exempt from federal taxation. *Id.*; 26 C.F.R. § 301.7701-1(a)(3) (2018) (stating that the Internal Revenue Code does not recognize “tribes incorporated under section 17 . . . as separate entities for federal tax purposes”).

142. See 25 U.S.C. § 5124 (2012); 25 C.F.R. § 84.004(b) (2018) (excluding from secretarial approval “[l]eases of tribal land that are exempt . . . under [Section 17]”); *id.* § 84.004(f) (also excluding “[c]ontracts or agreements that are exempt . . . under the terms of a corporate charter authorized by [Section 17]”); see also *id.* § 162.006(b)(3)(i) (excluding corporate “lease[s] of tribal land by a [Section 17 corporation]” from surface lease rules); *id.* § 166.1(c) (also excluding “tribal land” issued by a Section 17 corporation from grazing permit rules). Although the original IRA limited access to these Section 17 authorities to tribes that had also adopted other IRA provisions related to tribal governance more generally, Congress amended the law in 1990 to extend the option to create Section 17 corporations to all tribes, regardless of their original position on the IRA's other optional authorities. See Pub. L. 101-301, § 3(c), 104 Stat. 206, 207 (1990). There are also special, but similar, corporate forms available to tribes in Oklahoma, as the original IRA did not cover these groups. See Oklahoma Indian Welfare Act

Likewise, in 2000, Congress passed the Indian Tribal Economic Development and Contract Encouragement Act, which eliminated the BIA approval requirement for encumbrances on tribal trust lands that last less than seven years.<sup>143</sup> This means that all tribes can execute short-term encumbrances without Secretarial approval, and Section 17 tribal corporations can use federal authority for similarly autonomous leases for up to twenty-five years.

The BIA has also recognized that tribes do not need federal approval for contracts that “convey to tribal members any rights for temporary use of tribal lands, assigned by Indian tribes in accordance with tribal laws or custom.”<sup>144</sup> For example, a significant amount of tribal land for tribal housing is currently allocated to individual citizens through a tribally defined land tenure instrument called a “tribal land assignment.”<sup>145</sup> A tribal land assignment is not a lease *per se*, but rather a special, time-limited category of use rights recognized only on tribal lands.<sup>146</sup> Many tribes prefer assignments rather than formal leases for tribal housing, because tribal land assignments are more flexible and not subject to significant DOI oversight.<sup>147</sup> Tribal rights with respect to assignments, however, still have limits. When the Chemehuevi Indian Tribe tried to give assignees the right to alienate their assignments or have them descend upon the assignees’ death, the Ninth Circuit in 2014 held that the assignment looked too much like a fee simple conveyance of tribal land and thus was void without federal oversight

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of 1936, 25 U.S.C. §§ 5201–10 (2012); KAREN J. ATKINSON & KATHLEEN M. NILLES, TRIBAL BUSINESS STRUCTURE HANDBOOK, at III-11 (2008 ed.).

143. See Pub. L. 106-179, § 2, 114 Stat. 46, 46 (2000) (codified at 25 U.S.C. § 81(b) (2012)) (providing that Secretarial approval is only required for “agreement[s] or contract[s] with an Indian tribe that encumbers Indian lands for a period of 7 or more years”).

144. 25 C.F.R. § 84.004(d); see also 25 C.F.R. § 162.006(b)(1)(vii) (providing that federal surface leasing regulations do not apply to “[t]ribal land assignments and similar instruments authorizing uses of tribal land” that are derived from “tribal laws”).

145. 25 C.F.R. § 162.003 (defining “[t]ribal land assignment” as “a contract or agreement that conveys to tribal members or wholly owned tribal corporations any rights for the use of tribal lands, assigned by an Indian tribe in accordance with tribal laws or customs”); see also *Alternatives to Leases and Permits*, INDIAN COUNTRY GRASSROOTS SUPPORT, <http://indiancountrygrassroots.org/landalternatives.html> [<https://perma.cc/M5VH-6DXX>] [hereinafter *Alternatives to Leases and Permits*] (providing numerous examples of tribal land assignment laws and systems in practice).

146. See, e.g., Mont Faulkner, 39 I.B.I.A. 62, 64 (2003), <https://www.oha.doi.gov/IBIA/lbiaDecisions/39ibia/39ibia062.PDF> [<https://perma.cc/6TFZ-277B>] (holding that “unlike leases of tribal land, tribal land assignments are not subject to BIA approval under Federal law”).

147. COHEN’S HANDBOOK, *supra* note 54, § 16.01[3] (explaining that it is “common” for tribes to allocate occupancy rights of tribal lands to tribal members by virtue of tribal, not federal, law); see also BUREAU OF INDIAN AFFAIRS, *Real Estate Services: Tribal Land Assignments*, in INDIAN AFFAIRS MANUAL 1 (2018) (“The [DOI] will not recognize a tribal land assignment as an individual trust interest that may be conveyed or that operates as an encumbrance on tribal trust land although the tribe may treat the assignment as a temporary possessory interest or owner use privilege.”). When a tribe has made such an assignment of tribal agricultural land, however, DOI does require both the assignee and the tribe to grant any subsequent lease, subject to federal approval. See 25 C.F.R. § 162.207(a) (“Where tribal land is subject to a land assignment made to a tribal member or some other individual under tribal law or custom, the individual and the tribe must both grant the lease, subject to [federal] approval.”).

and approval.<sup>148</sup> There is conflicting authority, but in some contexts, DOI also seems to limit permissible assignees to “tribal members or wholly owned tribal corporations,” excluding other possible recipients.<sup>149</sup> The most recent leasing regulations also recognize that “permits” may be executed on trust lands without federal approval.<sup>150</sup> According to the “common characteristics” of “permits,” however, “permits” generally bestow more limited rights than “leases”: they extend only to short-term, non-transferrable, non-possessory, revocable rights for limited uses of Indian land.<sup>151</sup>

In 2012, Congress also passed the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act). The HEARTH Act allows tribal governments to opt into a regime under which they may approve their own surface leases of tribal trust lands for up to seventy-five years (after renewals and depending on the lease type) without lease-by-lease Secretarial oversight.<sup>152</sup> If a tribe wishes to participate in this optional leasing system, it must first adopt and then submit its own tribal leasing regulations to DOI. If the Secretary approves the regulations, the tribe can execute its own leases pursuant to those approved tribal regulations directly and without federal approval of individual leases.<sup>153</sup>

These reforms may be important initial steps toward more efficiency and tribal governance autonomy in Indian country, but they are not enough. After

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148. See *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 909–10 (9th Cir. 2014). However, drawing the line between an assignment and a federally regulated lease can be challenging.

149. 25 C.F.R. § 162.003 (limiting definition of “[t]ribal land assignment” to rights conveyed “to tribal members or wholly owned tribal corporations”). *But see id.* § 162.207(a) (suggesting possibility of a land assignment “to a tribal member *or some other individual* under tribal law or custom”) (emphasis added). In practice, tribes may often desire to allow non-Indian surviving spouses of deceased tribal members to retain lifetime rights to an existing housing assignment, for example.

150. 25 C.F.R. § 162.007 (explaining when “[p]ermits for use of Indian land do not require [BIA] approval”); Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) (final rule). A qualifying “[p]ermit” is a “written, non-assignable agreement . . . whereby the permittee is granted a temporary, revocable privilege to use Indian land or Government land, for a specified purpose.” *Id.* § 162.003. A “[l]ease,” by contrast, is a “contract” that grants the lessee “a right to possess Indian land, for a specified purpose and duration.” *Id.*

151. 25 C.F.R. § 162.007(d); Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. at 72,444–45. Grazing permits are separately defined and regulated in a different part of the code of federal regulations. *See* 25 C.F.R. pt. 166 (2018) (grazing permits).

152. *See* HEARTH Act of 2012 § 2, 25 U.S.C. § 415(h) (2012) (permitting some tribal leasing of tribal trust lands without federal approval, provided that tribal leasing regulations are preapproved by DOI). The HEARTH Act essentially extended the right to enter certain leases without Secretarial approval to all tribes. *See id.* Prior to its enactment, this right had previously only been granted to individual tribes via special legislation. *Compare* 25 U.S.C. §§ 415(b), (e) (granting special leasing authority to the Navajo Nation, Tulalip Tribe, and others) *with* 25 U.S.C. § 415(h) (outlining the general opt-in mechanism by which “any Indian tribe” can lease without federal approval). The authority permits tribes to approve “business or agricultural lease[s]” for twenty-five-year terms, with two possible twenty-five-year renewal periods, and “lease[s] for public, religious, educational, recreational, or residential purposes” for seventy-five-year terms. 25 U.S.C. § 415(h)(1).

153. 25 U.S.C. § 415(h)(1).

more than a century of pervasive federal control, tribal capacity building is surely an iterative process. If part of a coordinated strategy of ongoing evolution and transformation, these reforms may be beneficial, but if not, they may be deceptive half-measures that could have perverse consequences. Three primary critiques reveal that these reforms, if left as is, may further cement—or even exacerbate—existing system challenges.

### 1. *Ownership, Not Sovereignty*

First, in nearly every case where the BIA has cut out a federal approval step to improve the reservation land tenure system, the changes have applied only to tribal trust lands. They have not applied to any other property within reservation boundaries. The one exception is the regulatory carve-out for certain permits (temporary use rights) on any Indian land within a reservation, which applies to both allotments and tribally owned trust lands.<sup>154</sup> All the other recent land reforms described above are limited to tribally owned lands.<sup>155</sup>

Eliminating a federal approval step can expedite tribal land transactions, but facilitating decisions about the use of one's own assets is really ownership, not governance. There is a critical difference between the freedom and autonomy that a landowner enjoys via the sovereign's protection of her delegated *property* rights and the governance, dominion, and authority a sovereign yields over its *territory*, irrespective of ownership.<sup>156</sup> Tribal governments often experience a perverse conflation of their own ownership rights with broader sovereign governance rights. In efforts like these purporting to support tribal *sovereignty*, federal reforms limit tribal discretion to instances in which the tribe is itself already the *owner* of the property at issue. This means not only that tribal governments have no or limited jurisdiction over non-Indian property within reservations, but also that in many instances their governance authority is precluded for even individual allotments owned by a tribe's own citizens.

It could be that these ownership-based examples of increased tribal autonomy over tribal lands are a logical first step in a larger strategy to improve tribal capacity and to build a foundation for future tribal governance, but unfortunately, this does not seem to be the path we are on. Other acts predating the HEARTH Act were on their face intended to promote tribal self-

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154. See 25 C.F.R. § 162.003 (extending “[p]ermit” definition to cover rights on “Indian land,” which in turn includes “any tract . . . owned by a tribe or individual Indian in trust or restricted status”).

155. See, e.g., 25 U.S.C. § 415(h)(2) (stating that the HEARTH Act “shall not apply to any lease of individually owned Indian allotted land”); *id.* (limiting “[t]ribal land assignment” definition to “rights for the use of tribal lands, assigned by an Indian tribe in accordance with tribal laws or customs”).

156. See 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, 35 (1995) (“[I]ndividuals own title to property; sovereigns hold dominion over territory. Individuals are subject to sovereigns; property is a subset of territory. Sovereigns issue patents to title; individuals merely convey title by deed. Sovereigns ‘take’ title by eminent domain; individuals can do no such thing.”).



determination through land-based governance over a broader collection of reservation properties, not just tribally owned trust properties. But they have been implemented in a way that limits true land tenure flexibility.<sup>157</sup> For example, in 1993, Congress passed the American Indian Agricultural Resource Management Act (AIARMA),<sup>158</sup> which delineates the Secretary of the Interior’s authorities relating to the “management of Indian agricultural lands” in an effort to “promote the self-determination of Indian tribes.”<sup>159</sup> Specifically, AIARMA allows tribes to develop an “agriculture resource management plan.”<sup>160</sup> If a tribe’s plan is approved, AIARMA directs the Secretary to follow the tribal “goals and objectives set forth in the [plan].”<sup>161</sup>

Compared to other statutes, such as the HEARTH Act, which are limited to only tribally owned lands, AIARMA is unique because it applies to “Indian agricultural lands,”<sup>162</sup> which include both tribal and individually owned “Indian lands.”<sup>163</sup> In the case of AIARMA, “Indian lands” include both tribal trust lands and other tribal and individual lands, like allotments, that are subject to restraints on alienation.<sup>164</sup> Thus, agricultural resource management plans are supposed to be mechanisms for tribal governments to articulate policy and management priorities for *both allotted and tribal trust lands*.

The extent to which this requirement has been implemented, however, is unclear. Some experts have suggested that the BIA has not implemented AIARMA as Congress intended.<sup>165</sup> In DOI regulations for agricultural leases, for

157. *E.g.*, Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–08 (facilitating more tribal autonomy to negotiate and participate in novel ways in a broader range of energy agreements, but still subject to the approval of the Secretary of Interior for each individual agreement); National Indian Forest Resource Management Act of 1990, 25 U.S.C. §§ 3101–20 (allowing for more tribal input in forestry decisions).

158. Pub. L. 103-177, 107 Stat. 2011 (1993) (codified as amended at 25 U.S.C. §§ 3701–46).

159. *See* 25 U.S.C. § 3702(1) (noting that one of the purposes of AIARMA is to “promote the self-determination of Indian tribes by providing for the management of Indian agricultural lands and related renewable resources in a manner consistent with identified tribal goals and priorities”).

160. *Id.* § 3711(b).

161. *Id.* § 3712(a); *see also id.* § 3711(b)(1)(C) (noting that the plan shall “identify specific tribal agricultural resource goals,” as well as the tribe’s “critical values” and “holistic management objectives”).

162. *See id.* § 3715.

163. *Id.* § 3703(1) (defining “Indian agricultural lands” as “Indian land . . . that is used for the production of agricultural products, and Indian lands occupied by industries that support the agricultural community”).

164. *Id.* § 3703(9) (defining “Indian land” as “land that is (A) held in trust by the United States for an Indian tribe; or (B) owned by an Indian or Indian tribe and is subject to restrictions against alienation”); *see also* 25 C.F.R. § 162.101 (2018) (defining “Indian land” in agricultural leasing regulations that implement AIARMA as “any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status”).

165. NATIVE FARM BILL COALITION, INDIAN COUNTRY PRIORITIES AND OPPORTUNITIES FOR THE 2018 FARM BILL: TITLE I: COMMODITIES \*35 (2017), [www.ncai.org/NFBC\\_Policy\\_Recommendations.pdf](http://www.ncai.org/NFBC_Policy_Recommendations.pdf) [<https://perma.cc/5SR9-32KN>] (noting that the “[AIARMA] has never been fully implemented, and only a few tribes and individual Indian landowners have placed a plan in motion”); *see also* COHEN’S HANDBOOK, *supra* note 54, § 17.02[5][c] n.67

example, tribal law only supersedes relevant federal regulations when specific conditions have been met, and then only as applied to “tribal land.”<sup>166</sup> In other words, by regulation, DOI continues to limit the role of the tribe to that of an owner, not a sovereign.

This all may reflect DOI’s ongoing concerns about its own trust responsibility to individual owners and its desire to avoid any further liability.<sup>167</sup> It may fear that individual owners, unhappy with tribal land decisions, will respond by suing DOI. But reconciling this potential conflict between tribal governments and allottees is exactly what ultimately needs to occur if self-determination and tribal sovereignty is really the goal.<sup>168</sup>

## 2. *The Consistency Trap*

Self-determination through governance, as opposed to ownership, would include the right to define the parameters of reservation property institutions and to set other land use policies to achieve social, economic, and environmental priorities across a physical territory, without regard to who owns what parcel within that territory. Current rules reflecting checkerboard jurisdiction realities—with tribal governments generally limited in their ability to regulate lands owned by non-Indians—already make this a challenge.<sup>169</sup> On the other hand, the Supreme Court has elsewhere recognized inherent tribal authorities—which predate and are separate from the US Constitution—to zone whole areas of a reservation (including non-Indian fee lands and allotted lands within that area) if those areas still maintain a predominantly Indian character.<sup>170</sup> The

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(reporting that by fiscal year 2006 resource management plans under AIARMA had been completed for only twenty percent of agricultural and grazing lands).

166. 25 C.F.R. § 162.109(b); *see also id.* § 162.101 (defining “[t]ribal land” in the context of agricultural leases as tribal trust land or tribally owned land that is subject to federal restrictions). The scope of this exclusion is unclear, however, because for some matters of tribal agricultural leasing law, the BIA appears to take an opposite position, assuming individual agricultural allotments are governed by tribal leasing laws unless these individual owners affirmatively opt out of tribal governance. *See* 25 C.F.R. § 162.205 (providing procedure for individual Indian landowners to opt out of some tribal agricultural leasing policies).

167. Individual trust beneficiaries have successfully sued the Department of Interior in related contexts. *See, e.g., supra* note 81 and accompanying text (discussing \$3.9 billion *Cobell* settlement for DOI’s inability to account for who owns what); *see also* *Babbitt v. Youpee*, 519 U.S. 234, 242–43 (1997) (finding unconstitutional taking of heirs’ and devisees’ rights to tiny fractional interests after federal government attempted to require that the land escheat as anti-fractionation measure); *Hodel v. Irving*, 481 U.S. 704, 717 (1987) (same).

168. *See, e.g., Washburn, supra* note 88, at 230–31 (identifying the reconciliation of potential conflicts between tribal self-governance priorities and the federal government’s trust responsibility to individual allotment owners as a priority for the continued “renaissance” of tribal sovereignty).

169. *See* *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 321 (2008); Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 787 (2014). For further discussion of the property-based jurisdiction differences specifically, *see* Shoemaker, *Emulsified Property, supra* note 27, at 964–66.

170. *See* *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408, 423–25, 428–32 (1989). Tribes also have a range of other recognized sovereign authorities—including regulating their own membership, enforcing criminal laws against tribal citizens (and, in some cases under recent

significant challenge is that, even on trust lands that are more soundly within tribal authority, recent federal reforms seem to further limit tribal autonomy and choice about land use reforms.<sup>171</sup>

To the extent federal reforms purport to support self-determination rights of tribes, one might expect more tribal autonomy not only in the types of properties subject to tribal law, but also in the degree of discretion tribes retain for the laws they promulgate. Unfortunately, this is another area where current reforms fall flat. For example, under the HEARTH Act, a tribe can only escape the requirement of lease-by-lease Secretarial approvals for some tribal trust leases if it can first get the Secretary to approve of its tribal leasing regulations. However, the Secretary will only approve the tribal regulations if they are deemed “consistent with” existing federal leasing regulations for the same properties.<sup>172</sup> This means that the tribe can act independently over the lands it already owns, but only if the tribe’s pre-written rules are themselves the same as—or at least “consistent with”—federal rules.<sup>173</sup> This is neither self-determination nor sovereignty.<sup>174</sup>

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VAWA reforms, nonmembers), regulating businesses within the reservation, and other core governance authorities. *See generally* COHEN’S HANDBOOK, *supra* note 54, § 4.01 (summarizing inherent sovereignty of American Indian tribes and general scope of tribal powers).

171. For a similar critique of these measures based on specific reform experiences within the Navajo Nation, see Josephine Foo, *The HEARTH Act of 2012 and the Navajo Leasing Act of 2000: Financial and Self-Determination Issues*, AM. BAR ASS’N (Jan. 3, 2019), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/nar/20190103-the-hearth-act-of-2012](https://www.americanbar.org/groups/environment_energy_resources/publications/nar/20190103-the-hearth-act-of-2012) [<https://perma.cc/Y2K8-3UBN>].

172. 25 U.S.C. § 415(h)(3) (2012).

173. *Id.* Depending on how they are interpreted, these rules can cover everything from when appraisals are required to how leases are defined, for what purposes, and under what conditions. *See* 25 C.F.R. pt. 162 (2018). The Obama administration issued an interim policy that called for BIA personnel to use the maximum tribal deference and discretion allowed in reviewing tribal leasing regulations under the HEARTH Act, but this guidance expired in 2014. *See* BUREAU OF INDIAN AFFAIRS, NPM-TRUS-29, GUIDANCE FOR THE APPROVAL OF TRIBAL LEASING REGULATIONS UNDER THE HEARTH ACT 2 (2013) [hereinafter BIA INTERIM GUIDANCE FOR TRIBAL LEASING REGULATIONS], [https://www.bia.gov/node/4488/national\\_policy\\_memoranda/attachment/newest](https://www.bia.gov/node/4488/national_policy_memoranda/attachment/newest) [<https://perma.cc/VAW4-CVMG>] (“In determining whether tribal regulations are ‘consistent with’ BIA-leasing regulations, ‘consistency’ is to be interpreted in a manner that maximizes the deference given to the tribe.”) It is not yet clear whether the policy is still applied under the Trump Administration, although it has technically expired. Notably, the HEARTH Act was enacted against a history of prior Congressional debates that considered, but never adopted, broader and more flexible tribal land tenure authorities. *See* Monette, *supra* note 156, at 58–59 (discussing this history).

174. In addition, under the HEARTH Act, tribal leasing regulations must “provide for an environmental review process that includes” an opportunity for public comment. 25 U.S.C. § 415(h)(3)(B). Many legal scholars have critiqued this requirement as intrusive and potentially overly burdensome for tribes. *See, e.g.*, Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, but Collectively Deficient, Option*, 55 ARIZ. L. REV. 1031, 1054–59 (2013); *see also* Monte Mills, *Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy*, 6 AM. INDIAN L. J. 35, 66–68 (2017); Judith V. Royster, *Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91, 122 (2012).

This model of incubating and training the tribe to stand in the shoes of the BIA has been tried, and critiqued as a half-measure, in the past.<sup>175</sup> Since 1975, the Indian Self-Determination and Education Assistance Act (ISDEAA) has allowed tribes to take “increased control over the management of federal programs that impact their members, resources and governments.”<sup>176</sup> Tribes can take over administration of certain federal programs through agreements colloquially called 638 contracts or self-governance compacts.<sup>177</sup> In essence, these agreements allow tribes to use federal funding to take over the administration of certain BIA functions—but generally subject to BIA procedures and standards.<sup>178</sup> Although historic experience has shown that tribes who administer BIA programs can, and often do, produce better results than non-tribal BIA program managers,<sup>179</sup> federal contracts and compacts still do not give tribes administering federal programs a full range of choices in establishing priorities and developing policies.<sup>180</sup>

With respect to real property, tribes can enter 638 contracts or self-governance compacts with the Office of Special Trustee for American Indians (OST) to administer the federal appraisal services that would otherwise be

175. See, e.g., Cornell & Kalt, *supra* note 68, at 9 (critiquing self-determination policies that have failed to give tribes “a major role in determining what [federal] programs look like or whether the policies that drive those programs are appropriate”); George S. Esber, Jr., *Shortcomings of the Indian Self-Determination Policy*, in *STATE AND RESERVATION: NEW PERSPECTIVES ON FEDERAL INDIAN POLICY* 212, 221 (George Pierre Castile & Robert L. Bee eds., 1992) (“The Indian Self Determination Act is not a self-determination policy but an invitation to participate.”).

176. Office of the Special Trustee for Am. Indians, *Public Law 93-638 Contracting & Compacting*, U.S. DEP’T INTERIOR, [https://www.doi.gov/ost/tribal\\_beneficiaries/contracting](https://www.doi.gov/ost/tribal_beneficiaries/contracting) [<https://perma.cc/Z94F-D6UV>]; see also Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, tit. I, § 102–10, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5321–32).

177. See, e.g., COHEN’S HANDBOOK, *supra* note 54, § 22.02[1]–[3] (summarizing scope evolution of 638 contract and self-governance compact options). “Self-[d]etermination contracts” are authorized by the 1975 Act, and “[s]elf-[g]overnance compacts” are authorized by the 1994 amendments to the ISDEAA. *Id.*; see also ISDEAA of 1975, Pub. L. No. 93-638, tit. I, §§ 102–10, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5321–32) (“Indian Self-Determination”); Indian Self-Determination Act Amendments of 1994, Pub. L. 103-413, tit. IV, §§ 401–09, 108 Stat. 4250 (1994) (codified as amended at 25 U.S.C. §§ 5361–68 (2012)) (“Tribal Self-Governance”); see also *Public Law 93-638 Contracting & Compacting*, *supra* note 176.

178. See, e.g., COHEN’S HANDBOOK, *supra* note 54, § 22.02[2]–[3], [5] (discussing scope of tribal discretion under self-determination contracts and self-governance compacts and funding levels for each); see also 25 U.S.C. § 5321 (outlining 638 contract authorities, including funding limits); *id.* § 5363 (outlining annual lump-sum funding parameters for self-governance compacts).

179. For example, when forested tribes used these contracts to take control of their forest resources, tribes harvested forty percent more timber and obtained higher prices than the BIA had done when it controlled timber management. Matthew B. Krepps, *Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry*, in *WHAT CAN TRIBES DO?: STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* 179, 182–83 (Stephen Cornell & Joseph P. Kalt, eds. 1992); Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1069 (2008).

180. Royster, *supra* note 179, at 1070; see also Cornell & Kalt, *supra* note 68, at 9.

provided by the Office of Appraisal Services (OAS).<sup>181</sup> Tribes can also negotiate to administer other financial trust services provided by OST and to take on trust records management duties.<sup>182</sup> In terms of surface leasing, BIA regulations permit tribes to “contract or compact under the [ISDEAA] to administer” only those portions of part 162 “that [are] not an approval or disapproval of a lease document, waiver of a requirement for lease approval (including but not limited to waivers of fair market rental and valuation, bonding, and insurance), cancellation of a lease, or an appeal.”<sup>183</sup> The rest are deemed “inherently [f]ederal” duties that cannot be contracted to a tribe.<sup>184</sup>

One of the key purposes of the HEARTH Act was to eliminate this federal role and allow for more tribal autonomy in surface leases—including the actual approval choices themselves (albeit only on tribal lands).<sup>185</sup> The requirement that these tribal regulations still be “consistent with” federal leasing regulations, however, risks repeating this “become the BIA” pattern—in a sense incubating these emerging tribal realty offices to grow into replicas of the BIA bureaucracy. Even worse, although the ISDEAA allows tribes with 638 contracts to receive federal funding to operate programs that the BIA would have otherwise operated,<sup>186</sup> the HEARTH Act does not provide federal funding to tribes who

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181. See *Public Law 93-638 Contracting & Compacting*, *supra* note 176; see also U.S. Dep’t of Interior, *About the Office of Appraisal Services*, OFFICE SPECIAL TRUSTEE FOR AM. INDIANS, [https://www.doi.gov/ost/OAS/about\\_oas](https://www.doi.gov/ost/OAS/about_oas) [<https://perma.cc/TE92-8SLX>].

182. See KAREN EDWARDS ET AL., FIRST NATIONS DEV. INSTITUTE & NAT’L CONG. OF AM. INDIANS POL’Y RESEARCH CTR., EXERCISING SOVEREIGNTY AND EXPANDING ECONOMIC OPPORTUNITY THROUGH TRIBAL LAND MANAGEMENT 10, 16 (2009), <http://www.ncaiprc.org/files/LTROReportforwebposting2.pdf> [<https://perma.cc/3MXV-XHJM>] (describing examples of tribes that have successfully contracted to take over land title and records functions from the BIA); *Public Law 93-638 Contracting & Compacting*, *supra* note 176; see also OFFICE OF SELF GOVERNANCE, 2017 SELF-GOVERNANCE NEGOTIATION GUIDANCE FOR BIA PROGRAMS 17–18 (2016), <http://www.tribalselfgov.org/wp-content/uploads/2015/06/2017-Self-Governance-Negotiation-Guidance-for-BIA-Programs.pdf> [<https://perma.cc/H2C2-F3CP>] (outlining special funding agreement terms regarding trust records management that are required when tribes want to manage trust programs).

183. 25 C.F.R. § 162.018 (2018).

184. 25 U.S.C. § 5363(k) (precluding any Secretarial authority to delegate “inherently Federal” functions to tribes).

185. See, e.g., COHEN’S HANDBOOK, *supra* note 54, § 21.02[3] (stating that with the HEARTH Act, “tribes now determine for themselves in the first instance which lands will be leased and for what purpose”); BIA INTERIM GUIDANCE FOR TRIBAL LEASING REGULATIONS, *supra* note 173, at 2 (“The clear intent of the [HEARTH] Act is to provide tribes with the opportunity to exercise their inherent sovereignty in drafting regulations to meet their particular needs and to expedite the leasing process.”).

186. See *supra* note 178 and accompanying text.

voluntarily assume BIA leasing authorities,<sup>187</sup> making the HEARTH Act, in one view, an “unfunded” version of a 638 contract.<sup>188</sup>

Other federal land-related reforms have followed similar models of purporting to promote tribal self-determination, but only narrow, specific types of self-determination that follow federal priorities. The following three examples are illustrative.

In 2012, the BIA issued several leasing regulations that purported to require BIA compliance with tribal laws and policies in federal leasing procedures.<sup>189</sup> However, compliance was required only to the extent that tribal laws and policies did not conflict with a superseding federal law or policy.<sup>190</sup>

In 2004, Congress recognized the right of “any Indian tribe” to “adopt a tribal probate code to govern descent and distribution” of applicable lands after an Indian landowner’s death.<sup>191</sup> However, the Secretary must approve the tribal probate code before enactment.<sup>192</sup> The Secretary cannot do so unless the code is consistent with “section 102 of the Indian Land Consolidation Act Amendments of 2000.”<sup>193</sup>

187. See Foo, *supra* note 171 (describing “tribal administration of leases” under the HEARTH Act as “an unfunded option” and critiquing this lack of federal funding in light of significant costs and benefits of lease administration likely taken on by participating tribes); see also *id.* (noting that the HEARTH Act still requires tribes to comply with “the basic framework of the act” and leaves “only so much room for a tribe to tailor its lease law to community needs”).

188. *Id.* (contrasting unfunded tribal leasing under the HEARTH Act with funded 638 contracts). Despite this critique, others view the HEARTH Act as an “advancement in self-governance.” Kelli Mosteller, *For Native Americans, Land is More Than Just the Ground Beneath Their Feet*, ATLANTIC (Sept. 17, 2016), <https://www.theatlantic.com/politics/archive/2016/09/for-native-americans-land-is-more-than-just-the-ground-beneath-their-feet/500462> [<https://perma.cc/B9CA-AFB4>]; see also Bryan Newland, *The Hearth Act: Transforming Tribal Land Development*, THE FED. LAW. 66, 70 (2014) (“The HEARTH Act marks one of the largest shifts in federal Indian leasing policy in the past century.”).

189. See, e.g., 25 C.F.R. § 162.016 (2018) (noting that “BIA will comply with tribal laws in making decisions regarding leases”); *id.* § 162.107(b) (noting that the BIA will “prepar[e] and advertis[e] leases in accordance with applicable tribal laws and policies” when tribes have “jurisdiction over the land to be leased”); see also Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162 (2018)) (final rule) (noting that BIA’s leasing regulations “require significant deference . . . to tribal determinations”); *id.* at 72,448 (recognizing that “tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land”).

190. See, e.g., 25 C.F.R. § 162.016 (“Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.”) (emphasis added).

191. 25 U.S.C. § 2205(a)(1) (2012).

192. *Id.* §§ 2205(b)(1)–(2)(A).

193. *Id.* § 2205(b)(2)(C). This means that tribal probate codes must (1) “prevent further fractionation of trust allotments”; (2) “consolidate fractional interests and ownership of those interests into usable parcels”; (3) “consolidate fractional interests in a manner that enhances tribal sovereignty”; (4) “promote tribal self-sufficiency and self-determination”; and (5) “reverse the effects of the allotment policy on Indian tribes.” Indian Land Consolidation Act Amendments of 2000, Pub. L. 106-462, tit. I, § 102, 114 Stat. 1991 (2000) (codified at 25 U.S.C. § 2201 note (Declaration of Policy)); see also 25 U.S.C. § 2205(b)(2)(C) (requiring codes to be consistent with “section 102 of the Indian Land Consolidation Act Amendments of 2000”).

In 2005, Congress authorized tribes to “enter into a lease or business agreement for purpose of energy resource development on tribal land”<sup>194</sup> without Secretarial review or approval of individual transactions. Again, however, this authorization applies only as long as the tribe’s decision falls within certain parameters and is executed pursuant to a pre-approved “tribal energy resource agreement” (TERA).<sup>195</sup> TERAs are intended to “govern[] leases, business agreements, and rights-of-way” related to covered energy developments.<sup>196</sup> TERAs do not have an explicit consistency hook, but the process for getting approval for a TERA is considered to be so “complex” and “confusing” that “it has likely deterred tribes from seeking a TERA.”<sup>197</sup> As of 2015, no tribe had entered into a TERA.<sup>198</sup>

Many of these federal restrictions, including those in DOI’s own leasing regulations and probate procedures, amount to a version of federal preemption. In some cases, this preemption makes sense. Especially where property rights are defined for third-party transactions or federal loan guarantees, uniformity may be efficient for federal expenditures.<sup>199</sup> However, sometimes—under the HEARTH Act, for example—consistency contains vestiges of unnecessary federal control, without federal liability or tribal benefit, at the expense of otherwise viable tribal sovereign choices. Under such circumstances, a tribe lacks the flexibility to really *determine* its own land tenure priorities.

One possible source of future tribal flexibility may exist in Title II of the Indian Trust Asset Reform Act of 2016 (ITARA). Title II requires the Secretary to set up a ten-year “Indian trust asset management demonstration project,” in which tribes can apply to take a more active role in trust asset management.<sup>200</sup> DOI began implementing the Demonstration Project on October 1, 2018, and has begun accepting tribal applications for participation.<sup>201</sup> Many details about the

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194. 25 U.S.C. § 3504(a).

195. *Id.* § 3504(d).

196. *Id.* § 3504(e).

197. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-502, INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT ON INDIAN LANDS 33 (2015) [hereinafter GAO, INDIAN ENERGY DEVELOPMENT]. The TERA approval process includes multiple submissions, *see* 25 C.F.R. §§ 224.54–57 (2018); a detailed agency evaluation of the energy development capacity of a submitting tribe, *see id.* § 224.73; a public comment period, *see id.* §§ 224.67–68; and an assessment of the potential environmental impacts under the National Environmental Policy Act, *see id.* § 224.70. In addition, the TERAs themselves must establish an environmental review process that gives the public notice and “an opportunity to comment on . . . the environmental impacts of the proposed action.” 25 U.S.C. § 3504(e)(2)(C)(iii)(I).

198. GAO, INDIAN ENERGY DEVELOPMENT, *supra* note 197, at 5.

199. *See supra* note 138 and accompanying text (discussing experience of growth in HUD loan guarantees).

200. Indian Trust Asset Reform Act, Pub. L. 114-178, tit. II, § 203, 130 Stat. 432 (2016) (codified at 25 U.S.C. § 5612).

201. Letter from Tara Sweeney, Assistant Sec’y, Bureau of Indian Affairs, to “Tribal Leader”, Oct. 1, 2018 (announcing “the establishment of the Demonstration Project”), [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/10-1-18.ITARA-DTLL-Final\\_508.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/10-1-18.ITARA-DTLL-Final_508.pdf) [<https://perma.cc/AR3C-LSKE>].

program's implementation remain to be determined. For example, some provisions suggest that at least part of a tribe's plan would have to comply with HEARTH's consistency requirement.<sup>202</sup> Other provisions, however, suggest that in some cases tribes could seek waivers of some federal regulations in exchange for also waiving any federal liability.<sup>203</sup> The ten-year limit on the project may also deter tribal investment, but if implemented broadly, ITARA could provide an entry point to more holistic tribal property reforms.<sup>204</sup>

### 3. *More Bureaucratic Complexity*

Finally, it is important to think about the difference between federal land reforms that truly open a flexible pathway for tribal governments' engagement in a broader project of tribal capacity-building and land tenure innovation, and federal reforms that box in tribal governments with ever-more subcategories of bureaucratic land tenure rules. Property norms tend to evolve naturally over a long series of repeat interactions, and true change requires federal reforms that meaningfully create flexible space for this kind of grassroots property experimentation and more immediate land use decision-making.<sup>205</sup> But complexity has a way of bearing down on this regime in particular, and at least some federal land reforms seem more micromanaging than space-clearing.

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202. See 25 U.S.C. § 5614(b)(2)(A) (authorizing Secretarial approval of tribe's trust asset management plan with respect to "surface leasing transactions" so long as tribal regulations comply with the HEARTH Act); see also *id.* § 5614(b)(2)(B)(i) (authorizing Secretarial approval of a tribal trust asset management plan with respect to "forest land management activities" so long as the tribe has adopted its own regulations that are also "consistent with the regulations of the Secretary adopted under the National Indian Forest Resources Management Act").

203. For example, the statute disclaims federal liability "to any party (including any Indian tribe) for any term of, or any loss resulting from the terms of, an Indian trust asset management plan that provides for management of a trust asset at a less-stringent standard than the Secretary would otherwise require or adhere to in absence of an Indian trust asset management plan." 25 U.S.C. § 5615(b). This at least implies that the statute contemplates the Secretary's approval of a plan that deviates from standard agency practices for asset management. See *id.*

204. More recent proposed US legislation suggested a conversion to a new baseline "restricted fee" tenure form, with significantly more tribal flexibility to grant easements or rights of way on top of the federal title without any federal oversight or preemption whatsoever. American Indian Empowerment Act of 2017, H.R. 215, 115th Cong. (2017). Though a hearing was held with general support for some version of this approach, the bill has not passed. See, e.g., *American Indian Empowerment Act of 2017: Hearing on H.R. 215 Before Comm. Nat'l. Res.*, 115th Cong. (2017) (statement of Cris E. Stainbrook, President of Indian Land Tenure Foundation) (testifying that the American Indian Empowerment Act of 2017 "will open considerable opportunities for the many of the Native nations ILTF works with but will not be suitable for other Native nations," and "each Native nation will make the decision to participate or not"). There is also some precedent from Canada, where First Nations have in recent years had the option under the First Nations Land Management Act to adopt land codes addressing leasing and other matters within reserves with much more flexibility and autonomy as to the terms of those land codes. See Malcolm Lavoie & Moira Lavoie, *Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act*, 54 OSGOODE HALL L. J. 559, 567–71 (2017) (outlining the range of First Nations choices within this regime).

205. See *infra* Part IV.B.



For example, in prior work, I have examined how recent land reforms continue to hypercategorize Indian property and sovereignty variables.<sup>206</sup> In the tribal trust reforms discussed above, for example, tribal autonomy tends to be limited to specific forms of transfers (e.g., transfers only of leaseholds and only for specific purposes),<sup>207</sup> and for inflexibly defined durations (e.g., rules slicing tribal autonomy into seven-year, twenty-five-year, or other specific segments of time).<sup>208</sup> Different statutory regimes apply depending on how the land transaction is classified, with different rules for surface versus mineral leases versus other business contracts or encumbrances.<sup>209</sup> Sometimes surface leasing rules further depend on whether the lease is for agricultural or nonagricultural purposes, and nonagricultural leases are further subdivided into renewable energy, housing, business, and religious or charitable leases.<sup>210</sup> Grazing permits get a whole different chapter of the federal register, and forestry and minerals are also an entirely different regulatory subject.<sup>211</sup>

The BIA has a way of maintaining its grip on land transactions, even where the stated purpose is greater tribal autonomy. For example, in the context of the HEARTH Act, it is unclear why—given the federal waiver of liability—the BIA still requires lease copies, records of lease payments, and ongoing, proactive federal review of a tribe’s compliance with its own regulations.<sup>212</sup> If the BIA is worried about tribal error in some way, it could perhaps preserve a cause of action for lessees to appeal tribal decisions to a federal agency for a particular

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206. See, e.g., Shoemaker, *Complexity’s Shadow*, *supra* note 6, at 487, 522–31 (discussing recent trend in federal Indian land reforms to “hypercategoriz[e] property and sovereignty interests” in allotments specifically).

207. See, e.g., *supra* notes 194196 and accompanying text (describing federal authorities specific to qualifying energy development transactions); *supra* note 200202 and accompanying text (describing recent federal programs limited to specific forest management activities and to surface leases only).

208. See, e.g., *supra* notes 142143 (describing specific authorities in seven- and twenty-five-year increments) and note 152 (describing seventy-five-year lease options).

209. See, e.g., 25 C.F.R. § 84.004 (2018) (listing multiple categories of “contracts and agreements that do not require Secretarial approval”).

210. See 25 C.F.R. pt. 162.

211. See, e.g., 25 C.F.R. pt. 166 (grazing permits); 25 C.F.R. pt. 163 (forestry regulations); 25 C.F.R. pt. 211 (leasing tribal lands for mineral development).

212. Compare 25 U.S.C. § 415(h)(7) (2012) (federal waiver of liability) with *id.* § 415(h)(6) (requiring tribe to provide the Secretary with copies of approved leases and, in some cases, documentation of lease payments made to the tribe) and *id.* § 415(h)(8) (allowing Secretary, upon petition by an interested party, to review tribal compliance with the tribe’s own leasing regulations and take action to remedy the violation). Likewise, in the energy-specific context discussed above, tribes must also provide copies of any transactions executed under a TERA to DOI, and DOI will monitor direct tribal payments. See, e.g., 25 U.S.C. § 3504(e)(5) (requiring tribes to provide specific categories of lease and payment documents to the Secretary). DOI also retains significant authorities to supervise, investigate, and even rescind tribal authorities if the tribe does not comply with the TERA—including the authority to hear and act on independent party complaints about tribal actions to the Secretary of Interior. See, e.g., 25 U.S.C. § 3504(e)(2)(D)(i) (providing for periodic Secretarial review to monitor tribal performance under the TERA); *id.* § 3504(e)(2)(B)(iii)(XII)(bb) (requiring lease provisions that provide the Secretary with authority to rescind or take other action to remedy lease or other agreement violations); *id.* § 3504(e)(7) (authorizing Secretary to investigate and resolve third-party complaints regarding tribal compliance). All in the name of furthering tribal “self-determination.” *Id.* § 3502.

period of time and on particular grounds. But ongoing review and oversight like this, where there is no federal liability and no federal investment of any kind, is micromanagement.

Likewise, the recent recognition of more flexibility with respect to “permits” (limited use rights) on trust lands has potential to create flexible spaces for local innovation. The regulation endorsing these flexible permit rights, however, still requires the BIA’s prior review of every proposed permit to ensure that the proposed transaction is in fact a “permit” and not a “lease” for which federal approval and other bureaucratic administration is required.<sup>213</sup> This pre-approval step negates the goals of flexibility and efficiency because now, even in a transaction proclaimed to be outside the scope of BIA authority, tribes must submit the transaction to the BIA.<sup>214</sup> This cements the BIA’s role even in this effort to increase landowner autonomy and tribal control, and therefore limits landowner and tribal flexibility.

In sum, although recent trust land reforms may reduce some inefficiencies and modernize many aspects of the federal trust system, these reforms often fall far short of truly supporting tribal self-determination. Instead of promoting flexible tribal land governance, these reforms limit tribal choices to those concerning lands in tribal ownership, and constrain tribal decisions with pervasive requirements that they be consistent with federal procedures and priorities. Moreover, rather than removing the federal government from the equation, recent trust land reforms serve to further entrench federal roles and federal oversight, even while proclaiming the goal of tribal self-determination. These reforms have not created sufficient space for tribes to creatively reinvent and improve reservation land dynamics.

### III.

#### DEEP PROPERTY DYNAMICS

Both of the current strategies—(1) merging trust property into existing state-based fee systems, and (2) more modest tinkering in a way that may incubate tribal governments into unfunded arms of the BIA—speak to deep assumptions about how property systems operate and what land reform can realistically achieve. This Section considers how instincts about property’s need for standardization and stability have formed natural, if implicit, boundaries in

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213. 25 C.F.R. § 162.007(a)(2) (requiring tribes to “[s]ubmit all permits to . . . allow [the BIA] to maintain a copy” and determine if the document “meet[s] the definition of ‘permit’”).

214. It certainly may be difficult in practice to distinguish “use” from “possession,” and in this case, entire regulatory regimes turn on the difference. If it is a qualifying temporary use, the right is subject exclusively to tribal law, but if it is a possessory right, the whole federal regime takes effect. Compare 25 C.F.R. § 162.007 (explaining that permits do not require federal approval) with *id.* § 162.005 (explaining when federal regulations apply to “leases”) and *id.* § 162.003 (defining lease as granting “a right to possess Indian land, for a specified purpose and duration”). The rules should at least allow tribal governments to make that determination first and only invite BIA involvement if and when actual conflict arises.

the current property reform debate. This Section also challenges the veracity of these assumptions by demonstrating property's deep potential for pluralism and dynamism.

### A. *Property's Limits*

Standardization and stability are two fundamental drivers of property system design, but both can be antithetical to property system change. This Section explores how assumptions implicit in these narratives—including the primacy of economic efficiency in property design—covertly drive much of the current American Indian land tenure debate.

#### 1. *Standardization*

Property is fundamentally a collection of legal rights to valuable resources, and one function of property institutions is to operate as a kind of common currency in market economies. By emphasizing standardization demands, we assume that property rights need to be uniformly packaged to facilitate efficient market transactions for these resources.<sup>215</sup> The more uniform property institutions are, the easier it is to negotiate transfers of these rights across numerous actors.<sup>216</sup> Standardized institutions set collective expectations about resource entitlements and reduce information costs by creating a single property-law language or currency.<sup>217</sup> The term “fee simple,” for example, is a near-universal language for a specific package of property rights, and this uniformity reduces transaction-related information costs.<sup>218</sup> We aren't bogged down by having to do a lot of extra investigation to understand bespoke sets of rights.

Standardization drives much of the current land tenure trajectory in Indian country in interesting ways. Lack of standardization can be blamed for some of the current poverty-producing effects of the existing trust-property system. Not

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215. Property standardization is enforced by the *numerus clausus* principle, a central feature of property law across regimes, which prohibits individual rights holders from creating novel, customized property institutions. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000) (“A central difference between contract and property concerns the freedom to ‘customize’ legally enforceable interests.”). *But see* Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1601 (2008) (exploring other *numerus clausus* rationales, including its use as a regulatory mechanism through which society can accommodate competing pluralist values and property functions).

216. *See* Merrill & Smith, *supra* note 215, at 8, 31.

217. *Id.*; *see also* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) (noting that because “property rights must be communicated to a wide and disparate group of potential violators,” they “must be easily comprehended and must resist possible misinterpretation”); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1114 (2003) (“[T]he adoption of recording acts and their features reflect all of the devices identified as limiting the burdens of processing on third parties.”).

218. *See* Merrill & Smith, *supra* note 215, at 8 (arguing “[s]tandardization of property rights reduces . . . measurement costs” to third parties); *see also* Meredith M. Render, *Complexity in Property*, 81 TENN. L. REV. 79, 129–30 (2013) (arguing that creating common property-law language and uniform institutions reduces social complexity).

only are Indian trust assets functionally inalienable—thus limiting their availability as credit-maximizing collateral and foreclosing some economically beneficial transactions—but they are also already nonstandard. The modern Indian property regime is complex and uncertain, and requires an additional layer of unique and difficult-to-obtain knowledge.<sup>219</sup> It does not mirror state-level fee simple private property regimes. In fact, even considering modern Indian land tenure as one single monolithic federal property law for Indian lands is wrong. Even within this already non-standard property regime, there is variation within federal law. Many tribes, or categories of tribes within certain states, have special legislation adopted exclusively for their reservation properties based on unique modern circumstances or historical events.<sup>220</sup>

This distinctiveness does add expense to some land uses in Indian country, potentially to the detriment of Indian people. Abraham Bell and Gideon Parchomovsky have identified one type of these costs as “translation costs,” which “arise[] whenever a person who possesses localized property rights seeks to make use of them outside the group or community in which they are recognized.”<sup>221</sup> Indian law’s different, and sometimes inconsistent, property law definitions increase the cost of deciphering and translating those rights to outsiders, both because of information deficiencies and because of incompatibilities between systems.<sup>222</sup>

With or without realizing it, this standardization impulse informs all the current discourse and reform attempts in Indian country. A dramatic conversion of trust assets to a state-regulated, purely privatized fee simple would certainly reduce transactions costs and make Indian property more standard—at least for transactions with third parties who otherwise interact within state-based property systems. Converting trust properties to state-based fee properties would make Indian resources more freely transferrable, more easily communicated, and more capable of swift transfer to more productive uses. This is the promise of more economic prosperity with fee simple property. It also leads to the exact outcome—transfer of Indian lands to third parties—that Indian country is most worried about.<sup>223</sup>

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219. See, e.g., Shoemaker, *Complexity’s Shadow*, *supra* note 6, at 495–511.

220. See, e.g., 25 U.S.C. § 415(a) (2012) (complex list of numerous specific leasing term-limit exceptions by reservation, pueblo, state, county, or specific allotments); *id.* § 415(b) (special leasing rules for Tulalip and other tribal governments); *id.* § 415(c) (special leasing rules for some Hopi lands); *id.* § 415(e) (special leasing rules for some Navajo lands); *id.* §§ 416–416(j) (special leasing rules for San Xavier and Salt River Pima-Maricopa Indian Reservations). Alaska, Hawaii, and Oklahoma are all home to unique Indigenous land tenure regimes, too. See, e.g., *supra* notes 123 & 142 and accompanying text (discussing examples of the same).

221. Abraham Bell & Gideon Parchomovsky, *Property Lost in Translation*, 80 U. CHI. L. REV. 515, 516, 542 (2013).

222. See *id.* at 518–19, 572.

223. See Carpenter & Riley, *supra* note 17, at 848 (“If American Indian tribes lose property, then they lose sovereignty, and vice versa; these losses compound the epic dispossession on which the country was founded.”).

Many of the actual recent federal trust reforms, like the HEARTH Act, also implicitly incorporate a standardization objective, but take a different approach. By requiring tribal leasing regulations to be consistent with existing federal rules, for example, the HEARTH Act standardizes tribal actions across multiple reservation territories, even if the entire federal frame itself remains non-standard as compared to the more familiar state-law fee simple property systems.

Ultimately, if facilitating economic transactions is the primary goal, this standardization concern is perhaps the most compelling argument against efforts to return to localized reservation-by-reservation land tenure systems. A unique reservation property regime may be standard and efficient within the local network in which it operates, but when a tribe has to interact with another property system (like the state or federal property regimes applied outside or even elsewhere on the reservation), the potential results are daunting.<sup>224</sup> But this assumes a falsely binary choice. Translation costs are only relevant in two specific circumstances: when the property institution must be transferred or communicated outside of its internal network, and when economic efficiency in third-party market transactions is a guiding concern.

Tribal governments should be able to weigh these factors for themselves, perhaps defining different property institutions for different purposes and audiences (e.g., inside the tribal community versus outside), and making different arrangements for different contexts.<sup>225</sup> We can assume tribal governments will act rationally. If the economic benefits of standardization are valuable and important within particular scenarios, tribal governments are capable of choosing to enact or maintain property models that mirror—or are otherwise easily communicated to—state systems, as the specific context warrants.<sup>226</sup>

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224. Cf. Daniel Fitzpatrick, *Fragmented Property Systems*, 38 U. PA. J. INT'L L. 137, 141 (2016) (discussing challenges of multiple property systems operating within same physical spaces).

225. Other distinctions may include whether the owners are residents or non-residents, whether they are enfranchised voters in the tribal government, and the size and type of property interests at stake.

226. Modern tribal governments encounter this challenge of how best to reclaim—and in some cases, modify—historic indigenous legal traditions in light of the current majority legal order's numerous self-determination efforts. See, e.g., Jennifer Hendry & Melissa L. Tatum, *Justice for Native Nations: Insights from Legal Pluralism*, 60 ARIZ. L. REV. 91, 103–04 (2018) (emphasizing the challenge of balancing efforts to retain traditional legal cultural features while still pragmatically ensuring feasibility of necessary translations to remainder of US legal order); Melissa L. Tatum, *Tribal Courts: The Battle to Earn Respect Without Sacrificing Culture and Tradition*, in HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE, AND RESISTANCE 81, 91–92 (Larry Catá Backer ed., 2007) (emphasizing conflict between tribal courts' needs to develop credibility within tribes and in the larger US justice system). But see Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 203–04 (2014) (positioning tribal efforts to mirror dominant legal culture as negative examples of ongoing colonization). Chief Judge Abby Abinanti of the Yurok Tribal Court has also eloquently discussed the related challenge of not so much reinvigorating old peacemaking traditions in tribal courts but, rather, reimagining what those institutions may have evolved to today in order to respond to modern issues and concerns, if not for periods of federal interventions. TRIBAL JUSTICE (MAKEPEACE PRODUCTIONS, AMERICAN DOCUMENTARY | POV, VISION MAKER MEDIA 2017); *Tribal Justice: Synopsis*,

## 2. Stability

Deep ideas about the need for property's stability over time also limit how flexibly we think about future property reforms. Like standardization, stability of property institutions can be very important if the goal of property law is to support and facilitate market transactions. Stable property rights secure the expectations of owners and non-owners in their dealings with each other about these valuable resources.<sup>227</sup> We assume that an owner is more likely to invest in and make beneficial exchanges around what they can reasonably rely on being secured to them in the future.<sup>228</sup> Too much unpredictable and volatile change, we worry, will deter investment and efficient market transactions.

This stability frame also may explain some of the current economic challenges in Indian country—although perhaps unfairly. In many cases, Indian country investments are already perceived as too risky or expensive because of the current complex and often uncertain legal regime.<sup>229</sup> Changes in Indian property regimes that cause them to be seen as even more in-flux and subject to tribally-driven change could lead to negative economic consequences. This concern may stall some efforts at reform, and is reflected in current federal trust changes. Requiring tribal consistency with the existing federal management regime, for example, serves the purpose of maintaining system-wide stability—even if the regime being preserved is already problematic.

At first glance, this stability frame seems nonexistent in any rhetoric about fee simple conversions within reservation territories. That dramatic change would upend any expectation of stability on the part of American Indian landowners. Abrupt conversion to fee simple frameworks raise major questions

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MAKEPEACE PRODUCTIONS, <http://www.makepeaceproductions.com/tribaljustice/synopsis> [<https://perma.cc/9CE9-4AAS>].

227. See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 538 (2005) (emphasizing property's role in creating stable relationships between persons and assets).

228. See, e.g., *id.* at 538, 552, 557–58 (arguing that stability is a central feature of a property system because it increases the value of the assets and facilitates desirable transactions and investments); Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 439 (2011) (explaining how the stability rationale often “reflects the prevailing, often visceral, idea that the values inherent in our system of property—rewarding investment, promoting exchange, bolstering individual identity, and fostering community—are best served by long-term stability in a legal regime on which people can rely”); Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 863 (2011) (concluding after a review of the literature that “there is little debate that the underlying purpose and goal of property law is to promote and support stability”); Merrill & Smith, *supra* note 215, at 66–68 (identifying *numerus clausus* principle as tending to promote system stability by reducing the frequency of legislative or other changes to property estates).

229. See, e.g., Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J. L. & ECON. 641, 647–48 (2008) (arguing that state courts can generate greater per capita income gains for tribal members because they supply more reliable and consistent justice). However, this work by Anderson and Parker has been critiqued for some misapprehensions of the complex federal Indian law framework at work. See Carole Goldberg, *In Theory, In Practice: Judging State Jurisdiction in Indian Country*, 81 U. COLO. L. REV. 1027, 1045–47 (2010).

about future land governance, including questions about recording (e.g., would the federal government abandon its recording function? to whom?); the definition of resulting property rights and the handling of any disputes (e.g., would fractional interest owners suddenly be at risk of state-law partition actions? adverse possession actions? in what court?); and property tax (e.g., would trust properties become taxable overnight? by what jurisdiction? at what appraised value?).<sup>230</sup> Presumably, however, in advocates' opinions, that one-time reshuffling would be justified by a state-law fee simple regime that would remain stable from there forward.<sup>231</sup>

The stability of property entitlements also serves nonmaterial purposes, including encouraging identity-reinforcing personal attachments to objects or places.<sup>232</sup> For example, Margaret Radin has emphasized that property's long-term stability facilitates the connection between property rights and individual identities that is at the core of her theory of property and personhood.<sup>233</sup> Reliance on a secure entitlement to a thing is instrumental, in Radin's view, to property's ability to help us formulate our identities by holding on to the things that we value most.

Although the particular private-property mechanism that Radin theorizes may not identify the source of some Indigenous peoples' place-based connections, related effects do impact current Indian country dynamics. In the recent federal allotment buyback program, for example, only forty-four percent of individual owners accepted offers to purchase their fractional interests at fair-market value as of 2016.<sup>234</sup> Many of the remaining owners have held out against economic pressure and seek to maintain their reservation land ownership at least in part for emotional and cultural legacy values.<sup>235</sup> Thus, remaining owners may now be even more unwilling to give up or change current entitlements.

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230. See also *infra* Part IV.A.

231. See, e.g., Anderson & Parker, *supra* note 229, at 648.

232. See, e.g., JEREMY BENTHAM, THE THEORY OF LEGISLATION 113 (C.K. Ogden ed., 1931) (1802) (describing essential role of property law in strengthening and securing an individual's expectations with regard to a thing); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 977–78 (1982) (explaining Hegel's notion of property and personhood having close ties). Other property theories also emphasize that property stability helps ensure a sphere of personal liberty buffered from government interference, which in turn secures political liberty in functioning democracies. See, e.g., Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 333–61 (1996) (reviewing multiple arguments that property rights are essential to democratic order, including the idea that “property nurtures the independence necessary for political participation” and that “a secure baseline of property” for everyone may be needed to ensure all people “have a voice in the political order”).

233. See, e.g., MARGARET JANE RADIN, REINTERPRETING PROPERTY 53–55 (1993) (suggesting that in some cases the degree to which an object relates to an individual's personhood may determine the necessary strength and stability of one's property-based entitlement to that object).

234. 2016 STATUS REPORT, *supra* note 69, at 27.

235. See, e.g., *Why I Opted Out of the Cobell Settlement*, INDIAN COUNTRY TODAY (June 5, 2011), <https://newsmaven.io/indiancountrytoday/archive/why-i-opted-out-of-the-cobell-settlement-sPRq2ATSgkqjnXpQd19XzQ> [<https://perma.cc/YLD2-5ZSJ>].

Again, however, future reform choices do not have to be limited to such binary options. The choices are not exclusively (1) lose all property-based attachments, or (2) retain allotments exactly as they are. For example, future allotment reforms could imagine wholly new tenure arrangements that reduce the costs of the current system but simultaneously allow owners to maintain their emotional and physical connection to reservation spaces.<sup>236</sup>

Finally, it is important to question how stability may be more a symptom of property than a desired function. Property, at its core, is an entitlement, and just like any vested entitlement, property rights tend to be sticky (or hard to reverse).<sup>237</sup> Owners are often unwilling to give up entitlements once endowed, and value them more highly once they are labeled as theirs.<sup>238</sup> Relatedly, property is so fundamental to our social organization that it is difficult to imagine anything else. Across reservation landscapes, leases and grazing permits have already been issued. Tribal housing projects are already clustered in specific arrangements, and mineral extraction is occurring following current federal guidelines with long-term commitments. In many ways, one of the most difficult obstacles to property transformation may simply be imagining—or, in the context of indigenous land tenure, re-imagining—a different world than the one in which we currently live.

### B. *Property's Potential*

Because of these twin influences of standardization and stability, property as a system can seem uniquely immune to reform. But when we scratch at these initial instincts, we see that the actual experience of property systems over time, and around the world, reflects a high degree of pluralism and dynamism. This Section explores this reality as a window to the broader range of available options for the future of American Indian land tenure.

#### 1. *Pluralism*

Despite our deep ideas about the need for standardizing property institutions, property institutions are highly pluralistic in practice. Even with theoretically standardizing mechanisms like *numerus clausus*, the units of property that do exist are highly malleable. This is already evident in the initial

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236. See *supra* Part.V.A.3 (providing one sample idea of how this could work in future reforms).

237. See, e.g., Bruce Ziff, *Yet Another Function for the Numerus Clausus Principle of Property Rights, and a Useful One at That*, 13 (Mar. 19, 2012) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2026088](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026088)) [<https://perma.cc/C9K3-LVPB>] (arguing for caution in creating new property rights because of difficulty in unwinding any doctrinal mistakes).

238. See, e.g., *Babbitt v. Youpee*, 519 U.S. 234, 241–43 (1997) (explaining that devisees of small fractional interests in numerous allotments objected to forced-escheat provisions); *Hodel v. Irving*, 481 U.S. 704, 709–10 (1987) (explaining that heirs and devisees of deceased members of the Oglala Sioux Tribe objected to federal law that would have forced escheat to the Tribe of certain fractional interests in allotments).



creation of the special Indian trust status and historic Indian title. But more so, even in the presumptively standardized fee simple state system, property owners can use a range of flexible legal tools—including real covenants, equitable servitudes, contracts, business forms, and private trusts—to produce nearly any combination of bespoke terms and conditions on property ownership.<sup>239</sup> Thus, the information-cost-reducing justification for property's most standardizing attributes may never be fully achieved, and therefore need not limit reform strategies so much.<sup>240</sup>

Structurally, multiple property systems, each derived from distinct sources of authority, already coexist and overlap in the United States.<sup>241</sup> Even core aspects of non-Indian property law vary by state, and local governments impose a variety of location-specific land use regulations.<sup>242</sup> In addition, a significant literature has explored the overlap of formal and informal legal and social orders for specific resource control rights.<sup>243</sup> Families in the United States have multiple informal arrangements for property within their own households.<sup>244</sup> Ranchers and other resource users routinely develop their own norms for trespass enforcement and control within specific geographic areas.<sup>245</sup> And other complex *de facto* property arrangements emerge everywhere from standing in line for

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239. See, e.g., Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L. J. 467, 467 (2011); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1023–26 (2009) (rejecting any simplification benefit in actual application).

240. See, e.g., Dorfman, *supra* note 239, at 476–80 (questioning efficacy of numerus clausus as a standardizing tool given lack of actual property limits).

241. See Hendry & Tatum, *supra* note 226, at 93 (arguing that there is already legal pluralism throughout federal Indian law because “competences and responsibilities are divided across federal, state, and tribal courts, with the ultimate goal of giving effect to local and culturally specific normative practices within what is still a fundamentally centralized legal system”); see also Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1169 (2007) (emphasizing how in era of globalization “people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups”).

242. See, e.g., Bengte Evenson & William C. Wheaton, *Local Variation in Land Use Regulations*, BROOKINGS-WHARTON PAPERS ON URBAN AFF. 221, 221 (2003), <https://www.jstor.org/stable/pdf/25067399.pdf> [<https://perma.cc/RDY6-LKCP>] (stating that “land use regulation is the responsibility of more than 18,000 local governments”).

243. See, e.g., Dave Fagundes, *The Social Norms of Waiting in Line*, 42 L. & SOC. INQ. 1179, 1181 (2017); David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313 (2019).

244. See Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 234–36 (2006) (exploring informal property coordination at the scale of one's household).

245. See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 677 (1986); see also Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163, 174 (1975) (describing history of different rancher norms around cattle branding based on geographic context).

general admission concert entry to traditions surrounding how one acquires and protects a roller derby name.<sup>246</sup>

Moreover, rather than producing economic travesties, this kind of institutional flexibility and system-wide variation can be highly desirable. It makes property more robust, innovative, and responsive to a wide range of social needs.<sup>247</sup> Standardization narratives assume material wealth maximization is the purpose of property, but this is neither the primary purpose of reservation land tenure nor the only function of property itself. I have already discussed how property law can fundamentally shape the way individuals relate to one another, engage with the physical world, and, by communicating important social hierarchies and relationships, translate social values to the real world.<sup>248</sup> Designing these systems entails both material and nonmaterial values choices.<sup>249</sup> Beyond just economic objectives, property designs also reflect essential choices about environmental stewardship, historic preservation, individual liberties, shared community relationships, and distributional equity (or lack of equity) among all citizens, whether they are property owners or not. Discussions about this kind of values pluralism in property are robust, particularly in the progressive property literature.<sup>250</sup> This work reveals that property is highly pluralistic, and there is no single correct metric for assessing the best design of property relationships.<sup>251</sup>

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246. See *supra* note 243 and accompanying text; see also Fitzpatrick, *supra* note 224, at 141 (summarizing conditions for persistent, overlapping *de facto* and *de jure* property regimes in context of international development efforts).

247. See, e.g., Scott E. Page, *Uncertainty, Difficulty, and Complexity*, 20 J. THEORETICAL POL. 115, 143 (2008) (“Complexity often correlates with robustness and innovativeness.”).

248. See *supra* notes 39–41 and 99–104 and accompanying text (analyzing how property law operates as a fundamental language and organizing structure); see also KRISTIN T. RUPPEL, *UNEARTHING INDIAN LAND: LIVING WITH THE LEGACIES OF ALLOTMENT 5–7* (2008) (illustrating how federal Indian law’s imposition of reservation property regimes has deeply shaped both Indian and non-Indian experiences of reservation spaces and colonial relationships); Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 778–79 (2009) (describing the role property plays in signaling status and hierarchy).

249. See Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1565 (2003) (“The *numerus clausus* principle, in other words, sustains the institutions of property as intermediary social constructs through which law interacts with—reflects and shapes—our social values.”); Davidson, *supra* note 215, at 1601 (explaining that pluralists interpret property forms as “the resolution of the competition between the multiple and often clashing ends that property serves”).

250. See, e.g., Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1051 (2011) (discussing pluralistic values guiding property); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1439–42 (2012) (arguing that property law serves diverse functions in both social and physical realms); see also Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1300–01, 1306–08 (2001) (applying pluralistic property ideas to issues of American Indian sovereignty and property).

251. This is true not only in collective, sovereign choices about property-system design, but also in individual property owner priorities and choices. For example, the more than fifty-five percent of fractional trust owners who received offers to purchase but refused to sell their undivided trust interests for federal consolidation efforts—despite all the limits on their current ownership rights and the likely insignificant economic returns from future retained ownership—demonstrate, again, that they more highly value nonmaterial attachments to the land. See 2016 STATUS REPORT, *supra* note 69, at 19

Buried in colonialism was a pervasive idea that Indigenous and European property systems could not coexist because Indigenous property rights were incompatible with English privatized interests, and “as a matter of the relationship between the two regimes: simply by existing, the one excludes the other.”<sup>252</sup> It may be true that some conflicts are inevitable to the extent the two regimes create literally contested claimants to the same physical space or object. For example, Canadian scholar John Borrows has emphasized the importance of physical mobility to Indigenous freedom. Borrows argues that Indigenous Peoples must be permitted “to freely move throughout our countries, and across the broad world of ideas,” with flexibility to “relate to land and ideas [not] as others expect.”<sup>253</sup> Although such freedom is essential, direct conflicts to a single resource may sometimes be best resolved through a unified property order or negotiations between legal orders.<sup>254</sup> Apart from these direct conflicts, however, divergent property regimes and values can and do exist in multiple contexts.<sup>255</sup>

There is no insurmountable reason tribal governments should be denied the freedom to explore different property law ideas and design their own property regimes to reflect a unique balance of values and concerns. In fact, given pressing environmental and equitable issues across the United States today, this landscape of exploratory innovation in property law may be essential to building greater resilience for all of us.

## 2. *Dynamism*

Outside of reservation territories, this kind of values pluralism is constantly negotiated and renegotiated in property and land use regulation, in both large and small ways. Despite narratives of stability, property law is actually highly dynamic. The key is to consider how property dynamism operates at different scales and across different institutional dimensions.

Much of the literature on property system change focuses on rare, cataclysmic transitions from commons or other forms of collective ownership to privatized property, or vice versa.<sup>256</sup> Even then, there is much we do not

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(indicating that only 44.5 % of individuals with offers have agreed to sell as part of the federal buyback program); *see also supra* notes 234–235 and accompanying text.

252. Purdy, *supra* note 47, at 366 n.132; *see also* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 54–81 (1983) (demonstrating inherent conflict between different land use patterns and resulting property understandings of more settled European agriculturalists and more unbounded and adaptive eastern Indigenous land users).

253. JOHN BORROWS, FREEDOM AND INDIGENOUS CONSTITUTIONALISM 13, 19–20 (2016).

254. *Cf.* Shoemaker, *Emulsified Property*, *supra* note 27, at 1002–13 (arguing for need to unify property jurisdiction within tribal governments in case of mixed-tenure or emulsified properties within reservations).

255. *See supra* notes 243–246 and accompanying text (notes on informal property variations).

256. *See, e.g.,* Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359, S359 (2002) (identifying “canonical example” of property regime change following “some external shock”); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. S421,

understand.<sup>257</sup> This work focuses on very dramatic restructuring events and emphasizes changes that occur only along the “right to exclude” axis, moving for example from open access to an individual’s right to keep out nonowners. Examples include the shift from common fields and feudalism to enclosure and then westernized private property in England,<sup>258</sup> the transitions in and out of farm collectivization in the Soviet Union and the People’s Communes in Mao’s China,<sup>259</sup> and Harold Demsetz’s famous (and highly contested) narrative of the emergence of private rights to fur trading territories among the Indigenous populations of the Labrador Peninsula.<sup>260</sup>

Other property reforms, however, have occurred in different ways but are no less important. Examples include the desegregation of white-only lunch counters in the South; the advent of new tenure structures including modern condominiums, cooperatives, and planned developments; and the introduction of important creditor protections for the family home.<sup>261</sup>

In practice, property has adapted over time and continues to do so.<sup>262</sup> In fact, property must incorporate the capacity for reform, change, and exchange.<sup>263</sup>

S422 (2002) (noting that the “conventional story” of property regime change focuses on transition between open-access commons and individualized private ownership).

257. See, e.g., Jamie Baxter, *Storytelling, Social Movements, and the “Evolution” of Indigenous Land Tenure*, 18 AUSTRALIAN INDIGENOUS L. REV. 65, 65 (2014) (“[M]ost [property law] scholars . . . would readily admit that we still know remarkably little about the dynamics that actually shape institutional persistence and change, especially in transitions between property regimes.”).

258. See, e.g., Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual through Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739, 1751–52 (1992) (highlighting ongoing transitions between historic feudalism and current private property regimes).

259. See, e.g., Robert G. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1318, 1331 n.60 (1993); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 627–37 (1998) (analyzing parallel transition from socialist to privatized property in the Soviet Union, using Moscow storefronts as primary example).

260. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350–52 (1967).

261. See, e.g., EDUARDO M. PEÑALVER & SONIA KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 64–70 (2010); Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880*, 80 J. OF AM. HIST. 470, 487 (1993) (discussing how the homestead exemption laws led to “family security . . . over creditor rights”).

262. See Anna di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMP. L. 367, 367 (2014) (noting that “[a] wealth of new property forms” have been introduced and incorporated in “the last fifty years”).

263. As a point of clarification, sometimes stability conversations within property literature focus on a separate, but related, issue about the security of an individual’s own use and possession, as well as the necessary flexibility for that owner to make choices about transferring or exchanging the property and, perhaps, her place in the wider social order. See generally Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 277 (1991) (identifying need for property to secure a stable place in the social order for owner while also dynamically recognizing individual capacity to change entrenched hierarchies). Audrey McFarlane has emphasized that this aspect of instability—i.e., the risk of change in ownership and land loss—has been borne

The consequence of perpetual stability is ossification, and this risk has to be balanced with responsiveness to changing conditions and demands.<sup>264</sup> Legitimate property systems must continue to evolve to respond to changing citizen needs and on-the-ground circumstances over time.<sup>265</sup> In fact, mainstream property scholarship has even debated recently whether the fee simple absolute itself is ready for a newer, changed incarnation—or should be abandoned altogether.<sup>266</sup>

Property change actually occurs across different variables and at different scales, reflecting more nuanced gradations in how property is defined and regulated. For example, instead of thinking of property as only changing in a binary way from open access to private, Shitong Qiao and Frank Upham have argued that exclusion exists along a spectrum that may change in myriad ways over time based on context.<sup>267</sup> There is a whole range of hybrid institutional choices. For example, Scotland underwent a major land reform process in 2003.<sup>268</sup> It now recognizes a public right to access private and public lands for certain beneficial uses, which limits a landowner's right to exclude sometimes, but not always, in nuanced ways.<sup>269</sup>

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disproportionately by minority property owners. See McFarlane, *supra* note 228, at 873. Here, I am focused more on system-wide stability versus dynamism, but certainly these are all relevant concerns.

264. See, e.g., PEÑALVER & KATYAL, *supra* note 261, at 82; Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1612 (2010) (reflecting on property law's need for both gradual transformation over time and responsiveness at moments of crisis and consternation); Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 5 (2000) (arguing that "property as an institution . . . is packed with disruptions," including a series of built-in mechanisms for "rights-disruptions that amount to expropriations," and that "any regime that failed to [build such disruptions] would collapse of its own brittleness").

265. See, e.g., Davidson, *supra* note 228, at 443 (arguing that people expect not just "unyielding legal stability" but also "regulatory responsiveness and inclusiveness" in property); Rose, *supra* note 264, at 14–15 (arguing "that the very nature of a property regime demands that property be stable only *relatively*, not *absolutely*" and thus "some expropriations are . . . necessary to the operations of a property regime itself").

266. See, e.g., ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 34–79 (2018) (reviewing reform private-property proposal in historical context); Fennell, *supra* note 10, 1459–61 (arguing that fee simple has become outdated as society has become less agrarian and increasingly spatially interconnected and urbanized and that fee simple should not be assumed to be "the endpoint of real property's evolution"); Eric A. Posner & E. Glen Weyl, *Property is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51, 51, 95 (2017) (critiquing private property and perpetual ownership, which are core incidents of fee simple, and arguing for alternative "universal compulsory purchase provisions"); see also Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1, 4–5, 5 n.8 (2017) (arguing against these fee simple reform proposals).

267. See Shitong Qiao & Frank Upham, *The Evolution of Relational Property Rights: A Case of Chinese Rural Land Reform*, 100 IOWA L. REV. 2479, 2480, 2484–85 (2015) ("For the most part, property rights evolve quietly and incrementally, which is hard to explain if we take exclusive rights as the core of property, or, to put it more generally, if we are focusing solely on the question of who owns the things.").

268. See John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 741 (2011) (discussing the Land Reform (Scotland) Act of 2003).

269. *Id.*

In addition, property reforms occur not only along the exclusion axis but across a range of other property functions and rights. Abraham Bell, Gideon Parchomovsky, and others have argued that focusing only on the axis of exclusion (or on who owns the asset) misses many other evolutionary trajectories in property law.<sup>270</sup> These include changes in the boundaries of the owner's other rights of dominion (including the terms of an owner's rights to possession and use) and the asset configuration itself.<sup>271</sup> For example, other notable historic land reforms have included changes in whether women can even own property,<sup>272</sup> what inventions and ideas are available for intellectual property protection,<sup>273</sup> and the invention of zoning law itself.<sup>274</sup>

Finally, property change can and does occur in different-sized events. Carol Rose has classified three levels of property system changes. The most radical shifts—like the abolition of slavery—require some kind of major revolution or political upheaval.<sup>275</sup> In the middle, various regulatory adjustments respond to smaller social changes, like modifications of environmental laws based on developing science or ecological concerns.<sup>276</sup> And finally, functioning property systems also require a host of little adjustments made on an ongoing, housekeeping basis as citizens, and sometimes courts, resolve everyday uncertainties and concrete disputes between stakeholders.<sup>277</sup>

In all cases, property is constantly changing, experimenting, and evolving. The final challenge in thinking about the future of American Indian land tenure, then, is not whether a range of more creative reforms are possible (they are) but how best to get there. This is the subject of the penultimate Section.

#### IV.

##### THE PROCESS OF PROPERTY SYSTEM CHANGE

If property is truly so pluralistic and dynamic, why is American Indian land tenure so stuck? This Section first briefly acknowledges unique challenges to the project of Indian country land reform. Second, it analyzes available mechanisms

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270. See Abraham Bell & Gideon Parchomovsky, *The Evolution of Private and Open Access Property*, 10 THEORETICAL INQUIRIES IN L. 77, 79 (2009); see also Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 636–37, 636 n.17 (2018) (collecting numerous sources on early American tenure reforms to eliminate feudalism in favor of free alienability); Qiao & Upham, *supra* note 267, at 2486 (exploring evolution of rights from feudal England to the United States, focusing on the centrality of modifications to rights of alienation and devise over time, rather than exclusion).

271. *Id.*

272. See Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359 (1983).

273. See Susan Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267 (2004).

274. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–88, 395 (1926).

275. Rose, *supra* note 264, at 24–25.

276. *Id.* at 15.

277. *Id.* at 5–6. Rose frames this discussion about a particular type of appropriative disruption, but the analogy and analysis hold for other property system adaptations and reforms.

for property system change and, in particular, what we can learn about the process of social and legal change from other studies of property adaptation. Property system change requires a flexible coevolution of law and norms that occurs over a long period of time, built on the accumulation of numerous concrete interactions in specific contexts. The overall rigidity of the federal trust overlay, as well as the requirement of so much prescriptive, formulaic tribal rule-making, is the primary obstacle to more flexible local-level experimentation and reform. This Section emphasizes the primary need for space-clearing efforts that allow and support more flexible, iterative property law experimentation at the tribal level.

#### A. *Unique Challenges and Reconciliation*

In addition to property's universal impulse to standardization and the general stickiness of stable property entitlements over time, reservation-specific property reforms pose unique challenges. The multiple, sometimes-contradictory reform goals—including both economic development and the preservation of sovereign land bases—are fundamentally difficult to reconcile. In addition, there will be winners and losers to any tenure changes, and in the reservations landscape of hyper-local governance, these political realities are daunting.

While other major historical property reforms occurred after a transformational political moment, like the abolition of slavery and post-apartheid land redistribution in South Africa, a dramatic social and political shift is likely missing here.<sup>278</sup> We are not responding to any major political upheaval and reorganization. To the contrary, given the history of failed federal reservation land reforms and forced land loss, appetite for further radical reform may be lacking. Instead, many tribal governments are rationally risk averse. In many ways, the lands that remain now are literally tribal governments' last stand.

There are also enormous institutional capacity challenges. Unlike other international property reforms that have worked to reconcile two existing—often one *de jure* and another *de facto*—property regimes,<sup>279</sup> the challenge here is the

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278. In Bernadette Atuahene's important work on property transitions in countries like South Africa, she focuses on "states where past property dispossession has the serious potential to cause backlash and destabilize the current state" because these risks create "a unique moment of interest convergence, where opponents and supporters of redistribution are most likely to work together to pursue a common goal—stability." Bernadette Atuahene, *Property Rights and the Demands of Transformation*, 31 MICH. J. INT'L. L. 765, 768 (2010); see also PEÑALVER & KATYAL, *supra* note 261, at 64–70 (discussing how civil rights protests drove public accommodations property reform); Davidson & Dyal-Chand, *supra* note 264, at 1608 (noting that "fundamental questions about . . . property" are often revealed in "times of crisis").

279. See, e.g., Fitzpatrick, *supra* note 224, at 141; Martha Minow, *Rights and Cultural Difference*, in IDENTITIES, POLITICS, AND RIGHTS 347, 359 (Austin Sarat & Thomas R. Kearns eds., 1995); see also ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 137–40 (1991) (focusing on differences between formal, legally centralized property regimes and other non-legal property systems developed through social norms, custom, and other forms of private ordering); SHITONG QIAO, CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL

loss of historic Indigenous land tenure regimes. We are not trying to reconcile two persistent systems. We are trying to recreate a new system where one has been lost, at least in some aspects. Tribal governments may have to reinvent—and rebuild—entire institutions, often with too-limited resources.<sup>280</sup> This is a very hard (and expensive) thing to do.<sup>281</sup>

Plus, this entire quagmire is the federal government's fault.<sup>282</sup> With this blame comes some duty to bear the burden of making things right. The federal trust responsibility to Indigenous nations legally and morally requires the federal government to support and protect tribal self-governance.<sup>283</sup> With respect to trust properties in particular, there are sometimes also specific property-related trustee duties that may be uniquely difficult to disentangle—including, but not limited to, bearing the cost and burden of maintaining that title, preempting state taxation and other authorities, and, in many cases, ensuring land resources are returning their highest value returns.<sup>284</sup> Negotiating the legal transfer or release of some of these responsibilities may be part of a solution strategy,<sup>285</sup> but any scenario that may be read as absolving the federal government of trust responsibilities will be deeply challenging on multiple levels. There have been many generations of historical harm done to Indigenous Peoples, often through federal land policies. In some cases this has led to blame, anger, and disputes about future responsibilities—even while there are also many bright spots where relationships are improving.

Ultimately, reclaiming tribal land tenure flexibility may be a key step toward a larger project of reconciliation, but tribal governments may have to undo federally created problems themselves. In fixing these problems, tribal

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NORMS 2–4 (2018) (discussing Chinese small property emergence and evolution despite initial formal legal barriers); Amnon Lehavi, *The Culture of Private Law*, 45 REAL ESTATE L.J. 35, 41, 44 (2016) (emphasizing need for some, but not perfect, congruence between property law designs and prevailing cultural orientations of impacted groups); Zhang, *supra* note 103, at 348.

280. See, e.g., Shoemaker, *Emulsified Property*, *supra* note 27, at 976–79 (describing challenges of recreating and taking over title recording systems in particular).

281. Cf. Jill M. Belsky & Alexander Barton, *Constitutionality in Montana: A Decade of Institution Building in the Blackfoot Community Conservation Area*, 46 HUM. ECOLOGY 79, 80–81, 88 (2018) (exploring case study of one effort to build new conservation-oriented property institutions from ground up that has involved slow and iterative process over many years).

282. See, e.g., Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, tit. I, § 101, 114 Stat. 1991 (codified at 25 U.S.C. § 2201 note (2012)) (acknowledging that “the problem of the fractionation of Indian lands . . . is the result of a policy of the Federal Government, cannot be solved by Indian tribes, and requires a solution under Federal law”).

283. See, e.g., Reid Peyton Chambers, *Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century*, in NATURAL RESOURCES DEVELOPMENT IN INDIAN COUNTRY 7–9 (2005); Washburn, *supra* note 88, at 214.

284. See, e.g., *United States v. Mitchell*, 463 U.S. 206, 226–28 (1983) (holding United States as trustee accountable for mismanagement of forest resources on allotted trust lands on Quinault Reservation); see also *supra* notes 81–82 and accompanying text.

285. See *infra* Part IV.A.2.c. (discussing possibility of tribe-by-tribe renegotiation on federal trust status arrangements).



governments will both be relieving the federal government of its own responsibilities and increasing the burden on the tribal government's own institutions. This simply feels unfair.

Reconciliation means different things in different contexts,<sup>286</sup> but the “key objective” of reconciliation is “building sustainable peace.”<sup>287</sup> In efforts “to restore and recognize Indigenous governance and jurisdiction,” the fundamental components of the process include “acknowledgement, apology, and redress.”<sup>288</sup> Reconciliation requires more than just reclaiming tribal land tenure flexibility, but supporting reclaimed land tenure authorities is one essential component. Property so powerfully structures the world around us—and our understanding of it—that a legitimate argument exists that there really is no tribal sovereignty until there is respect for tribal land tenure choices. But what reconciliation looks like, and how and if it precedes, is a tribal government's ultimate choice. Bernadette Atuahene, for example, has asserted that the essential remedy for a dignity taking—like the history of American Indian dispossession and land loss in the United States—is dignity restoration, which “is about allowing dispossessed individuals to have significant say in how they are made whole . . . through processes that affirm their humanity and reinforce their agency.”<sup>289</sup> In accepting blame, the federal government should financially and otherwise support tribal efforts to overcome these land reform challenges, but should not co-opt the process or control the substantive choices a tribal nation may make.<sup>290</sup>

### B. *The Reform Process*

History tells us that more top-down, unilateral federal reforms will not fix these nuanced land tenure challenges. Indian country is not monolithic but tremendously diverse. Land tenure reform should reflect this. Moreover, given the complexity of the current land tenure system, it is also likely that any future unilateral federal actions will have unintended consequences.<sup>291</sup>

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286. See BEN J. GEBOE, *COMPARATIVE APPROACHES TO RECONCILIATION: CANADA, UNITED STATES OF AMERICA, AUSTRALIA AND NEW ZEALAND* 4 (Institute for the Study of International Development, 2015), [https://www.mcgill.ca/isid/files/isid/pb-2015-03\\_0.pdf](https://www.mcgill.ca/isid/files/isid/pb-2015-03_0.pdf) [<https://perma.cc/R46F-TQH3>].

287. *Id.* at 4 (citing UNITED NATIONS, *BUILDING JUST SOCIETIES: RECONCILIATION IN TRANSITIONAL SETTINGS: WORKSHOP REPORT ACCRA, GHANA* (2012)).

288. *Id.* at 4–5.

289. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework to Understanding Involuntary Property Loss and the Remedies Required*, 41 L. & SOC. INQUIRY 796, 818 (2016); see also Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. OF L. & SOC. SCI. 171, 179 (2016).

290. Ironically, even by financially supporting this challenging transition for the sake of doing the right thing by tribal nations, the federal government is likely to come out ahead, assuming tribal nations create more sustainable systems than the current federal quagmire. *Cf. supra* Part I.B.2 (detailing unsustainable federal administrative expenses).

291. See Shoemaker, *Complexity's Shadow*, *supra* note 6, at 517; see also *supra* Part I.B.

Instead, in established property regimes, property reform best occurs with a critical coevolution of top-down (legal) and grassroots (norm-building) efforts.<sup>292</sup> Local land norms evolve over a long time as a result of numerous on-the-ground, resource-specific interactions.<sup>293</sup> Legal and legislative changes, meanwhile, can sometimes nudge related social changes but most often serve to gradually confirm already-successful norm development.<sup>294</sup>

This coevolution ideal also reflects scientific understandings about successful adaptation in other complex systems. According to these understandings, adaptation requires a high degree of flexibility and the capacity to implement successful experiments efficiently.<sup>295</sup> The job for a new era of land reform, then, is really to create space for more local-level experiments and ongoing evaluation and adaptation.<sup>296</sup>

Right now, the modern trust tenure system leaves shockingly little space for evolution and experimentation around tribal real property issues. Nearly all trust land reforms have happened in the top two categories of Rose's hierarchy—the federal legislative level or the regulatory level—which can lack sufficient political accountability, are subject to interest-group capture, and tend to be too blunt as instruments. Moreover, even where the federal government recognizes some tribal autonomy, that authority is limited either by federal consistency

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292. See QIAO, *supra* note 279, at 4 (framing this interaction as a “co-evolution of property law and norms”); Yun-chien Chang & Richard A. Epstein, *Introduction to Spontaneous Order and Emergence of New Systems of Property*, 100 IOWA L. REV. 2249, 2250 (2015) (summarizing how spontaneous order and statutory rules can work together to develop and refine property system parameters); see also Dean Lueck & Thomas J. Miceli, *Property Law*, in HANDBOOK OF LAW AND ECONOMICS 183, 200, 212–13 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (summarizing “mechanism[s] by which property rights are established”).

293. See Lueck & Miceli, *supra* note 292, at 213 (explaining that “the presence of repeated interaction . . . can generate conventions or norms in which the parties agree to create a system of rights”); see also Ellickson, *supra* note 259, at 1319 (exploring how “customary land rules . . . form an unauthored strategy that cleverly allocates a prized resource with confoundingly complex attributes”).

294. See, e.g., PEÑALVER & KATYAL, *supra* note 261, at 55–63 (documenting transition from lawless squatters of the frontier west to legally sectioned land claims). *But see id.* at 78 (also acknowledging how “the law has to do more of the heavy lifting in establishing the precise scope of property rights” when social norms are undefined).

295. See J.B. Ruhl, *Regulation by Adaptive Management—Is It Possible?*, 7 MINN. J.L. SCI. & TECH. 21, 28–29 (2005). This ideal also reflects common law's naturally iterative development process through a gradual accumulation of concrete experiences, conversations, and conflicts. Karl Llewellyn “eloquently described” this as a process of accumulative storytelling (and story creating), explaining that “the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, mean anything at all.” Rashmi Dyal-Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683, 1741 (2014) (quoting K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 68 (1930)). We also see this kind of iterative, ground-level experimentation and adaptation in other well-functioning natural systems. See, e.g., David W. Orr, *Slow Knowledge*, 10 CONSERVATION BIOLOGY 699, 700 (1996) (“[E]volution seems to work by the slow trial-and-error testing of small changes. Nature seldom, if ever, bets it all on a single throw of the dice.”).

296. See C.S. Holling & Lance H. Gunderson, *Resilience and Adaptive Cycles*, in PANARCHY: UNDERSTANDING TRANSFORMATIONS IN HUMAN AND NATURAL SYSTEMS 25, 33–40, 47–52 (Lance H. Gunderson & C.S. Holling eds., 2002).

requirements or by the fact that tribal choices must be first proscribed in tribal legislation or regulation that is approved by DOI.<sup>297</sup> By definition, this procedure requires abstract prediction and delineation of future priorities without sufficient responsiveness and flexibility for continually evolving on-the-ground circumstances. For example, there is generally only limited tribal court jurisdiction for trust property disputes around the edges of ownership, no partition or adverse possession equivalent, and, without any flexible market for exchanges, no local rules for trust land transfers.<sup>298</sup> Co-owners of Indian allotments do not interact or, in many cases, even communicate directly about their land, as they have no legal right to possess it without federal permission. And usually, absentee co-owners communicate, if at all, only with the BIA as leasing agent.<sup>299</sup>

Effective reform will require more flexible spaces for local-level experimentation and innovation. The challenge in Indian country is that so many carefully-evolved and context-specific Indigenous property systems have been extinguished by generations of dense and brittle federal law. The task today is to create space for local choices to be made again—over time and in real world contexts. Tribal governments will build capacity. Federal bureaucracies will shrink and become more sustainable, and tribal reservation property can be more dynamic and pluralistic again. This may ultimately lead to an even-more transformative political moment, but we do not have to start there.

## V.

### TOWARD NEW INDIGENOUS LAND TENURES

This Section begins to chart a series of specific strategies that can create this kind of transformative local property system change. Because property change benefits from a slow iterative process,<sup>300</sup> this Section charts a series of specific steps both tribes and the federal government can take to open essential flexible spaces for the iterative development of new property norms, laws, and institutions. Several tribes are already pursuing pieces of this work. Without speaking to the substance of any tribal choices that might be made within these frames, this Section is a roadmap of sample strategies that can be used to make space for the ultimate reclaiming of new, modern Indigenous land tenures.

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297. See *supra* Part II.B.

298. Tribal courts do, however, have jurisdiction over personal or non-trust property issues arising on the reservation, especially when they involve tribal citizens. This can sometimes relate closely to trust land issues. *E.g.*, *Smith v. Eckhart*, Crow Court of Appeals, No. 99-116, ¶ 5–12 (2000 Crow 6) (sample tribal court case involving fence dispute between two trust allotments).

299. See *supra* note 67 and accompanying text.

300. Cf. Orr, *supra* note 295, at 700 (“[T]he only knowledge we’ve ever been able to count on for consistently good effect over the long run is knowledge that has been acquired slowly through cultural maturation.”).

The results and the process will be different for individual tribes, depending on tribal priorities and circumstances.<sup>301</sup> For example, one tribe may pursue expanded autonomy in property and land use through existing federal frameworks, seeking to flexibly grow their self-governance rights within the current federalized system.<sup>302</sup> Another tribe may choose to maintain the same, or a version of, the underlying federal trust title with all its protections, but then seek broader flexibility to define and build a whole range of new tenure forms to stack on top of—or within the umbrella of—that original federal title. For example, the tribe may redefine the rights of co-owners within allotments, or sanction a range of new transferrable interests to convey on top of permanently-preserved federal title.<sup>303</sup> A third tribe may negotiate for sufficient legal protections and financial support to facilitate taking back the underlying title from the federal government entirely and replacing it with a tribally defined land tenure system, perhaps also stacking a series of tribally created rights on top of a new tribally defined trust or other novel tenure framework.<sup>304</sup> A final tribe may even renegotiate the entire federal relationship, like the Canadian First Nation that recently entered a modern treaty in British Columbia.<sup>305</sup> This Nisga'a Final Agreement recognizes the possibility that the Nisga'a Nation may choose to

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301. These reform variables may include the objectives or community priorities for property functions, the intended audience for any reformed property institutions (with possibly different institution designs for inside and outside the reservation), the desired timeline, current capacities, funding sources, and the breadth or scope of ultimate reform ambitions.

302. Even this more-limited strategy can produce expanded tribal capacity and authority, including in land use controls and other environmental, historical, and cultural preservation efforts. *Cf.* Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L. J. 179, 244–45 (1995) (discussing how supporting existing self-help housing settlements for the poor can have a greater impact for the challenge of providing sufficient affordable housing than resisting these sometimes-illegal developments).

303. The Small Trust Land User Research and Assistance Project on the Navajo Nation, for example, has suggested that tribes might create flexible and alienable condominium-style rights “without implicating land” (and associated federal restrictions) by creating alternative “air space” tenures. *Alternatives to Leases and Permits*, *supra* note 145; *see also The Small Trust Land User Research & Assistance Project*, INDIAN COUNTRY GRASSROOTS SUPPORT, <http://indiancountrygrassroots.org/landproject.html> [<https://perma.cc/3GU2-VRQU>]. The Small Trust User Project has zeroed in on several specific examples of how the current federal trust system does not reflect community values and wishes with respect to land, and the project is focused on new land tenure designs that could circumvent some of the most limiting aspects of federal trust property rules. *See Community Needs & Wishes*, INDIAN COUNTRY GRASSROOTS SUPPORT, <http://indiancountrygrassroots.org/landwishes.html#Customary> [<https://perma.cc/VJS6-6V5E>].

304. *See* Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy Over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 442, 455–56 (2006) (arguing that “[a] necessary first step in reclaiming tribal autonomy over the land base is the removal of federal supervision and a shift toward an exclusive tribal control” and emphasizing that exclusive tribal autonomy, with tribes holding exclusive title, to tribal lands “must be an option, within the federal legal structure”).

305. This is a daunting proposal, to be sure, but the process has to start somewhere. *See generally* Sari Graben, *Lessons for Indigenous Property Reform: From Membership to Ownership on Nisga'a Lands*, 47 U.B.C. L. REV. 399 (2014) (analyzing the Nisga'a Final Agreement and its potential consequences and challenges for land tenure and governance); *see also infra* note 373 and accompanying text.

create freely transferrable property rights, but also ensures that territorial jurisdiction will persist within the Nation regardless of any future change in who owns what within reserve boundaries.<sup>306</sup>

Tribal choices will vary, and any of these strategies will require many steps to achieve. The key, though, is a clear articulation of a goal of bold and radical property system transformation—not to finish the work of allotment or termination, but rather to undo and repair the failures of these historic federal policies. Given the present political climate and troubling trajectory of current trust land reforms, this project is increasingly urgent and requires our broad, collective support.

This Section discusses both legal and nonlegal strategies for this effort. Starting with direct legal reforms, the Section provides sample strategies that tribal governments can pursue independently, identifies possibilities for future supportive federal reforms, and finally discusses potential responses to the specific challenges of allotments. This Section concludes with a brief discussion of other supportive steps, including some non-legal strategies, that can help build energy, investment, and essential participation and engagement in this project of local property reform.

#### A. *Creating Flexible Innovation Space*

Both tribal efforts to push out on the boundaries of existing legal structures and federal actions to reorient the baseline legal categories and opportunities can create critical flexible innovation space for future tribal property reforms. This Section explores concrete examples of both of these potential strategies and provides specific ideas for some of the unique challenges of fractionated allotments.

##### 1. *Tribal Steps*

First, tribal efforts can create more flexible space within the boundaries of existing authorities and build greater political will for larger reforms, even without waiting for federal action.<sup>307</sup> Many tribal governments are already pursuing such efforts, in diverse ways and at different stages of development.<sup>308</sup> This Section collects and locates new and existing strategies for building local flexibility.

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306. *Id.*

307. Cf. PEÑALVER & KATYAL, *supra* note 261, at 77–79 (describing “altlaw” reform strategy of attempting to define the boundaries of unsettled property rights by asserting colorable interpretations of uncertain or ambiguous law).

308. See Carpenter & Riley, *supra* note 17, at 862–77 (providing related tribal government nation-building examples but also acknowledging most efforts are “embryonic”).

*a. Stretching and Expanding Tribal Authorities*

Much of the work on tribal nation-building outside the land tenure context has emphasized the importance of tribal governments practically exercising their own inherent sovereign rights, sometimes without waiting for federal permission.<sup>309</sup> To some degree, these same strategies work for property reform.<sup>310</sup> The following three samples exemplify some of the property-specific strategies and opportunities in this vein.

1. Exploiting Areas of Jurisdictional Ambiguity: There are many grey areas of property-law jurisdiction in reservation territories that are arguably still within a tribe's inherent authorities. A bold tribal government can use this theory to strategically reclaim a range of more flexible inherent authorities. For example, there are open questions about who decides many nuisance and trespass actions within reservation territories,<sup>311</sup> which jurisdiction zones precisely where,<sup>312</sup> and even the scope of tribal authority on issues like adverse possession, eminent domain, co-owner conflicts, and taxing authority for interests, like leases, on top of the trust title.<sup>313</sup> Tribal governments can stretch into these areas of tribal law, and many do.

2. Challenging Federal Limits on Tribal Land Control: Perhaps even more immediately, tribal governments can also look to expand their current authorities

309. *E.g.*, Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 116–17, 120–22 (2017). The Harvard Project on American Indian Economic Development also provides a wealth of resources and research supporting the conclusion that native nations do best when they make their own decisions on matters that affect them. *See generally* STEPHEN CORNELL, WHAT MAKES FIRST NATIONS ENTERPRISES SUCCESSFUL? LESSONS FROM THE HARVARD PROJECT, JOPNA No. 2006-01, (2006), <https://hpaied.org/sites/default/files/publications/What%20Makes%20First%20Nations%20Enterprises%20Successful.pdf> [<https://perma.cc/U7SY-FN4U>]; *The Harvard Project on American Indian Economic Development*, HARVARD PROJECT AM. INDIAN ECON. DEV., <https://hpaied.org> [<https://perma.cc/G7L8-B7UK>].

310. *See* PEÑALVER & KATYAL, *supra* note 261, at 77–79, 90–118 (exploring other histories of property reform and emphasizing importance of “alllaw” strategies by which activists push, from the inside, for alternative views of already-existing rights as a means of social and legal reform).

311. *Cf.* Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction Over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527, 532–33 (2010) (arguing, in light of uncertainty, that Congress or federal courts should recognize a bright-line rule in favor of tribal court jurisdiction for all Indian and non-Indian trespass on reservation).

312. *See supra* note 170 and accompanying text (discussing zoning rules).

313. *See, e.g.*, Shoemaker, *Complexity's Shadow*, *supra* note 6, at 509–12 (unpacking additional layers of property-specific uncertainty); Shoemaker, *Emulsified Property*, *supra* note 27, at 980–94 (analyzing sample uncertainties in particular context of mixed-ownership, “emulsified” allotments). Even where the federal government has sought to provide clarity on a specific matter, frequent litigation can increase uncertainty. *Compare* 25 C.F.R. § 162.017 (2018), *and id.* § 169.11, *with* Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324, 1353 (11th Cir. 2015) (holding that some, but not all, state taxes were preempted by federal law), *and* Order re Parties' Motions for Summary Judgment [144, 149, 150] at 31, Agua Caliente Band of Cahuilla Indians v. Riverside County, No. ED CV 14-0007-DMG (DTBx), at \*17 (C.D. Cal. June 15, 2017), 2017 U.S. Dist. LEXIS 92592 (finding that federal law does not preempt specific county possessory interest taxes), *aff'd*, Memorandum, No. 17-56003, 2019 U.S. App. LEXIS 2791, at \*3–5 (9th Cir. Jan. 28, 2019).

by aggressively interpreting the breadth of existing federal laws. For example, as interpreted earlier, many current federal laws—including AIARMA and the HEARTH Act—may already permit broader tribal autonomy than is recognized in recent regulations.<sup>314</sup>

3. Developing Current Opportunity Spaces in Federal Law: Finally, tribal governments can interpret many of the various unregulated use rights (e.g., assignments, permits, and other customary use rights) on trust lands more broadly. For example, tribes might pursue granting potential lessees an informal permit to access tribally owned lands for exploratory or pre-development activities while the BIA's lease approval process is still ongoing. Although potentially a stretch of current intentions in some circumstances, these short-term transfers responsibly used could both expedite results and build tribal capacity and credibility for managing greater tenure control in the future.

In all these tribal strategies, the most important step is naming the goal of reclaiming broader Indigenous land tenures and then proceeding with that intention accordingly.

*b. Translating Lessons from Analogous Property Choices*

Tribal governments also wisely seek to build, learn from, and engage with their other property-related sovereign authorities that are inherent and fully outside of the federal trust system. These inherent authorities include tribal rights to define and regulate non-trust property systems on reservations. After building and strengthening these other property-specific capacities, norms, and laws, tribes can translate and transition this foundational work to future land tenure—and trust land specific—projects. The following sample efforts describe some strategies tribal governments can take.

1. Growing Tribal Authorities and Capacities Over Non-Trust Personal Property on Reservation: Although the current trust system curtails many tribal real-property authorities, tribal governments have exclusive authority over most tribal citizens' on-reservation non-trust personal property.<sup>315</sup> Thus, for example, many tribal probate courts have already set priorities and procedures for succession of personal property, which may someday inform more real property jurisdiction. The Navajo Tribal Court, for example, has published numerous decisions communicating community norms and Navajo law for how items of value are passed among family.<sup>316</sup> This also applies outside probate to a range of

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314. See, e.g., *supra* notes 165–167 (discussing inconsistent and incomplete implementation of AIARMA in particular); *supra* note 173 (discussing the potentially fluctuating scope of tribal discretion afforded under the HEARTH Act by different administrations).

315. See, e.g., COHEN'S HANDBOOK, *supra* note 54, at § 16.05[1] (explaining that “tribal law controls succession to members' unrestricted real and personal property within Indian country”).

316. E.g., *Riggs v. Estate of Attakai*, No. SC-CV-39-04, 7 Am. Tribal Law 534 (Navajo Nation Sup. Ct. 2007) (explaining trust-like arrangements implied by tribal law for family transfers of certain grazing rights).

other acquisition, transfer, use, and other ownership and possession issues that arise for these personal items.

2. Focusing on Permanent Improvements on Trust Properties: A recent DOI rule characterized permanent improvements to trust lands as non-trust personal property, separate from the underlying trust and often within a tribal court's jurisdiction.<sup>317</sup> Although this creates tremendous administrative challenges, it also provides another vehicle for a broader range of expansive tribal authorities, including resolving possession and disposition disputes. With sufficient support and funding, these experiences could be used as opportunities both to generate new property norms and to experiment and build other property-related institutions and capacities.

3. Looking to Persistent Traditional Property Norms: In addition to revitalizing traditional values around land and land tenure, many tribal governments are also focusing on nurturing those Indigenous traditions that have persisted. For example, under Navajo common law, families control their land assignments as long as they "stay[] on the land."<sup>318</sup> Likewise, the Hoopa Valley Nation still uses their own traditional private property rules to determine who owns which fishing sites.<sup>319</sup> Although many Indigenous property institutions were lost through federal policy, they are not entirely gone, and further nurturing these remaining systems may also inform future land choices.

4. Expanding Tribal Ownership Decisions: Other opportunities for tribal growth and capacity-building include instances in which a tribe makes direct decisions about other land uses. Although acting as an owner is not the same as acting as a sovereign government, tribal governments are building tribal land use capacity with creative projects on their own tribal trust lands. These experiences can also lead to concrete discussions about wider tenure priorities. For example, the Pe' Sla project in the Black Hills involves a powerful demonstration project to build and sustain community values around land use.<sup>320</sup> In addition, many tribes are exploring creative food and agriculture system innovations on reservation lands, including efforts to facilitate farmer and rancher cooperation, education, and market and credit access. These efforts may also lead to new and transferable land use innovations.<sup>321</sup>

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317. See Indian Trust Management Reform, 76 Fed. Reg. 7,500, 7,501 (Feb. 10, 2011) (interim final rule).

318. E.g., John C. Hoelle, *Re-Evaluating Tribal Customs of Land Use Rights*, 82 U. COLO. L. REV. 551, 562–63 (2011).

319. See MILLER, *supra* note 45, at 14.

320. See *supra* notes 22–25 and accompanying text.

321. See, e.g., INDIGENOUS FOOD AND AGRICULTURE INITIATIVE, UNIV. OF ARK. SCH. OF LAW, INTERTRIBAL FOOD SYSTEMS 3, 17, 35–36, 42–43, 49–50, 71–72 (2015), [http://communityfood.wkkf.org/pix/WKKF\\_food-scan\\_IFAI\\_r304.pdf](http://communityfood.wkkf.org/pix/WKKF_food-scan_IFAI_r304.pdf) [<https://perma.cc/GN22-6GM6>] (“For far too long, tribal communities have been disconnected from their lands and resources. . . . The good news is that tribal communities across the country are rewriting this history of injustice and inequity.”).



5. Exploiting Reservation Fee-Property Potential as an Interim Measure:

Finally, there are numerous creative tribal strategies, such as the use of fee simple lands for housing development, that could translate to larger property reform efforts. The Winnebago Tribe of Nebraska, for example, developed Ho-Chunk Village, a mixed-use community based on “culturally appropriate” principles.<sup>322</sup> Perhaps most surprisingly, they built the entire community on fee lands within the Winnebago Indian Reservation.<sup>323</sup> This strategy is controversial given all the risks of forced fee simple transfers and other state-law encroachments,<sup>324</sup> but it may also translate to inform new models of development in a future, more flexible trust system.<sup>325</sup>

c. *Learning from Mistakes*

Ultimately, this process should be transparent that sometimes tribal governments make land use rules that are not productive for local needs or otherwise fail to improve on current federal structures. For example, some grassroots organizers have critiqued the Navajo Nation’s internal rule that leases of tribal lands must be for a single use only because it prevents the community from pursuing beneficial multiuse options, such as entrepreneurial opportunities for in-home businesses.<sup>326</sup> Learning from mistakes is a natural part of the iterative process of adaptive change and system evolution.

2. *Federal Reforms*

Instead of forced, dramatic property regime changes overnight, federal policy reforms should focus on creating more genuine opportunity spaces for tribally-led property reforms. The goals should be to support individual tribal choices, reduce complexity and bureaucracy, and maximize openings for flexible local experimentation. This Section explores samples of this kind of federal effort, focusing first on possible actions under current legal frameworks and then exploring more far-reaching potential reforms for the future.

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322. JORGENSEN, ACCESS TO CAPITAL, *supra* note 35, at 54 (describing how the developers of the Ho-Chunk Village “intentionally created” a community space).

323. *Id.* (summarizing the use of fee lands in developing the Ho-Chunk Village); *see also* Lance Morgan and the Decline of Federal Indian Law, NEXTGEN NATIVE (June 28, 2017), <http://nextgennative.libsyn.com/lance-morgan-and-the-decline-of-federal-indian-law> [<https://perma.cc/J7W9-45Y6>] (discussion with Lance Morgan, President & CEO of Ho-Chunk, Inc. about the Ho-Chunk Village development).

324. *See supra* notes 29–30 and accompanying text; *supra* Part I.B.3.b and accompanying text.

325. *See, e.g., supra* note 295 and accompanying text.

326. *See, e.g., Alternatives to Leases and Permits, supra* note 145 (describing how Navajo Nation law, not federal law, imposes single-use requirements on trust land leases in a way that disadvantages the community).

a. *Creating More Flexible Innovation Spaces in Current Trust Paradigm*

There are several relatively easy regulatory reforms that either DOI or Congress could implement to eliminate bureaucratic hyper-categorizations of property interests and maximize space for tribal flexibility. Often, such reforms would not even require new legislation. The following three sample actions are illustrative.

1. Support for Expansive Interpretations of Flexible Trust Land Governance: To start, when tribal governments seek expansive (and reasonable) interpretations of existing authorities, such as the HEARTH Act and AIARMA, DOI should support and implement these interpretations to support tribal property innovations.<sup>327</sup> AIARMA, for example, should be interpreted more clearly to extend tribal agricultural land governance authorities over both allotted and tribal trust lands.<sup>328</sup>

2. Reduce Unnecessary Regulatory Barriers: The DOI can also reduce bureaucratic complexity by making other space-clearing rule changes to support tribal capacity building. The goal should be to position tribal governments as exclusive, first-line decision makers. For example, consider the new regulation that recognizes tribal and individual rights to grant permits on trust lands without federal oversight. DOI should eliminate the current requirement that permits be submitted to DOI before execution to verify that the proposed transaction is a permit and not a lease, as this requirement imposes an unnecessary extra layer of federal administration.<sup>329</sup> If the rule instead recognized that permits are not subject to federal authority and encouraged and supported tribal court jurisdiction as a first-line dispute-resolution mechanism in ambiguous cases, it would be an ideal, relatively low-stakes entry point for increased tribal jurisdiction and capacity-building around trust properties.<sup>330</sup>

Likewise, instead of DOI collecting and maintaining copies of all tribally-executed, HEARTH-compliant leases, Congress should support participating tribes in developing and implementing their own lease recording systems. Similarly, rather than position federal actors as first-line dispute resolvers, the federal government should intervene in HEARTH leasing only rarely and if the issue cannot be resolved in tribal institutions first.

3. Expand and Support Broader Tribal Contracting Options: Congress could also transfer broader (including even currently-defined “inherently federal”) trust-related authorities to interested tribal governments, along with sufficient funding. For example, tribal governments should be able to contract to take over Office of Hearing and Appeals functions, particularly over the probate

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327. See *supra* Parts II.B.1–2.

328. See *supra* notes 162–163 and accompanying text.

329. See *supra* Part II.B.3.

330. See *infra* Part V.A.2.

of trust properties on the reservation, in order to unify systems across trust and non-trust probates.<sup>331</sup> Likewise, more funding should be directed to support tribal recording systems. Tribes can currently contract to preform federal land title and recording services for trust properties<sup>332</sup>, but they should have similar support to unify trust and non-trust recording systems. In many cases, non-trust properties are recorded (if at all) in state and county systems, but recording both trust and non-trust properties could be a territorial function of thriving reservation governments.

*b. Modifying Alienation and Sanctioning New Tenure Forms*

Ultimately, holistic tribal property reforms will require support for even bolder opportunities. This Section collects two sample strategies for this kind of work, both of which enable individual tribal governments to opt in or out.

1. Create Options for More Flexible Exchange: Congress could modify the Trade and Intercourse Act to permit some flexible alienation or transfer of some trust property interests—where tribal governments choose this result. Options could include, for example, an opt-in system for free alienation of trust properties among tribal citizens only. A system of flexible intra-tribal trust land exchanges would have no effect on tribal jurisdiction under current law (because these trust lands would never pass to nonmembers under this frame) but would give tribal governments critical space to build or implement tribal property law with respect to this exchange system. Within this fairly safe experimental space, tribal governments could define which interests are subject to transfer under what conditions and could craft responses to address important issues like property concentration, fraud risks, and defining the responsibilities of maintaining ownership.<sup>333</sup> The rules and systems created within this internal exchange system could then be translated to more wide-ranging property reforms if a tribe so chose.

2. Sanction New Flexible Tribal Tenures and Other Property Choices on Top of Trust Titles: Apart from actual title transfers, however, an even better option may be Congressional recognition for a whole range of tribally-derived new tenure models. For example, Congress could easily eliminate or reduce the consistency requirement of the HEARTH Act, allowing much more flexible leasing arrangements without federal involvement.<sup>334</sup> But even more dramatically, Congress could modify the Trade and Intercourse Act to permit the creation and transfer (pursuant to tribal laws) of a range of use, possession, and

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331. See *supra* Part II.B.2; see also Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 782–83 (2003) (also arguing for more flexibility in probate determinations to equitably distribute—according to community values and priorities—intestate assets at probate).

332. See *supra* note 182 and accompanying text.

333. See, e.g., Shoemaker, *Complexity's Shadow*, *supra* note 6, at 551.

334. This author is currently undertaking a detailed comparative study of land tenure laws actually adopted under these two regimes by both Canadian First Nations and US tribal governments.

other tribally defined rights on top of—or under the umbrella of—the baseline federal trust title. Such rights could endure indefinitely or as long as the tribe defines. Currently, any temporary land assignment, permit, or other customary use right across tribal trust land is already deemed a special kind of property interest that does not result in any effect on or transfer of the underlying trust title.<sup>335</sup> There is no reason additional interests—including freely transferable possessory interests—could not be defined and treated the same.

Ultimately, tribal governments should have broader autonomy to create interests wholly of their own design to coexist with or stack on top of the underlying trust titles.<sup>336</sup> This would permit the kind of innovation that the Chemehuevi tribe tried with transferable land assignments, but also allow wholly different models for individuals or groups, with a bespoke balance of rights and responsibilities. For example, grassroots organizers within the Navajo Nation have imagined creating new tenure forms that mimic some of the structure of condominiums off-reservation. Such tenure forms would combine a stable, collective ownership of the underlying title itself with private, transferrable interest in units to specific “air spaces” above the underlying (stable) title.<sup>337</sup> The possibilities for flexible definition of these on-top-of-the-trust tenures are nearly endless and could extend to tribally defined tenures that meet the unique needs of specific reservation environments.

### *c. Tribe-by-Tribe Negotiations*

Finally, some tribes may ultimately choose to pursue renegotiation of the entire trust relationship with the federal government.<sup>338</sup> Stacy Leeds, for example, has argued that the tribe itself should become the holder and controller of the underlying title, not the United States.<sup>339</sup> This may sound far-fetched and certainly creates financial and other issues around the transfer of ongoing federal responsibilities, but Canada is experiencing a renewed period of treaty negotiations in which First Nations are negotiating much more favorable land terms, including the right to alienate land without losing future jurisdiction.<sup>340</sup> In the United States, these renegotiations could ultimately change not only tribal jurisdiction over Indian-owned lands within the reservation, but also jurisdiction over non-Indian lands as well.<sup>341</sup>

These actions are hard. A cost of true tribal self-determination could be a shift in some federal trust responsibilities, and state governments are also likely to protest any action perceived as diminishing their own jurisdictional reach or

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335. See, e.g., *supra* notes 144–147 and 150–152 and accompanying text.

336. Cf. *supra* note 148 and accompanying text.

337. See *supra* note 303 and accompanying text.

338. Congress formally ended treaty making in 1871, but a whole range of agreements are still regularly entered into law. See COHEN'S HANDBOOK, *supra* note 54, § 1.03[9].

339. Leeds, *supra* note 304, at 456.

340. See, e.g., Graben, *supra* note 305, at 402.

341. See *infra* note 350 and accompanying text.

property tax base.<sup>342</sup> Yet these challenges are not insurmountable with sufficient time, investment, and careful negotiation, and this kind of broadly renegotiated land system would mean a tribal government could ultimately seek sufficient legal space for any number of innovative land tenure designs, based on the tribe's own desires and capacities.

### 3. *Special Allotment Challenges*

Finally, allotted lands within reservation territories require extra attention.<sup>343</sup> Fractionation is an enormous burden on the land administration system.<sup>344</sup> Tribal jurisdiction is currently much more limited over allotted trust lands than it is over tribal trust lands,<sup>345</sup> and the system's design perpetuates current problems,<sup>346</sup> with fractionation continuing to increase exponentially over generations.<sup>347</sup>

Reforms focused on allotments, then, may pursue multiple objectives, including reducing administrative costs, making co-ownership more functional for current owners, and increasing tribal autonomy and cohesive jurisdiction across reservation landscapes. Actual changes to allotted land tenures, however, also must account for the property owners' constitutionally protected property rights. There are limits to what the federal government can permit with regard to those rights (at least without paying just compensation).<sup>348</sup> Further, these rights mean that the federal government owes a unique and important trust responsibility to the individual allotment owners themselves.<sup>349</sup> While tribal governments are required by the Indian Civil Rights Act, and often their own tribal laws, to provide due process and just compensation for any taking of property rights as well, some have worried that there is no federal cause of action or federal enforcement of these tribal duties.<sup>350</sup>

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342. See, e.g., *supra* note 23 and accompanying text; see also Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 539 (2013) (summarizing numerous state and local objections to land into trust).

343. See also Washburn, *supra* note 88, at 230–31 (identifying future rights of allotted land owners as one of the most difficult questions that tribal governments will have to confront as powerful, modern self-governing sovereigns).

344. See *supra* Part I.B.1.

345. This is true even on non-fractionated allotments owned by citizens of the governing tribe. See *supra* Part II.B.1.

346. See Shoemaker, *No Sticks in My Bundle*, *supra* note 67, at 440. DOI's land management actually encourages fractionation, especially because there are no costs of title maintenance, such as taxes or recording requirements, for the individual owners.

347. See *supra* Part I.B.2.

348. E.g., *Hodel v. Irving*, 481 U.S. 704, 717–18 (1986).

349. See, e.g., *supra* note 81 and accompanying text.

350. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–67 (1978) (finding no cause of action other than limited habeas corpus remedy for federal courts to review tribal compliance with the Indian Civil Rights Act). Perhaps in light of this, federal decision-makers have often worried about fairness to allotment owners who are not enfranchised in the governing tribal nation, either because they are enrolled in a different tribe or because they are not Indian at all. See, e.g., Shoemaker, *Emulsified Property*, *supra* note 27, at 964, 997–98, 998 n.259. On the other hand, the Supreme Court has rejected

Prior reforms directed at allotment challenges in particular have been piecemeal and ineffective,<sup>351</sup> and most other reform proposals tend to address only part of the complex problem. Many alternative ideas impose still-more unrealistic transaction costs<sup>352</sup> or strip current owners of their title, despite landowners' clear desire to maintain a property-based connection to reservation spaces.<sup>353</sup> Given the failure of current reforms and the complex challenge presented, this Section suggests two core alternative options. First, a tribe may redesign the default rules of co-ownership within jointly-owned allotments in a way that better aligns with tribal priorities and values for these lands and their uses. Alternatively, a tribe may seek to transition and assemble all the undivided allotments within its territory into a new, consolidated reservation-wide land interest that protects some ownership values, such as a physical and emotional connection to important reservation spaces, but eliminates many of the costs of the current system.

*a. Tribal Redefinition of Co-Ownership*

First, as I have written about in detail before, the current federally-defined co-ownership rules counterintuitively prohibit co-owners from taking direct possession of their own allotments without a formal lease,<sup>354</sup> and many of these allotments are currently jurisdictionally mixed (or "emulsified") with undivided interests held in both fee and trust statuses, with interests and owners regulated

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constitutional challenges to a state statute that permitted city governments to extend extraterritorial police jurisdiction over suburban residents who could not vote in city elections. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 73–74 (1978). In general, the Court is more resistant to recognizing similar tribal government authorities in unenfranchised nonmembers of the tribe. *See, e.g., Montana v. United States*, 450 U.S. 544, 565–66 (1981).

351. Prior reforms have primarily sought to consolidate fractional interests, slow future fractionation with probate change, and facilitate more allotted land use by adjusting some consent requirements for leases. These have been ineffective for reasons explored in Shoemaker, *Complexity's Shadow*, *supra* note 6 and Shoemaker, *No Sticks in My Bundle*, *supra* note 67.

352. For example, Congress has created mechanisms to allow for individual trust owners to opt into "owner-managed" allotments. *See generally* 25 U.S.C. § 2220(c)(1) (2012). Stakeholders report challenges, however, as the original consenting co-owners die and complex issues arise about how future heirs and devisees navigate the owner-managed status. *See, e.g., American Indian Probate Reform Act of 2004: Before the S. Comm. on Indian Affairs 2* (2011) (testimony of Sharon Redthunder Acting Director, Indian Land Working Group), <https://www.indian.senate.gov/sites/default/files/upload/files/Sharon-Redthunder-testimony-and-attachment.pdf> [<https://perma.cc/FU76-B97S>]. Relatedly, some land buyback and exchange efforts have been notoriously complicated and full of delay. *See Carl G. Hakansson, Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231, 251, 251 n.168 (1997) (describing the landowners' "tedious and burdensome" process of exchanging fractional interests for smaller portions of consolidated tribal land on the Pine Ridge reservation).

353. *See, e.g.,* Jered T. Davidson, Comment, *This Land is Your Land, This Land is My Land? Why the Cobell Settlement Will Not Resolve Indian Land Fractionation*, 35 AM. INDIAN L. REV. 575, 603–17 (2010) (proposing termination of some fractional interests through dormant interest legislation or eminent domain).

354. *See* Shoemaker, *No Sticks in My Bundle*, *supra* note 67, at 433–35.

by state, federal, and tribal governments.<sup>355</sup> One option remains returning entire allotments to tribal jurisdiction—perhaps with some federal compensation for any lost federal benefits—and then reintroducing tribally defined use and possession rights for co-owners. With more space for actual owners' direct use, more context-specific arrangements could emerge. These organic experimental arrangements could help shape first future property norms and ultimately tribal property laws around co-ownership.<sup>356</sup> Unified tribal court jurisdiction could resolve specific conflicts, giving rise to an iteratively and experimentally developed tribal common law of co-ownership over time. This tribal co-ownership law could ultimately be designed to respond to the specific challenges of existing fractionation, whether by creating new and more flexible incentives for consolidation or by making jointly owned land more usable even in its current state.

*b. New Reservation-Wide Tenures*

Alternatively, a rational tribal government might also conclude that fractionation is too extreme and look for novel property law tools to facilitate more efficient property institutions. Such institutions would have to protect owners' rights while reflecting and preserving other critical values. With careful evolution and community participation, tribal governments might envision wholly different models of allotted land owners' physical connections to reservation spaces. For example, if we accept the BIA's current position that allotted landowners' existing property rights already preclude direct physical possession of their own lands without a formal lease, it is not that far of a reach to imagine reconfiguring allotment interests into a new tenure model that is perhaps not even physically bounded to a single parcel but instead structured as an interest in a larger collective of reservation spaces. This could, for example, be viewed as a kind of cultural easement with pro rata rights to income from a consolidated resource base (e.g., all allotted lands on the reservation) and separate tribally defined access rights (which could exist on allotted lands in general or, more likely, other critical reservation spaces within tribal control).

This kind of newly conceived tenure model, while radical in some respects, is rich with opportunity for tribal innovation and possibilities for culturally congruent property institutions. Giving stakeholders an investment or voice in some kind of association of owners also alleviates issues with the lack of political enfranchisement of some owners (including nonmember Indians and even possibly non-Indian fee owners).<sup>357</sup> Title maintenance costs and land use challenges would be diminished, and owners would maintain their legacy connection to the reservation in ways that can be locally defined to be culturally congruent.

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355. Shoemaker, *Emulsified Property*, *supra* note 27, at 972–74.

356. *E.g., id.* at 1007–11.

357. *See infra* notes 374–375 and accompanying text.

Given the constitutional protections for allotment interests, it is worth noting that there are parallels for this kind of transformative change in other contexts. For example, in the oil and gas context, most US states have a compulsory unitization mechanism whereby a vote of some supermajority of surface rights holders can create a new unit of all owners, with all unit members sharing in production with unified management of the full resource.<sup>358</sup> This converts an individual right to a pro rata share of the collective underground resource, with income and other rights disconnected from the specific surface space, and it can be achieved even over some minority dissenting owners' objections. Likewise, in the other direction, homeowners associations and condominium structures in many jurisdictions have dissolution mechanisms whereby a defined majority or supermajority of owners can force a conversion from co-ownership into private ownership, even if not every single co-owner agrees.<sup>359</sup> Finally, the post-conversion model of unified allotted interests could be designed similar to existing arrangements for real-estate investment trusts<sup>360</sup> or other land trust or land bank arrangements.<sup>361</sup>

### B. Other Supportive Strategies

Finally, this Section considers four more support strategies that may be effectively added to any tribal property reform effort. These include supporting and building other land-based social movements within reservation communities; reducing information costs through more creative and nimble uses

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358. See Jacqueline Lang Weaver & David F. Asmus, *Unitizing Oil and Gas Fields Around the World: A Comparative Analysis of National Laws and Private Contracts*, 28 HOUS. J. INT'L L. 3, 19–20 (2006).

359. In British Columbia, for example, a strata property (similar to a US condominium) can be dissolved by the vote of only eighty percent of owners, and, absent that threshold vote, other interested parties can seek dissolution by court order. See Douglas C. Harris, *Owning and Dissolving Strata Property*, 50 U.B.C. L. REV. 935, 939–40 (2017).

360. See, e.g., Zhilian Feng, et al., *An Overview of Equity Real Estate Investment Trusts (REITs): 1993–2009*, 19 J. OF REAL EST. LITERATURE 307, 307–08 (2011) (discussing basic ownership structure of REITs as basically “actively managed corporations” formed by real estate assets in a tax-advantaged ownership).

361. See, e.g., James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69, 79–81 (2009) (describing sample community land trust model for affordable housing). The “floating fee” model that Lee Ann Fennell proposed may also have relevance here. Fennell, *supra* note 10, at 1465; see also Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools ‘Takings-Proof’*, 28 J. LAND USE & ENVT'L L. 157, 192–93 (2013) (discussing a “rolling easement” concept for a type of geographically unbounded property interest as a potential adaptive response to sea-level rise). Brian Sawers has also proposed a related idea involving outright condemnation of fractional interests (in order to avoid any potential constitutional concern) and then in-kind compensation to fractional interest owners. This compensation would take the form of either ownership interests in alternative (consolidated) parcels of tribal land elsewhere on the reservation, or economic shares in a collective tribal land corporation containing all the consolidated fractional interests. See Brian Sawers, *Tribal Land Corporations: Using Incorporation to Combat Fractionation*, 88 NEB. L. REV. 385, 408–13 (2009). Certainly, this institutional format is also available, but I see more flexibility in fundamental land tenure redesign than in funneling this project through a particular (fraught and sometimes culturally contested) state-based corporate legal form.



of available data; investing significantly in this process of tribal experimentation and reform; and, most controversially, exploring mechanisms to engage non-Indian landowners as active and cooperative stakeholders in these reform processes.

### 1. *Nurture Land-Based Social Movements*

If property-system change requires both legal and social momentum, land-based social movements can be powerful vehicles to energize land tenure reforms more broadly. If major property change requires a flashpoint of political will, how can advocates move this needle? Social momentum can have two features. First, focusing on land issues in a particular context—whether food sovereignty, Indigenous agriculture, energy development, or a particular housing need—can move land tenure discussions from abstract to concrete. For example, discussing land use design in the context of incubating desirable Indigenous agriculture in specific places creates a concrete entry point that is vastly more accessible for community participation and iterative land-use experimentation than simply trying to redesign an entire land tenure system, in the abstract, from the ground up.

Second, there is precedent for land-based movements dramatically altering the course of legal events. To the extent more radical federal reforms will require a more difficult balancing of political wills, an active social movement cannot hurt. For example, the energy generated by the DAPL pipeline protest led the Obama administration to temporarily halt the DAPL pipeline, and a unique alliance of Indigenous activists and Nebraska ranchers has similarly affected the still-delayed Keystone XL project.<sup>362</sup> In Nebraska alone, different social movements have resulted in gifts of historic tribal land rights back to original Indigenous owners in three separate instances: the return of certain Pawnee burial grounds after a public conflict over the repatriation of human remains; the donation of one landowner's property in the path of the Keystone XL pipeline to the Ponca for the purpose of returning aboriginal corn to this space; and the collection of access rights along Standing Bear's historic trail of tears.<sup>363</sup> Likewise, in Canada, First Nation activists led the *Idle No More* movement,

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362. See Jessica A. Shoemaker, *Pipelines, Protest, and Property*, 27 GREAT PLAINS RES. 69, 74, 76–77 (2017).

363. See *id.* at 77–78; see also Joe Duggan, *Ponca Tribe Will Soon Own Piece of Land That's Part of 'Trail of Tears,' Name it After Chief Standing Bear*, OMAHA WORLD-HERALD (July 27, 2015), [https://www.omaha.com/news/nebraska/ponca-tribe-will-soon-own-piece-of-land-that-s/article\\_3135f670-041f-5695-b4d9-bea70a5a46ae.html](https://www.omaha.com/news/nebraska/ponca-tribe-will-soon-own-piece-of-land-that-s/article_3135f670-041f-5695-b4d9-bea70a5a46ae.html) [https://perma.cc/4YPX-LYXM]; Mark Hefflinger, *In Historic First, Nebraska Farmer Returns Land to Ponca Tribe Along "Trail of Tears,"* BOLD NEBRASKA (June 11, 2018), <http://boldnebraska.org/in-historic-first-nebraska-farmer-returns-land-to-ponca-tribe-along-trail-of-tears> [https://perma.cc/5JS8-6DHH].

which continues to resist unwelcome land tenure reforms and other political and legal actions.<sup>364</sup>

## 2. *Reduce Information Costs with Technology*

Information challenges persist in many current reservation land tenure dynamics, including the effects of uncertainty about who governs where and limited democratic engagement given the subject's overall complexity. These information challenges, however, can be addressed with information technologies. For example, data visualization tools that unpack layers of land use decisions and processes and allow stakeholders to better see the current land tenure regime across reservation spaces could be used to increase public engagement and agency around these issues. This kind of data could improve the functioning of the current system and also “inform public discourse and facilitate alternative opportunities for public participation with processes of decision-making.”<sup>365</sup> More careful use of data about outcomes could also be used to more accurately and efficiently evaluate the success of each tribal experimental reform.<sup>366</sup>

In addition, worries about information costs of non-standard property systems drive many of the fears and inherent limits of land-reform discussions.<sup>367</sup> Tribal advocates may consider, therefore, information-related solutions that can reduce the costs of tribally driven land reforms that produce non-standard property interests. With care, even bespoke property forms can be communicated efficiently and straightforwardly.<sup>368</sup> In other words, if standardization of property institutions is primarily driven by the need to reduce information costs, are there other ways that non-standard property forms could be communicated that also reduce information costs—at least as compared to an alternative institution that might be vaguely communicated or otherwise difficult to decipher? This may not require much in the way of “big data” or sophisticated visual cognition tools. It might just require attention to careful and precise communication of reservation property commitments to constituent audiences, when necessary.

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364. See Baxter, *supra* note 257, at 66, 70–73 (discussing relationship between *Idle No More* movement and land tenure change in Canada).

365. Peter Hemmersam, et al., *Exploring Urban Data Visualization and Public Participation in Planning*, 22 J. URB. TECH. 45, 46 (2015).

366. See generally Nestor M. Davidson, *Affordable Housing Law and Policy in an Era of Big Data*, 44 FORDHAM URB. L. J. 277 (2017) (detailing numerous ways advancements in data analysis can help shape better law and policy responses to the challenge of affordable housing).

367. See *supra* Parts II.B.2, III.A.1.

368. For example, research in urban planning and geography is exploring how data visualization and creative mapping and information design techniques can improve public participation in planning processes. See, e.g., K. Al-Kodmany, *Using Visualization Techniques for Enhancing Public Participation in Planning and Design: Process, Implementation, and Evaluation*, 45 LANDSCAPE & URB. PLAN. 37, 44 (1999).

Finally, although a slightly different point, information *sharing* may play an important role, too. Certainly, many pan-Indian groups already exist that advocate for Indian interests across tribal differences. Some of these are already specific to Indian land tenure concerns.<sup>369</sup> Although each tribal government may elect to engage in its own process of law reform and social norm building, sample codes, rules, or decisions could be shared in an idea clearinghouse—or, with support, model jurisdictional ordinances drafted.<sup>370</sup>

### 3. *Invest in Experimentation*

Currently, the federal government covers much of the expense of American Indian land tenure, at least in terms of actual bureaucratic outlays. This is a legal and moral obligation, but as previously discussed, these expenses are likely unsustainable,<sup>371</sup> and US taxpayers would benefit from tribal efforts to design and implement more sustainable systems that ultimately reduce the cost of the ongoing federal trust infrastructure. In addition, we could all benefit from learning from the experiences of more diverse laboratories of property system innovations across reservation landscapes. For these and other reasons, the federal government should actively fund and support tribal efforts to reclaim Indigenous land tenure—including through new funding streams, flexible pilot projects, and credit-union models.

Increasing tribal autonomy will increase tribal expense. Tribal governments can build revenue through new property tax or other tax measures, but this is difficult both politically and economically. Tribes may also creatively pursue more 638 contracts or other federal funding for a trust demonstration project under the ITARA, or demand other recompense from the federal government.<sup>372</sup> A transfer of the underlying trust title to the tribal government, for example, may require significant compensation for the long-term transition of federal duties to tribal governments—which could be achieved through new tribe-by-tribe negotiations of trust responsibility waivers or supported transitions of specific federal duties, such as trust administration.<sup>373</sup>

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369. See, e.g., INDIAN LAND CAP. COMPANY, <https://www.ilcc.net> [<https://perma.cc/R2W2-RLEQ>]; INDIAN LAND TENURE FOUNDATION, <https://iltf.org> [<https://perma.cc/BA7S-6XP9>]; INDIAN LAND WORKING GROUP, <http://www.indianlandworkinggroup.org> [<https://perma.cc/XC7H-XY26>]; INTERTRIBAL AGRIC. COUNCIL, <http://www.indianaglink.com> [<https://perma.cc/4GN2-E5SX>].

370. For example, the Indigenous Food and Agriculture Initiative at the University of Arkansas School of Law is working on a model food and agricultural code for tribal government consideration and possible adoption. See *The Model Food and Agriculture Code*, INDIGENOUS FOOD & AGRIC. INITIATIVE, <https://www.indigenousfoodandag.com/model-food-code-project> [<https://perma.cc/3JT3-F82W>].

371. See Part I.B.2.

372. See *supra* notes 200–204 and accompanying text.

373. See, e.g., Blomley, *supra* note 132, at 1292–93, 1296–97 (reflecting on complicated dynamics of reconciling “pre-existence of Aboriginal sovereignty” through modern, ongoing treaty negotiations in British Columbia, Canada); Gover, *supra* note 94, at 347, 369–70 (arguing that DOI should negotiate funding agreements with participating tribes to support tribes that take on great management and trust administration responsibility).

#### 4. *Extend the Franchise*

Finally, tribes may rationally choose to limit their land tenure reform efforts, at least in the first instance, to land owned by the tribe itself and possibly to land owned by its own tribal citizens. But to the extent a coherent land tenure design ultimately requires more cohesive regulation across entire reservation landscapes, the democratic deficit problem of unenfranchised non-Indian (or even nonmember Indian) landowners persists. Unenfranchised landowners may worry about bias, rightly or wrongly, and have serious concerns about their reservation property rights not being subject to an actionable takings or other due process protection in federal court if they do not have a political vote or say in tribal government decisions.<sup>374</sup>

Tribal property regulations intended to extend to noncitizens may need a mechanism of some enfranchisement—even if limited to specific land use matters—for validity. Issues of Indian identity and political enfranchisement in tribal governments are extraordinarily complex and can be fraught, including by federal precedent that currently requires a problematic quantum of “Indian blood” as a prerequisite to full recognition of Indian identity in some cases.<sup>375</sup> On the other hand, there are numerous promising examples of current intergovernmental cooperation—including tribal efforts to include some non-Indian residents on tribal court juries, for example.<sup>376</sup> Tribes may also experiment with extending a limited franchise to non-Indian landowners just to engage on land use or other localized planning or property-related matters. Relief may also be provided by creating new backstop federal causes of action to ensure non-Indian landowners’ due process rights and just compensation for any takings. Tribal governments desiring a full reservation-wide property jurisdiction may need to continue this conversation.

Ultimately, much creativity and imagination may be required, but the potential is vast.

#### CONCLUSION

The experience of American Indian land tenure confirms that property law is extremely powerful in shaping both social and physical landscapes. Historic federal land reforms sought to weaponize this power by forcing assimilationist agendas on Indigenous Peoples and cultures through allotment and termination-era property reforms. Recent rhetoric suggesting that a new generation of similar

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374. See *supra* note 350 and accompanying text.

375. E.g., Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 503 (2017) (quoting 1974 BIA policy for determining which tribal members were eligible for employment preference).

376. See, e.g., Matthew L.M. Fletcher, *Tribal Consent*, 8 STANFORD J. C.R. & C.L. 45, 49 & n.25 (2012) (discussing legal concerns that arise when nonmembers are subjected to tribal jurisdiction but not eligible to participate in tribal government. Fletcher notes the example of recent tribal actions to “tak[e] the ‘democratic deficit’ seriously” by placing nonmembers on tribal court juries when nonmembers are defendants.).

privatization reforms may be forthcoming has understandably caused deep concern in Indigenous communities.

This Article has comprehensively critiqued these fee simple proposals but has also argued that the current federal trust status of many reservation lands is itself deeply problematic. Beyond its economic inefficiency, the trust status fundamentally limits essential tribal self-governance rights. Rather than accept a false binary between only fee simple state property or the status quo of the federal trust, this Article has argued that property as a system is highly pluralistic and dynamic. Reform in this context is challenging, in part because of the complex and painful history at stake, but it can be done.

The ultimate goal of this Article is to imagine an entirely different real-property landscape and present it as a realistic alternative choice. Local property systems and norms evolve and accumulate over many repeat interactions, in specific contexts, and over a very long time. The federal trust system has squashed much of this flexible local space, but it can be created again. There is much more work to do, but a full range of choices exist between fee simple and the existing federal trust. Property systems fundamentally construct physical and social worlds, and tribal governments should have the freedom and the support to create these worlds for themselves.

