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Give or Take an Acre: Property Norms and the Indian Land Consolidation Act

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Give or Take an Acre: Property Norms and the Indian Land Consolidation Act

*Katheleen R. Guzman**

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I. INTRODUCTION

In 1887, Congress passed the General Allotment Act to privatize Indian reservations and advance the assimilationist sentiment of the day.¹ The Act divested land from tribes to their members, each of whom received a tract of land on a wing² and a prayer: become an autonomous Christian agrarian.³ With various goals (benign and otherwise) in mind,⁴ the Act's proponents envisioned its transformative ability to supplant communitarian tribal norms with the classical liberal virtues of self-sufficiency, individuality and private ownership.⁵ These hopes, however, did not materialize, and while allotment was soon abandoned in policy and practice, its legacy remains.⁶

1. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1999)). While allotment had been employed since the mid-1850's, the Act was the first time it was imposed outside of consensual, negotiated treaties. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 613 (R. Strickland ed., 1982). The Act was often implemented through individual treaties and provided the prototype for other allotment acts applicable to a specific tribe. See generally *infra* Part II (exploring the Act's pre-conditions and effects).

2. How that "wing" was later taken is a different tale told in *Andrus v. Allard*, 444 U.S. 51 (1979) (permitting ban on the sale of eagle feathers by an Indian tribe) and discussed *infra* notes 100-02 and accompanying text.

3. Thomas Jefferson's notion of civilized democracy, inextricably connected to agriculture, provided the foundation for allotment. "Protestant evangelism fused with the Jeffersonian ideal of the yeoman farmer in a vision that saw the conversion of the Indian to property ownership as not merely a cultural but a spiritual transformation." FERGUS BORDEWICH, KILLING THE WHITE MAN'S INDIAN 38-39 (1996); see *infra* notes 34-37 and accompanying text (exploring the invoked justifications for replacing tribal property with private property).

4. Although the General Allotment Act was touted as the "pulverizing engine for breaking up the tribal mass," Merrill E. Gates, Opening Address, 18 Proc. Ann. Meeting Lake Mohonk Conf. Friends Indian 16 (1900), it appears that the motives of its proponent, Senator Henry L. Dawes, were irreproachable. In Dawes's words,

We are blind, we are deaf, we are insane if we do not take cognizance of the fact that there are forces in this land driving on [the settlers] with a determination to possess every acre of [Indian] land, and [the Indians] will lose it unless we work and declare that the original owner of this land shall, before every acre disappears from under him forever, have 160 acres of it when he shall be fitted to become a citizen of the United States.

Id.; see ANN. REP. OF THE COMMISSIONER OF INDIAN AFFAIRS (Sept. 28, 1886) [hereinafter ANN. REP.]. The United States Supreme Court acknowledges this duality of motive. "[The General Allotment Act] seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to 'speed the Indians' assimilation into American society' and in part a result of pressure to free new lands for further white settlement." *Hodel v. Irving*, 481 U.S. 704, 706 (1987) (quoting *Solem v. Bartlett*, 465 U.S. 463, 466 (1984)) (citations omitted); see *infra* notes 34-37 and accompanying text (detailing pressures leading to allotment).

5. See BORDEWICH, *supra* note 3, at 38-39 (explaining the foundation of allotment).

6. See *infra* Part II.B. (detailing economic effects of allotment). For more in-depth dis-

Fractionation is one critical consequence of allotment. Through confluent legal and sociological factors,⁷ multiple owners now share minuscule interests in the same original allotment tracts. Consider an 1898 allotment of 80 acres, where the allottee and two successive generations die intestate leaving five heirs apiece. Roughly 125 tenants in common would each own a 1/125th equitable interest in one half of a quarter section. The scenario is plausible because many allotments exceed several hundred owners.⁸ As a result, "common denominators have reached 54 trillion, billions are not uncommon, and millions [approach the norm]."⁹ Fractionation thus renders allotment development or other economically productive use monumentally elusive, and propels interested investors into a "Kafkaesque quagmire"¹⁰ of negotiation and statutory and regulatory compliance.

In response to this problem, Congress passed the Indian Land Consolidation Act ("ILCA") in 1983. To "improve the economy of the tribe and its members," the ILCA strictly foreclosed the testate or intestate transfer of extremely fractionated interests, and instead, mandated their noncompensated escheat to the tribe with jurisdiction.¹¹ Congress hoped that escheat

discussion of the continuing role of allotment and its assimilationist underpinnings in modern sovereignty and territory jurisprudence, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

7. Burdensome administrative prerequisites to inter vivos transactions and initial prohibitions on testamentary ones meant that few allottees exercised transfer rights, forcing the allotment through intestacy to potentially numerous heirs as tenants in common. "First, testate succession was not permitted for many allottees until 1910. 25 U.S.C. 373. Even after wills were permitted, many Native Americans did not write them, again subjecting allotments to the intestacy scheme of the jurisdiction within which they were located." Alex Tallchief Skibine, *In the U.S. Supreme Court: The Limits on the Government's Power to Regulate the Right to Distribute Property by Devise and Descent*, Nov. 27, 1996, available in 1996 WL 680722.

8. Paul E. Frye, "A Travesty of a Mockery of a Sham": *The Federal Trust Duty and Indian Self-Determination*, SPECIAL INST. ON NAT. RESOURCES DEV. & ENVTL. REG. IN INDIAN COUNTRY 2B-13, Paper No. 2B (Rocky Mtn. Min. L. Found. 1999).

9. INDIAN LAND CONSOLIDATION ACT AMENDMENT, S. REP. NO. 98-632, at 82-83 (1984), reprinted in 1984 U.S.C.A.N. 5470. See generally Michael C. Lawson, *Heirship: The Indian Amoeba*, reprinted in *Hearing on S. 2480 and S. 2663 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 85 (1984). In fact, the lowest common denominator for some fractionated ownership interests has reached a googol—a number containing 101 digits, or 10¹⁰⁰ power. Interview with Q. Michael Jones, National Director for the Land Titles and Records Division, Department of the Interior, Bureau of Indian Affairs (Dec. 5, 1996).

10. Lynn H. Slade, Presentation, *The Federal Trust Responsibility in a Self-Determination Era*, SPECIAL INST. ON NAT. RESOURCES DEV. & ENVTL. REG. IN INDIAN COUNTRY, Paper No. 2A (Rocky Mtn. Min. L. Found. 1999). That sentiment captured the conference consensus, where allotted lands were characterized as "the chaff of federal Indian policy" whose leasing was often "just better off not tried." Comments of conference participants, regional solicitor Timothy Vollman and attorney Michael Webster, respectively.

11. Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, 96 Stat. 2519 (codified as amended at 25 U.S.C. § 2206 (1994)).

would counteract the further atomization of allotments, encourage a consolidated tribal land base, and provide land for tribal programs.¹² Despite laudable goals, the ILCA failed to pass constitutional muster. In *Hodel v. Irving*,¹³ the Supreme Court rejected the ILCA's escheat provision as an unconstitutional taking; the amended version, which reached the Supreme Court in 1997 in *Babbitt v. Youpee*,¹⁴ was similarly spurned.¹⁵ By holding that the ILCA violated the Fifth Amendment Takings Clause rather than the Fifth Amendment Due Process Clause, the Court grudgingly acceded federal power to mandate the escheat of the fractional property interests but implicitly conditioned its exercise upon just compensation to each affected decedent's estate.

Neither decision has been popular. While critique on both cases remains sparing, the existing review of *Youpee*¹⁶ and its predecessor *Irving*¹⁷ approaches unanimity in its assessment of the Supreme Court's holdings as "strange and defiant,"¹⁸ "curiously anachronistic, simplistic, and mischievous,"¹⁹ "strain[ed],"²⁰ "broken, flawed, unpromising, and elusive,"²¹ assimilationist,²² and even "particularly pernicious."²³ Given the ranging im-

12. *Ute v. Utah*, 935 F. Supp. 1473 (D. Utah 1996), citing H.R. REP. NO. 97-908, at 5 (1997), reprinted in 1982 U.S.C.A.N. 4415, 4416.

13. 481 U.S. 704 (1987).

14. 519 U.S. 234 (1997).

15. See *infra* note 67 (elaborating on the Supreme Court's holding in each case). See generally Part III (assessing the constitutionality of forced escheat under tradition takings principles).

16. Michael Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1213-17 (1999) [hereinafter Heller, *Boundaries*]; Chris Schwab, Case Note, 65 TENN. L. REV. 805 (1998).

17. See, e.g., Ronald Chester, *Essay: Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195, 1197 (1995); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1662-65 (1988); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1621-25 (1988); T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1728 (1988).

18. Chester, *supra* note 17, at 1197, 1198.

19. JESSE DUKEMINIER & STANLEY JOHANSON, *WILLS, TRUSTS, AND ESTATES, TEACHER'S MANUAL* 274 (5th ed. 1995).

20. Kmiec, *supra* note 17, at 1664.

21. Daniel Kornstein, *Inheritance: A Constitutionally Protected Right?*, 36 RUTGERS L. REV. 741, 743, 745-46 (1984) (commenting pre-*Youpee* and *Irving* on whether restricting inheritance would equal a taking).

22. See, e.g., E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 302 n.132, 314 (1998) (citing *Irving* and *Youpee* as illustrating pervasive cultural bias and disregard for minority values); Rebecca Tsosie, *American Indians and the Politics of Recognition: Soifer on Law, Pluralism, and Group Identity*, 22 L. & SOC. INQUIRY 359, 371 (1997) (reviewing ARIAM SOIFER, *LAW AND THE COMPANY WE KEEP* (1995)) (noting the *Irving* Court's willingness to "sacrifice group claims to property to the Anglo-American norm of individual private prop-

fact of the ILCA and the Supreme Court's response, it is startling that the ILCA has generated so little academic response,²⁴ and even more startling that the sparse commentary that does exist ostensibly unites in endorsing the Act.

The legislative, judicial, and academic reaction to fractionation and forced consolidation tells two tales with one moral: the popular view of both the extent of property rights and the nature of those who hold them is unnecessarily constricted. The Court's decision is not peculiar unless one holds a narrow view of property, just as it is not assimilationist unless one holds a narrow view of Native Americans who own it.

The primary story involves takings in general. The negative reaction to the *Irving* and *Youpee* Courts' holdings is traceable to the fact that the cases do not appear to make economic sense. As Part II elaborates, fractionation is a significant problem: minute individual interests yield low return at huge individual, tribal, and federal costs. Because consolidation would presumably transpose that equation,²⁵ the member-to-tribe transactions forced by the ILCA's escheat provision seem attractive as its ideal corrective. But such a narrow, economically-driven analysis eclipses other legitimate concerns and is precisely the most disappointing aspect of both the ILCA and its academic support.

The overwhelming criticism of the Court's approach indicates that the definition of property and the circumstances requiring its compensation are

erty rights").

23. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 11 (1997) (labeling the Court's treatment of the takings issue as applied to American Indian law as "disquieting, interfer[ing], and assimilat[ionist]").

24. Chester, *supra* note 17, at 1202.

25. This economic perspective presumably inspired most of the aforementioned criticism, emanating as it did from the "taking" perspective. If so, academic reaction might signify less endorsement of the ILCA in means and ends than a rejection of current taking jurisprudence in theory and application.

Within roughly the last decade, a series of Supreme Court decisions has curtailed land use regulation, reflecting the broader property rights struggle between absolutists versus relativists. One's view depends on a number of political positions, including the propriety of redistributive legislation and the Supreme Court's role in striking it. *See, e.g.*, Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 OR. L. REV. 603 (1993) (critiquing current taking jurisprudence and previewing its probable direction); Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 331, 339-41 (1995) (asserting that the Court should integrate economic interests into a broader jurisprudence of constitutional rights); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605 (1996) (analyzing the Lochnerian aspects of the Court's new takings doctrine); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1671-84 (1988) (observing that the classical liberal conception of property is incompletely embodied in the Court's recent jurisprudence).

too oriented toward the physical, and are freighted with economic baggage. Property is far more than a thing with value. Rather, it is the series of relative rights between and among persons with respect to that thing. In that vein, Part III reassesses the presumed constitutionality of forced escheat to show that abolishing the right to transfer certain property at death, no matter its dollar value, is in fact a taking under traditional legal perspectives.

More importantly, a just takings jurisprudence must factor more than the property's economic worth and the economic effect of its regulation or appropriation. Those who try to crack the Court's "secret code"²⁶ are otherwise left feeling befuddled and perhaps even duped when, as here, the Court finds a taking in legislation that increases economic returns or refuses to find a taking in legislation greatly reducing property's worth or income potential. Part IV thus examines how rejuvenating the contextual takings approach—one accounting for ideology, history, and policy—permits fresh evaluation of the legitimacy of the Supreme Court's holding within the ILCA context and thus supports expanding the jurisprudence of takings in general.

Discussing the primary story through the ILCA necessarily illuminates a secondary issue, more properly called myth: that of the prototypical "Indian land owner" and his response to forced escheat. Congress depicts the owner averse to the private ownership, sale, and speculation of real property and appalled by personal over group rights, while the Court's version has him embracing Anglo-American notions of property and all the individualism thereby entailed. Therein lies the twist:²⁷ Congress appears to further "the Indian way" while the Supreme Court suppresses it. The ILCA declares "we know what you want" (efficiency and community), while *Irving* and *Youpee* assert "you want what we have" (testamentary freedom and individuality). Both branches subtextually foist Anglo-American norms on the tribes through their promise of deliverance.

If both approaches are suspect, why favor that of the Supreme Court? The Court's view preserves a tribe's ability to define its own history and future, rather than forcing it to accept Congress's proffer.²⁸ Just as the pre-

26. See Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 997 (1999) (arguing for a return to and uncoupling of the purposes of the Takings Clause—efficiency and justice).

27. The ILCA thus inverts the general charge levied against the judicial system within the realm of testamentary freedom: "Generally, individuals have 'freedom' to distribute their property along carefully delineated channels in accordance with prevailing norms." Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 273 (1996).

28. As discussed in Part VI, tribes may of course create their own escheat or consolidation policies if they so choose. Notably, even tribes benefitting from the consolidation opposed it in principle. See Amicus Brief of the Allottees Association et al., filed on behalf of Respondents at

sumed “pan-ideology” of individual Native Americans is frozen at the height of westward expansion and Indian resistance, so too are Native/Anglo cultural junctures reduced to progress versus innocence lost or land preservation versus efficiency cost, depending upon where one’s sympathies or biases lie. This rhetorical climate reifies a false and hierarchical dichotomy, permitting a view of Indian land policy as wholly within the federal province and either something wrongfully done to tribes or the non-negotiable cost of a conquered people’s protection, inclusion, and even existence within the federal scheme. Although both perceptions delegitimize the policy at issue, few find space to evaluate it or its implementation as anything in between.

The ILCA is no exception. Casting fractionation as yet another Indian problem reinforces the diametric position of Native/Anglo land ethics, the efficiency (and, thus, superiority) of Anglo development policies, and the necessity of top-down solutions, where federal law mandates tribal policy. As Part V asserts, leaving Congress or the Court to determine “what tribes want” is farcical given the external position of the federal government and the breadth and differences between tribes. Part V thus concludes that the response to fractionation should entail federal/tribal/member collaboration, to forestall either reflexive imposition of Anglo-American property norms or stereotypical characterization of Native Americans’ relation to the land.

While boasting commendable goals and a passable means to reach them, the inequity of the ILCA is appreciated only after regarding the fuller legal, historical, and ideological continuum into which it was thrust to operate. As it falls far short of attaining the exacting fairness demanded by such a context, the Supreme Court properly invalidated the forced escheat provision of the ILCA, despite that it invoked Anglo-American property norms and strained traditional takings analysis to do so. What is more, faithfulness to tribal sovereignty and its correlative, self-determination, insists on a heightened tribal role in confronting the maleficence of allotment and the mischief of its consequences.

II. THE INDIAN LAND CONSOLIDATION ACT: ITS CAUSES AND EFFECTS

A. APPROACHING THE INEXORABLE: FEDERAL INDIAN LAND POLICY FROM DISCOVERY THROUGH ALLOTMENT

The 1823 decision of *Johnson v. M’Intosh*²⁹ constructed the current foundation for federal Indian land policy by swiftly sweeping Indian land “ownership” into the oddly-hybrid form it retains today: tribal use at fed-

12, *Babbitt v. Youpee*, 519 U.S. 234 (1997) (No. 95-1595).

29. 21 U.S. (8 Wheat.) 543 (1823).

eral sufferance. *Johnson* involved claims of colonial speculators to enormous land parcels through purchase from two tribes. Denying their claim in favor of purchasers from the federal government, *Johnson* held that, via the British Crown, discovery conferred fee title, and, thus, transferability, upon the United States, subject only to tribal rights of use and occupancy which were extinguishable by federal conquest or purchase.³⁰

But the settlers' American dream inhered less in the vagaries of property ownership concepts than in its actual physical possession. This goal was captured in the charge to "Go West," particularly after tales of opportunities there trickled back to the dreamers and would-be doers crowding the eastern seaboard.³¹ As settlers continued to exert pressure upon the Native American land base, and the economic and human costs of quelling the resultant conflicts spiraled, federal policy shifted from *Johnson's* conceptual limits on Native American ownership to physical ones.

Federal removal policy urged tribes to the vast No Man's Land of the Great West, while reservation policy herded them into smaller and more delineated confines once there.³² The Anglo response was continued discontent. To expansionists wedded to the manifest destiny tradition, the reservations were dystopian: they impeded physical and economic progress, preserved tribal existence, and directly opposed the settlers' deified concept of individual landholding.³³

By the late 1880s, reservation policy faced almost total dissatisfaction. Native American sympathizers identified infirm tribal economies with no progress in sight, and hoped that tribal members would be protected, prosper, and assimilate if given land to cultivate.³⁴ Enemies of the tribes correctly perceived the necessity of centralized communities to tribal sustenance. They too sought privatization, but to hasten tribal eradication and in turn open valuable reservation tracts to white settlement.³⁵ Such shared

30. *Id.* at 550-58.

31. The discovery of gold at Sutter's Mill resulted in thousands traveling across the plains and converging upon California in 1848. Carl J. Mayer, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. CHI. L. REV. 624, 638 (1986).

32. This was effected through persuasion- or coercion-induced treaties. The tribes ceded the bulk of their land to the United States Government reserving smaller portions to themselves. See ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* (2d ed. 1984) (detailing the travails of the Five Civilized Tribes during the removal and reservation eras).

33. KIRKE KICKINGBIRD & KAREN DUCHENEAUX, *ONE HUNDRED MILLION ACRES* at xxi, 14-15 (1972).

34. *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1888-1900*, at 80-140 (Francis Paul Prucha ed., 1978).

35. "The main purpose of [allotment legislation] is not to help the Indians . . . so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement . . . [W]hen the Indian is smothered out, as he will be under the operation of

means to diverse ends triggered the "carnival of exploitation"³⁶ spawned by allotment—the ultimate hegemony of Western European values.³⁷

The General Allotment Act and similar legislation³⁸ privatized reservations by removing the land from tribal ownership and control. The legislation surveyed, sectioned, and parceled land to individual tribal members in trust.³⁹ To ensure thorough acculturation and protection from Anglo-American depredation, the federal government planned to retain legal title and transferred mere beneficial or equitable title to each allottee, who was to receive a standard fee patent after 25 years.⁴⁰ During the trust period, all conveyances (e.g., sale, gift, devise, exchange, lease, or mortgage) were prohibited and thus void unless made with the approval of the Secretary of the Interior. Likewise, the property was free from taxation.⁴¹ Expansionism mandated speed, and allotment was supported and effected by every Commissioner of Indian Affairs between 1887 and 1934.⁴²

this bill, the investment will revert to the national Treasury, and the Indian, in the long run, will be none the better for it." H.R. REP. NO. 46-1576, at 7-10 (1880) (predecessor legislation to the Dawes Act), *cited in* Amicus Brief for the Respondents, *Babbitt v. Youpee*, 519 U.S. 234 (1997) (No. 95-1595), *available in* 1996 WL 528318, at *7 n.3.

36. LEWIS MERIAM, INST. FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 19 (1928) [hereinafter *THE MERIAM REPORT*].

37. Professor Angie Debo discusses how the Five Civilized Tribes (the Cherokee, Creek, Choctaw, Chickasaw, and Seminole), which were exempted from the General Allotment Act, nevertheless suffered their own versions of allotment imposed in part under threat of gun and as "punishment" for siding with the south in the civil war. Allottees acquired restricted rather than trust fees, meaning they owned legal and equitable title to the tract subject to transfer restraints. *See, e.g.*, DEBO, *supra* note 32 (tracing the history of five tribes through removal, reservation, and allotment policies).

38. *See, e.g.*, Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 (1889) (allotting Sioux reservation).

39. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887). By contrast, the members of tribes excepted from the Act (most notably, the "five civilized tribes") were issued "restricted allotments" or fee patents subject to restrictions against alienation without secretarial approval. *See* Act of Mar. 1, 1901, ch. 676, 31 Stat. 861, supplemented by Act of June 30, 1902, ch. 1323, 32 Stat. 500 (Creek); Act of Mar. 1, 1901, ch. 675, 31 Stat. 848, supplemented by Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee); Act of July 1, 1898, ch. 542, 30 Stat. 567, supplemented by Act of June 2, 1900, ch. 610, 31 Stat. 250 (Seminole); Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, 505, supplemented by Act of July 1, 1902, ch. 1362, 32 Stat. 641 (Choctaw and Chickasaw).

40. The trust period was designed with education and protection in mind: to protect the individual from state taxation and permit the allottee to learn economical management and cultivation of the land. *See generally* *THE MERIAM REPORT*, *supra* note 36.

41. 25 U.S.C. §§ 379, 404, 464, 483 (1994); 25 C.F.R. § 152.17 (1998). Pursuant to the Appropriations Act of June 21, 1906, ch. 3504, 34 Stat. 325, 326 (codified at 25 U.S.C. § 391 (1994)) and the Indian Reorganization Act, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1994)), the Interior Department has extended the trust period on allotted lands indefinitely. *See* 25 C.F.R. ch. I app. at 655 (1998) (citing executive orders and acts of Congress that have continued the trust period of Indian land).

42. JANET A. MCDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934*, at 6

Unless its covert purpose was to force precipitous declines in Indian-held acreage, allotment failed. Native American lands plunged from 138 million acres in 1887 to 48 million acres (of which approximately 20 million was desert) by 1934.⁴³ First, reservation land that exceeded allotment demand equaled "surplus" lands, which were open to general homesteading.⁴⁴ Second, a competency determination, often forced upon unwilling or incompetent allottees, resulted in an immediate fee patent to (and too often transfer from) that individual well before the statutory 25-year trust period expired.⁴⁵ Allotments moved quickly through their original owners' hands—sometimes through voluntary and equitable transactions but just as often through bad faith negotiation and sale, suspicious testate or intestate succession, or foreclosure by unscrupulous creditors.⁴⁶

Not only were significant land holdings lost, but individual allottees often lacked the interest, information, or implements to become the self-sufficient "Christian Yeoman" envisioned by Senator Dawes and his cohorts.⁴⁷ "The irony is that the culture dissolved in its ability to keep order and produce wealth among its members, but this was not accompanied by a transfer of loyalty to white institutions and culture."⁴⁸ These deficiencies

(1991). The fairness of allotment's implementation usually hinged on the reservation's agent and was often woefully lacking. Allotted land was often arid and worthless, unsuitable for farming or much else. Negligence and corruption abounded as choice tracts of land were withheld from allotment or transferred to the wives or children of whites. *Id.*

43. COHEN, *supra* note 1, at 138. Recent data indicates that the United States government holds approximately 55 million acres in trust for tribes and individual members. Stanley J. Czerwinski, *Native American Housing—Homeownership Opportunities in Trust Lands Are Limited*, GAO REP., Feb. 24, 1998.

44. General Allotment Act of 1887, ch. 119, 24 Stat. 388.

45. While Congress could permit the issuance of a fee prior to the expiration of the trust period, *see* H.R. REP. NO. 59-1558, at 2 (1906), this was particularly so after the Burke Act of 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1993 & Supp. 1999)), which, *inter alia*, permitted the Secretary of the Interior to make competency determinations and issue fee patents at any time thereafter. Soon thereafter, "competency commissions" were established to rove Indian Country and force fees upon such allottees. *See* *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987) (discussing practice and holding on procedural grounds that transactions stemming from "forced fees" could not be set aside); 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 295-305 (1984) (noting how allotment policy shifted from protecting Indians to speeding the alienation of their lands).

46. *See generally* MCDONNELL, *supra* note 42; CHARLES WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 20 (1986).

47. In fact, some argue that the reverse actually happened where allottees determined that leasing or selling the land was more fruitful than individually working it. This is the premise developed by Leonard A. Carlson, *Land Allotment and the Decline of American Indian Farming*, in 18 *EXPLORATIONS IN ECONOMIC HISTORY* 128-54 (1981).

48. Jennifer Roback, *Exchange, Sovereignty, and Indian-Anglo Relations*, in *PROPERTY RIGHTS AND INDIAN ECONOMIES* 23 (Terry L. Anderson ed., 1992)

were governmentally recognized as early as 1928⁴⁹ and encoded by 1934, when the Indian Reorganization Act⁵⁰ terminated allotment policy and procedure. As then-Commissioner John Collier noted:

[T]he Indian Service is forced to expend millions of dollars a year. The expenditure does not and cannot save the land, or conserve the capital accruing from the land sales or from rentals For the Indians the situation is necessarily one of frustration, of impotent discontent. They are forced into the status of a landlord class, yet it is impossible for them to control their own estates; and the estates are insufficient to yield a decent living, and the yield diminishes year by year and finally stops altogether.⁵¹

While remedial, the Indian Reorganization Act did little to halt the steady spread of land base erosion, as it neither reversed existing allotments by returning them to the tribe nor invalidated completed transactions to Anglo-American takers. It additionally proved ineffectual against the fractionation of existing allotments; such efforts were not undertaken until Congress passed the ill-fated ILCA a half-century later.

49. See THE MERIAM REPORT, *supra* note 36, at 779-98 (detailing the Act's inadequacies).

50. Also known as the Wheeler-Howard Act, 25 U.S.C.A. §§ 461-79 (West 1983).

51. *Readjustment of Indian Affairs: Hearings on H.R. 7902 of the House Comm. on Indian Affairs*, 73d Cong. 117-18 (1934), cited in Petitioner's Brief at 17, *Babbitt v. Youpee*, 519 U.S. 234 (1997) (No. 95-1595). Commissioner Collier might have spoken too optimistically when referring to the Indians as "the landlord class." Their circumstances more closely resembled that of the medieval serfs: able to use "their" land but dependant on the overlord (the government) for protection, ironically forced into a form of the very feudal economy that the settlers sought to escape.

B. *THE LEGACY OF ALLOTMENT: FRACTIONATION AS "THE TRAGEDY OF THE ANTICOMMONS"*⁵²

Undiluted economic analysis justifies the swift and expansive solution of escheat given the extent to which fractionation interferes with efficient land use. First, the transactional costs and demands of identifying, locating, negotiating with, and acquiring permission from all allotment cotenants are cumbersome and inefficient. It is difficult to identify and locate allottees, given the infamous multiple successive intestate estates, probate backlog, and outdated, incomplete, or irretrievable records with limited rights of access that often characterize allotted lands. Relatedly, there is little incentive for the cotenants to ensure that their interest is of record; that many cotenants neither know nor care about their proportionate ownership is both a cause and effect of the suboptimal return it generates. Unlike the routine cotenancy where any concurrent owner may lease, sell, or mortgage a fractional interest without procuring approval from the other owners,⁵³

52. A "commons" exists where many owners may use but not exclude others from a given resource; the familiar "tragedy" results from the disincentive to minimize negative externalities caused by overuse and resource depletion. See Harold Demsetz, *Towards a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (positing emergence of private property where governmental and economic shifts render benefits of appropriation higher than costs). Professor Michael Heller defines "anticommons" property as the converse—many owners enjoying a right to exclude others from a scarce resource such that no one has an "effective" privilege of use. To the extent that underuse results, a tragedy of the anticommons occurs. See Heller, *Boundaries*, *supra* note 16, at 1213-17 (arguing that the *Irving* and *Youpee* cases "entrench" a tragedy of the anticommons by protecting right to devise fractionated interests in allotted lands); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 622, 685-87 (1998) [hereinafter Heller, *The Tragedy of the Anticommons*] (characterizing fractionated allotments as anticommons and arguing that the reservations were not privatized enough). But is the under-development of allotted lands really a tragedy? See Stephen R. Munster, *The Special Case of Property Rights in Umbilical Cord Blood for Transplantation*, 51 RUTGERS L. REV. 493, 549 (1999) (noting within the biomedical patents context that "anticommons property is not necessarily tragic" as not all sub-optimal consumption need be so viewed). The construction of optimal versus sub-optimal "consumption" of land appears driven by a thoroughly economic perspective.

53. See, e.g., *Moore v. Foshee*, 38 So. 2d 10 (Ala. 1948) (deed); *Schank v. North Am. Royalties, Inc.*, 201 N.W.2d 419 (N.D. 1972) (lease). The transferee acquires the transferor's interest and cannot exclude non-participating cotenants from equivalent possessory rights. The lessor usually must account to the other cotenants for rents or profits received from third parties or non-rent income derived through property exploitation. See *Lichtenfels v. Bridgeview Coal Co.*, 496 A.2d 782 (Pa. Super. Ct. 1985) (requiring accounting to co-owners for profits from development); *White v. Smyth*, 214 S.W.2d 967 (Tex. 1948) (same).

Mineral leases work similarly since subsurface estates are usually jointly owned. While a handful of states requires unanimous cotenant consent before mineral development, see *Law v. Heck Oil Co.*, 145 S.E. 601 (W. Va. 1928), most jurisdictions permit any single cotenant or cotenant's lessee, irrespective of ownership percentage, to develop the mineral estate without the others' consent or even over their objection. Non-lessor cotenants are then entitled to an

leasing an allotment ordinarily requires *unanimous* consent by *all* interest holders.⁵⁴ This arrangement creates enormous difficulties where lost or simply recalcitrant cotenants exist. The effect of these factors might be mitigated if significant blocks of willing owners were able to terminate the cotenancy through partition. However, unique contextual rules again limit that particular detour,⁵⁵ as well as other title-clearing avenues such as ad-

accounting for profits (proportionate production less proportionate operating costs)—no slight risk for the developing cotenant who shoulders all costs should the well fail to produce. See *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566-74 (8th Cir. 1924) (holding a non-lessor cotenant entitled to an accounting); *Enron Oil & Gas Co. v. Worth*, 947 P.2d 610 (Okla. Ct. App. 1997) (holding permission of cotenant for exploration unnecessary).

54. Act of Aug. 9, 1955, ch. 615, 69 Stat. 539 (codified as amended at 25 U.S.C. § 415 (1999)) (non-mining allotment lease); Allotted Lands Leasing Act of 1909, ch. 263, 35 Stat. 783 (codified as amended at 25 U.S.C. § 396 (1999)) (mining allotment lease); *McClanahan v. Hodel*, 14 Indian L. Rptr. 3113 (D.N. Mo. 1987). See generally Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974) (reviewing the history of leasing policy and the scope of federal duties regarding leasing Indian trust land).

Leasing without unanimous consent is permitted in limited circumstances. Under a 1955 amendment to 25 U.S.C. § 396, the Secretary may execute allotment mining leases to the "highest responsible qualified bidder" without unanimous consent when the allottee is deceased and his or her successors have not yet been determined and/or located. Act of August 9, 1955, ch. 615, § 3, 69 Stat. 540. The Act does not specifically apply where the interest holder is identified and located but withholds consent, although it does reference an earlier Act authorizing leasing by BIA superintendents when the allotted lands "are not in use by any of the heirs and the heirs have not been able during a three-months' period to agree upon a lease by reason of the number of heirs, their absence from the reservation, or for other cause . . ." Act of August 9, 1955, ch. 615, § 2, 69 Stat. 539 (codified at 25 U.S.C. § 415a (1994)) (referencing Act of July 8, 1940, ch. 554, 54 Stat. 745 (codified at 25 U.S.C. § 380 (1994))). The Secretary of the Interior can sell allotted land timber upon request by owners of a majority interest or to prevent catastrophic loss. 25 U.S.C. § 406. The Secretary may also represent undetermined or missing cotenants. *Id.* Mineral leasing of Five Tribes allotted lands is governed by a different scheme, specifics of which are found at Act of August 4, 1947, ch. 458, § 1, 61 Stat. 731 and 25 C.F.R. pt. 174 (1980). See generally Timothy Vollmann & Sharon Blackwell, "Fatally Flawed": *State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 TULSA L.J. 1 (1989) (outlining statutory framework and procedures for state court approval of leases and conveyances).

As the unanimity requirement places allotments at a competitive disadvantage in both attracting investors and securing favorable lease terms, recent legislation attempts congressional relief for some tribes. See, e.g., Act of July 7, 1998, Pub. L. No. 105-188, 112 Stat. 620 (1998) (allowing allotments on Fort Berthold Reservation, North Dakota to be leased upon majority consent and non-consenting owners are entitled to share of rents and royalties). Other legislation sponsored by the Department of the Interior seeks to extend such majority consent rules to other allotted lands. See H.R. 2743, 105th Cong., § 219 (1997); 25 U.S.C.A. § 3715(c)(2)(A) (1994) (allowing majority interest owners in trust or restricted land to enter agricultural surface lease binding minority interests).

55. Normally, any single cotenant may dissolve the concurrent estate through partition by sale (division of proceeds) or in kind (division of property). By contrast, allotments cannot be

verse possession,⁵⁶ marketable record title acts,⁵⁷ and tax sale loss.⁵⁸

Second, allotments normally range from 80 to 160 acres.⁵⁹ Their relatively small size impedes revenue-producing agricultural, industrial, or mining development—a difficulty exacerbated by the variegated ownership and jurisdictional patterns dominant in allotted reservations. The high information and transfer costs generated by such a complex scheme deter third parties from even entering negotiation, particularly where those costs might exceed the parcel's entire value.⁶⁰ To the extent that a parcel's worth or retention value depends on its capacity to generate income, these impediments force the type of under-use that Professor Heller termed the "tragedy of the anticommons." Ownership interests (as well as the allotment itself) are functionally relinquished or abandoned save the occasional homesite.⁶¹ Worsening matters, the Department of the Interior attempted to provide investment incentives by structuring deals generating ludicrously

partitioned at all unless *all* cotenants agree. Act of May 14, 1948, ch. 293, 62 Stat. 236 (codified at 25 U.S.C. § 483 (1994)) (enabling secretary to partition allotments subject to the Indian Reorganization Act "upon approval of the Indian owners," construed to require the application of all co-owners in 25 C.F.R. § 121.33 (1980)). *But see* Sampson v. Andrus, 483 F. Supp. 240 (D.S.D. 1980) (granting Secretary discretion to authorize allotment partition upon the application of any single co-owner). These rules are generally construed inapplicable to restricted fees, which can be partitioned only upon the voluntary action of all owners. 25 C.F.R. § 121.33(b).

56. An adverse possessor cannot acquire title to lands allotted under the General Allotment Act where the United States government still holds legal title, but can do so against restricted fees of members of the Five Tribes. Act of April 12, 1926, § 2, 44 Stat. 239.

57. Marketable Record Title Acts, which bar any interest created before the "root of title," do not apply to interests held by the United States (therefore are inapplicable to trust allotments) and usually do not apply to restricted fees either unless they are considered a true statute of limitations. *See* Mobbs v. City of Lehigh, 655 P.2d 547, 551 (Okla. 1982) (holding a state marketable record title act not a statute of limitations, as it barred the property right itself rather than merely the remedy for its infringement).

58. Generally, neither trust nor restricted allotments, nor income derived therefrom, are subject to taxation. COHEN, *supra* note 1, at 391-99, 418-29. This removes the normal incentive to transfer or consolidate a real property interest whenever tax burdens exceed property revenue, and also removes the possibility for tax sale.

59. General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 (1999)).

60. These problems led solicitor Timothy Vollman to comment that "mineral leases of allotted lands are virtually unknown in the last twelve years." Presentation of Timothy Vollman, *Federal Approval of Mineral Development on Indian Lands*, SPECIAL INST. ON NAT. RESOURCES DEV. & ENVTL. REG. IN INDIAN COUNTRY, Paper No. 9 (Rocky Mtn. Min. L. Found. 1999).

61. *See* Heller, *The Tragedy of the Anticommons*, *supra* note 52, at 685-87 (arguing that inefficiency resulted not due to privatizing the reservation, but because it was not privatized enough—too many controls were retained by the federal government; too many cotenants now have "veto power" over actions by other cotenants).

low returns for the allottee or the tribe.⁶²

These already negligible returns diminish by degrees when weighed against the enormous administrative costs incurred by the Federal Bureau of Indian Affairs in managing the allotment lands and maintaining title records.⁶³ Government, and by implication, taxpayer, dollars spent to maintain the allotments far exceed the income value of many individual owners' interests, with some allottees' checks cut for as little as a penny a month. The *Irving* Court aptly illustrates:

Tract 1305 [of the Sisseton-Wahpeton Lake Traverse reservation] is forty acres and produces \$ 1,080 in income annually. It is valued at \$ 8000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$ 1. The largest interest holder receives \$ 82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,849,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$ 8000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$ 17,560 annually.⁶⁴

Any situation where management expenses run sixteen times yearly revenue is undoubtedly problematic, at least on efficiency and economic grounds. Congress tendered a solution through the Indian Land Consolidation Act.

62. Inadequacies allegedly exist throughout the negotiation, contract, and oversight stages, resulting in lease terms with depressed rent or royalty payments and a failure to properly account for mineral production, determine value, and collect and remit payments. See Alan R. Taradash, *Natural Resource Royalty Management and Accounting: Special Issues Associated with Valuation and Royalty Accounting for Production from Indian Lands, Past, Current, and Proposed Oil and Gas Valuation Regulations*, SPECIAL INST. ON NAT. RESOURCES DEV. & ENVTL. REG. IN INDIAN COUNTRY 8-14 to 8-20, Paper No. 8 (Rocky Mtn. Min. L. Found. 1999). For an excellent case study detailing such failures on state trust management on Navajo land, see Richard J. Ansson, Jr., *The Navajo Nation's Aneth Extension and the Utah Navajo Trust Fund: Who Should Govern the Fund After Years of Misuse?*, 14 T.M. COOLEY L. REV. 555 (1997). See also *infra* note 153 and accompanying text.

63. The Bureau of Indian Affairs (BIA) is charged with maintaining ownership records, 25 C.F.R. § 150 (1986); probating estates, 25 U.S.C. §§ 372-373 (1994); 25 C.F.R. pt. 15; entering leases, 25 C.F.R. §§ 162, 212; and distributing proceeds. Under conservative General Accounting Office estimates, the BIA spends between \$40,000,000 and \$50,000,000 per year performing such functions, and up to 75% of its realty budget is funneled toward management of the 12 most fractionated allotments. Brief for the Petitioners at 17 n.7, *Babbitt v. Youpee*, 519 U.S. 234 (1997) (No. 95-1595).

64. *Hodel v. Irving*, 481 U.S. 704, 713 (1987).

C. THE INDIAN LAND CONSOLIDATION ACT: SEEKING THE COMITY OF THE COMMONS

The original Indian Land Consolidation Act barred all allotment cotenants from testate or intestate transfers of any escheatable interest to any person, mandating its escheat to the tribe holding jurisdiction instead. The amended Act reflects minor changes in the definition of “escheatable interest” and in the category of potential heirs or devisees to whom the transfer is barred. The following chart illustrates:

<p>“No undivided fractional interest in any [trust or restricted Indian land] shall [descend] by intestacy or devise but shall escheat to <u>that tribe</u> if such interest represents 2 [%] or less of the total acreage in such tract and has earned to its owner less than \$100 [<u>in the year preceding death</u>].”</p>	<p>(a) “No undivided interest held by a member or nonmember Indian in any [trust or restricted Indian land] shall descend by intestacy or devise but shall escheat to the <u>[recognized tribal government possessing jurisdiction]</u> if such interest represents 2 [%] or less of the total acreage in such tract and is incapable of earning \$100 in any <u>[1 of 5 years succeeding death]</u>.”¹</p>
	<p>(b) “Nothing in this section shall prohibit the devise of such an escheatable fractional interest to [anyone who already owns an interest in the parcel or tract].”</p>
	<p>(c) “[A]ny Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section . . . [as long as it does not] fail[] to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.”</p>
<p>Overall effect: Bars both descent and devise of “escheatable interest”</p>	<p>Overall effect: Bars descent, limits but does not bar devise of “escheatable interest”</p>

¹ Failure to earn \$100 in at least one of the five years pre-death created a rebuttable presumption of its incapacity to earn that amount in any one of five years post-death.

The forced escheat provision of the ILCA was intended to prevent the further fractionation and reverse the pre-existing fractionation of allotments, in the hope that small, unproductive interests would gradually consolidate into economically and administratively manageable land units under the control of the tribes.⁶⁵

The ILCA made its way to the Supreme Court twice, and both times

65. *Ute v. Utah*, 935 F. Supp. 1473, 1504 (1996) (citing H.R. REP. NO. 97-908, at 5 (1982), reprinted in 1982 U.S.C.A.N. 4415, 4416).

was rejected as an unconstitutional Fifth Amendment taking.⁶⁶ Notwithstanding the tragedy of fractionation or the comity of consolidation, the Supreme Court correctly determined in both instances that forced escheat is an act for which compensation is due.

III. FORCED ESCHEAT AS A TAKING: THE CONSTITUTIONALITY OF THE ILCA UNDER TRADITIONAL TAKINGS ANALYSIS

The Supreme Court's characterization of the ILCA as a taking alarmed academia because the flimsy countervailing rights-structures in place seemed to signal the constitutionality of any alteration or even abrogation of allottees' testamentary rights. Congress's power to regulate, rather than "take," property was perceived as nearly absolute,⁶⁷ especially when regulating succession rights,⁶⁸ and especially succession rights pertaining to Native Americans.⁶⁹

66. The original ILCA was first challenged in *Irving v. Clark*, 758 F.2d 1260 (8th Cir. 1984). The Circuit Court rejected the heirs'/beneficiaries' claim that their own inheritances had been unconstitutionally taken, but sustained their claim by reworking it to allege the taking of their ancestors'/testators' right to devise. *Id.* at 1264. While the case was on appeal to the Supreme Court but before that Court rendered its decision, Congress amended the ILCA as set forth in the text. The Supreme Court in *Hodel v. Irving*, 481 U.S. 704 (1987), nevertheless avoided considering the amended version of the ILCA and affirmed the lower court to hold it unconstitutional.

The amended version of the ILCA was first challenged in *Youpee v. Babbitt*, 857 F. Supp. 760 (D. Mont. 1994), where the court held that the changes did little to alleviate the harshness of the Act. *Id.* at 765. That decision was affirmed on appeal in *Youpee v. Babbitt*, 67 F.3d 194 (9th Cir. 1995), with the court holding that the ILCA continued to abrogate both descent and devise rights of certain allottees. *Id.* at 199-200. Thereafter but before the Supreme Court rendered its decision, a United States district court in *Klauser v. Babbitt*, 918 F. Supp. 274 (W.D. Wis. 1996) held that the amended ILCA was in fact constitutional in permitting certain rights to devise. *Id.* at 280-81. The Supreme Court again settled the issue the following year, when *Babbitt v. Youpee*, 519 U.S. 234 (1997), reaffirmed that the amended ILCA remained invalid under the Fifth Amendment. *Id.* at 237.

67. Before *Hodel v. Irving*, 481 U.S. 704 (1987), the Supreme Court had not found a regulatory taking since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding a regulation that goes "too far" may be a taking for which just compensation is owed).

68. See *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) ("Rights of succession to property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."). See generally Chester, *supra* note 17, at 1195-96 (discussing the assumption throughout United States formation and history that inheritance was a privilege accorded by government rather than an inherent right); Kornstein, *supra* note 21, at 747-67 (discussing the philosophical and historical roots of inheritance, including the positivist view that it is a legal construction).

69. Congress's power over Indian affairs, rooted in the Indian Commerce Clause, art. I, Sec. 8, cl. 3 of the United States Constitution, is considered plenary even where its actions

The Fifth Amendment to the United States Constitution contains the familiar prohibition: "private property [shall not] be taken for public use without just compensation."⁷⁰ This prohibition comprehends three prerequisites: (1) that there is property (2) owned by someone (i.e., private) (3) being taken by the state.⁷¹ The sense that abolishing inheritance (or forcing escheat) defies this construct is encapsulated by Daniel Kornstein's influential premise that so holding is triply flawed. He asserts that rights to devise or inherit are not property and, further, if they are not property, they cannot be privately owned. This leads him to conclude that in any event, regulating them is not a taking.⁷² Nevertheless, *Irving* and *Youpee* make clear that such an insulated position owes more to inertia and ideological entrenchment than objective, reasoned proof.

invade or abrogate rights created by other federal bodies. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (holding treaties ineffective to the extent that they limit Congress's future power over Indian affairs); *United States v. Kagama*, 118 U.S. 375, 382-83 (1886) (although representing broad exercise of Congressional power over internal tribal affairs, applying Major Crimes Act to crimes by Indians against Indians justified by the tribes' dependant status on the federal government). See generally COHEN, *supra* note 1, at 207-12 (describing the allotment system).

70. U.S. CONST. amend. V.

71. Theoretically, the "taking" must also be for "public use." State appropriation for private use would be invalid under substantive due process, as even payment of just compensation would not appease the takings clause. Nevertheless, courts read the "public use" requirement quite broadly. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (permitting transfer of fee interests from landlords to private tenants "to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (asserting that public use exists if regulation has ultimate "public purpose").

Establishing each element does not necessarily render the governmental assertion of power unconstitutional, but instead requires that either compensation be paid to the affected property owners or the legislation be abandoned (entitling the affected property owners to compensation for the "temporary taking" while the legislation was in effect). First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314-19 (1987). The plaintiffs in *Irving* and *Youpee* sought injunctions against the enforcement of the escheat provisions and a declaratory judgment of its unconstitutionality. *Irving v. Clark*, 758 F.2d 1260, 1261 (1985); *Youpee v. Babbitt*, 857 F. Supp. 760, 761 (1994).

72. Kornstein, *supra* note 21, at 745-46 (finding no constitutionally grounded right of inheritance). Kornstein offers his comments on the interrelationship of inheritance rights and the Fifth Amendment within a larger effort to locate inheritance rights within constitutional provisions. His takings discussion is quite brief; he in fact introduces the issue by stating that "some theories merit only brief mention in the search for a constitutional right of inheritance" and ultimately finds takings analysis "unpromising." *Id.* at 745. Nevertheless, the structure and contents of Kornstein's arguments have been picked up by others criticizing the *Irving* and *Youpee* cases and nicely frames the usual arguments made. See, e.g., *Klauser v. Babbitt*, 918 F. Supp. 274, 277 (1996) (invoking Kornstein's article in holding that amended ILCA did not violate the Fifth Amendment).

A. SUCCESSION RIGHTS AS PRIVATE PROPERTY

1. "If inheritance is not 'property,' then the takings clause is irrelevant."⁷³

The primary issue in casting forced escheat as a taking calls into question whether there is even a property interest at stake. Tautologically, "property" is often defined as that which law is willing to protect and enforce, rendering the attempt to locate inheritance within its parameters for takings purposes the penultimate snipe hunt. No sooner than one perceives proximity to the elusive and metaphorical quarry, it skitters away.⁷⁴

From a lay perspective, there is nothing to "take" from a decedent's estate.⁷⁵ Being dead, a decedent no longer owns certain private property, and although alive, its putative takers as yet do not. Assume that X owns Blackacre. Thereafter, legislation prohibits Blackacre's testate or intestate transfer. If the property at issue is Blackacre *per se*, it is true that no taking of it has necessarily occurred. X continues to be entitled to use it in all permissible ways, including sale, and neither X's beneficiaries nor intestate heirs hold any legally protectable interest in it at all.⁷⁶ Tracking this conception, Blackacre is functionally owned by no private person at the instant of X's death.⁷⁷ X is dead, and by statute, any hopes X's putative heirs or devisees may have held regarding their succession to it are dashed. Under this view, forcing Blackacre out of X's estate works no damage to anyone's rights, and, thus, occasions no taking of property.

To argue, however, that the ILCA effected no taking because no private property existed and, therefore, no one owned it works in only the

73. See Kornstein, *supra* note 21, at 745. The problem might be that the Court seems to have "spent too much energy trying to define a taking, and too little defining [the] property" to which it should and does apply. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 417 (1998).

74. See *infra* notes 134-36, 159-62, 173-74 (discussing testamentary freedom as an essential right).

75. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 98-100 (1977) (asserting that laypersons view property as "thing-ownership").

76. An "[e]xpectancy" is the bare hope of succession to the property of another, such as may be entertained by an heir apparent. Such a hope is inchoate. It has no attribute of property, and the interest to which it relates is at the time nonexistent and may never exist." *In re Estate of Wilson*, 610 N.E.2d 851 (Ind. App. 1993) (stating that neither heir nor beneficiary holds any constitutionally protectable interest prior to death of testator or intestate); *Johnson v. Breeding*, 90 S.W. 545 (Tenn. 1975).

77. As Blackstone comments, "naturally speaking, the instant a man ceases to be, he ceases to have any dominion . . . All property must therefore cease upon death. . . ." WILLIAM BLACKSTONE, 2 *COMMENTARIES ON THE LAWS OF ENGLAND* 10 (1775) (continuing, however, by asserting the necessity of succession schemes to preserve peace and avoid "endless disturbances").

most sterile sense. Legal theory divorces the term "property" from the item itself to instead describe relative rights vis-a-vis that item. "Property" thus means things one can do *with* Blackacre (entitlements) including its use, possession and consumption, as well as enjoying its fruits, the ability to exclude others from its use, and the ability to transfer it.⁷⁸ Although ownership suggests the assemblage of all such rights in one person who then totes the full "bundle of sticks," one may properly speak of "owning" a lone entitlement or stick, such as an option, right of first refusal, easement, restrictive covenant, or developmental right. Legally, the *right itself* is the property. Thus, there *is* property at stake superior, and perhaps even anterior, to ownership of Blackacre *per se*: the right to transfer it, in whole or in part, during life or at death. Abolishing rights of descent and devise therefore abolishes property, however conceptual that might seem.⁷⁹ Whether that abolition constitutes a taking is a different inquiry.

The Supreme Court elides the first notional hurdle that there is no "property" to take along these lines by determining that the relevant interest taken was the right to transfer Blackacre at death rather than Blackacre itself. In so doing, the Court implicitly imports ownership aggregates into takings doctrine⁸⁰ to shift scrutiny from physical, item-oriented, acquisition losses suffered by disappointed heirs and devisees (would-be takers, whose "mere expectations" never ripened into property) to the conceptual, rights-oriented transfer losses suffered by decedents affected by the ILCA. The Court's subsequent recognition of the disappointed taker's third-party

78. See generally Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939) (recapitulating the property rights identified by theorist Leon Duguit). Scholars alternately lament or applaud that splintered characterization and its results. See Thomas C. Grey, *The Disintegration of Property*, in 12 NOMOS: PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980) (noting and lamenting the atomization of property as reducing its centrality to modern life); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (applauding increased classifications for their "intrinsic value as mental tools" as well as because "more than ever before" they constitute "part of the formal foundation of judicial reasoning and decision"); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (proposing to explicate Hohfeld's scheme by placing it in its historical context); see also Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980) (tracing the transformation of the concept of property from the revolutionary period to the modern period). For recent critique on traditional conceptions of property, see JOHN CHRISTMAN, *THE MYTH OF PROPERTY* 47-139 (1994) (arguing that ownership "cannot be disaggregated to any extent into its component parts") and Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994) (arguing that property is metaphorically identified with "wielding the male organ" and "controlling, protecting, or entering the female body").

79. See Radin, *supra* note 25, at 1671-84 (introducing term "conceptual severance").

80. *But see infra* note 119 and accompanying text (discussing the Court's ostensible rejection of conceptual severance in the takings arena).

standing to assert the transfer right on behalf of the decedent's estate tidily boxes and wraps its analysis to appease that disappointed taker as well as maneuver Kornstein's second concern: someone to whom the property "belongs."⁸¹

2. "Once death occurs . . . ownership of property is the very question at issue: the decedent no longer exists, and the heir never owned the property claimed to have been 'taken.'" ⁸²

The Court's focus on allottees' rights to transfer over recipients' rights to acquire unnecessarily obscures the material loss to the beneficiaries and heirs. The Court overlooked that both transfer and acquisition rights can be privately owned and thus taken. Instead of indirectly recognizing acquisition rights shoehorned into transfer rights, the Court could have acknowledged acquisition rights directly by holding that property was taken from the would-be recipients.

On its face, the argument legitimately invites suspicion: "no one is heir of the living." Wills can be written, revoked, and redrafted as often as wished, state intestacy schemes can be revised whenever the legislature desires, and both beneficiaries and heirs must survive the decedent to be entitled to anything. Thus, no "heir apparent" owns *any* present or future interest in a decedent's property until that decedent dies. Stated otherwise, transfer rights exist in owners only until death, while acquisition rights exist in takers upon death and not before.⁸³ As acquisition property rights replace transfer property rights immediately upon the decedent's death, their relative mutual exclusivity demands pinpointing exactly when the ILCA effected a taking and, relatedly, whether the ILCA challenge was facial or as applied.⁸⁴

81. The *Youpee* plaintiffs obviously learned lessons from precedent. As potential devisees or heirs, the *Irving* plaintiffs originally argued that the ILCA took their property directly rather than that of their decedents. *Irving v. Clark*, 758 F.2d 1260, 1264-66 (8th Cir. 1985). After the U.S. District Court for the District of South Dakota denied relief, the Eighth Circuit reversed after a bit of fancy reworking of the plaintiffs' essential claim to bring it within a third-party theory. *See id.* at 1266-68 & n.11 (acknowledging "some question" over whether plaintiffs sufficiently presented this possible claim).

82. Kornstein, *supra* note 21, at 745.

83. Functioning in many respects like a juridical person, the estate as a legal entity mediates and enforces those rights.

84. If a successful takings claim challenges legislation on its face, compensation is calculated from the date of the law's enactment. If legislation is deemed a taking as applied to a specific property owner, compensation is due from that application forward. JUERGENSMEYER & ROBERTS, *supra* note 73, at 444; *see* Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953 (1995) (providing excellent insight into when a regulation becomes a taking, particularly within the context of state and municipal

If the taking occurred upon the *enactment* of the ILCA, the only property affected would be the rights of owners to transfer the escheatable interest at death and the vested rights of heirs or beneficiaries in the escheatable interest in undistributed decedents' estates.⁸⁵ Neither *Irving, Youpee*, nor any other reported case contains a plaintiff in either position; instead, all plaintiffs were disappointed heirs or beneficiaries of decedents dying after the passage of the ILCA. Although the mere expectancies they held would have been inchoate non-property at the ILCA's enactment, the court permitted those would-be recipients to assert derivatively the takings claim on the decedent's behalf. Doing so implicitly treated the challenge to the ILCA as facial—unconstitutional while the decedents were still alive and transfer rights still existed to be lost.

But closer examination suggests that the ILCA more likely effected a taking *as applied* to a specific decedent's estate. Logically, that would be the point of actual injury—the crucial moment when the decedent's transfer rights and the beneficiary's acquisition rights would stand or fail. At least one lower court opinion points to that conclusion,⁸⁶ and, paradoxically, the Supreme Court obliquely adverts to this approach as well by permitting intestate heirs whose rights were not yet vested at the ILCA's enactment to bring claims on behalf of their decedents *who themselves had not challenged the ILCA as a taking*.⁸⁷ If the actual taking occurred upon the ILCA's application

land use regulation).

85. Acquisition rights in intestacy or under a will vest as property upon the decedent's death. See *In re Bevilacqua's Estate*, 191 P.2d 752, 755 (Cal. 1948) (holding that, as purely statutory, succession rights may be "changed, limited or abolished by the Legislature at any time prior to the death of the ancestor") (emphasis added); *In re Estate of Micheel*, 577 N.W.2d 407, 410 (Iowa 1998) (finding that expectancy vests at ancestor's death; parties' rights are determined in accordance with law at testator's death, not at execution of will); *In re Estate of Carlson*, 457 N.W.2d 789, 791-92 (Minn. App. 1990) (finding that upon vesting of inheritance right, later changes in law cannot affect potential heir status).

The interest would be vested subject to total divestment (clear property) rather than contingent (property that might never vest) or a mere expectancy (non-property). The potential divesting exists because the value of the underlying property interest transferred is subject to depletion and perhaps total loss (i.e., "abatement") if the decedent's collectible debts exceed assets. See, e.g., UNIF. PROBATE CODE § 3-902 (amended 1993) (setting forth abatement scheme if estate is insufficient to pay all creditors and beneficiaries). See generally WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* 407-20 (1988) (discussing abatement and tax allocation approaches). Even a single heir to a decedent's entire estate might ultimately acquire nothing depending on the intestate's debt position.

86. *Klauser v. Babbitt*, 918 F. Supp. 274, 275 (W.D. Wis. 1996) ("[P]laintiff . . . asks the court [to find the ILCA unconstitutional] as the act applies to interests in real property owned by his deceased grandmother."). Note, however, that the court's language does not delimit whether the act "as applied" means at any time the decedent owned the interest or the specific time of her death.

87. A key clue would have existed had the Court barred an ILCA takings claim based on

to a specific estate rather than its mere enactment, the decedent's transfer right would have already been replaced with a recipient's acquisition right, conferring direct property loss and thus standing on each disappointed heir or beneficiary.⁸⁸ The lack of an official determination of heirship would not affect this analysis. "Owner not yet known" does not equal "un-owned," a concept reflected in the Secretary of the Interior's ability to enter leases of allotments on behalf of undetermined heirs.⁸⁹

Two final, and admittedly somewhat radical, approaches permit viewing the ILCA as taking a vested property right directly from disappointed takers. The Court could have viewed the ILCA as conceptually effecting a two-step, successive taking but permitting only one claim and recovery. The first taking in this alternative scenario would be of the decedent's right to transfer, and the second taking would be of the beneficiary/heir's intact "recipient status"⁹⁰ (i.e., "right" to acquire) at decedent's death. Determining an initial taking of the transfer right is crucial in this analysis; for if the descent and devise of the escheatable interest are constitutionally foreclosed, then neither heir nor beneficiary has a right to acquire it.⁹¹ An even

the statute of limitations, suggesting when and to whom the injury in fact occurred.

88. Focusing on the loss of the recipients over those of the decedents holds theoretical and practical implications. Doing so strengthens the ILCA's characterization as a taking. As the limits on "dead hand control" illustrate, it is more legal (and palatable) for takings law to be concerned with the property rights of the living over those of the dead. Moreover, direct loss is infinitely more tangible than loss mediated through a decedent's estate. See Heller, *Boundaries*, *supra* note 16, at 1217 (noting the "familiar cognitive bias" to value things in hand over mere expectancies). Focusing on the taker's loss renders the ILCA more appropriate (thus more likely a taking) than regulatory. Practical differences could include whether the estate or the recipient bears the costs and benefits of litigation and interest generated by the condemned property.

89. See *supra* note 55 and accompanying text (discussing leasing and transfer rights of allotted parcels). For example, suppose that immediately upon X's intestate death, a squatter moves onto the property and depletes the corpus. Upon a determination of heirship, X's heirs will have the right to oust that trespasser (assuming X's administrator has not already done so). More significantly, X's heirs would be able to recover the value of the harm to the property prior to their acquisition to title. In other words, X's heirs would be able to enforce legal rights against the stranger (i.e., would own property) from X's death onward, not merely from the date their interest was actually determined and transferred to them.

90. I would limit the term "recipient status" to anyone who survived the decedent and who remained a beneficiary of a valid will or "next-of-kin" under state statutes at the decedent's death.

91. Had the ILCA left testamentary freedom intact and only changed the results of intestacy, I think it would have been constitutional, taking no transfer rights and thus no acquisition rights. Beneficiaries would remain able to acquire the property, but heirs in intestacy would not. Note the point being made: the entire ILCA was found unconstitutional. Disappointed heirs under the ILCA's application therefore benefitted greatly from its breadth, by being able to claim the same "taking" as disappointed beneficiaries. Although the Court did not overtly make the distinction, I would distinguish between the rights of heirs, whose status

more revolutionary approach would completely restructure the conception of wills into a new form of joint ownership. This approach requires the determination that for purposes of third-party interference, both transfer and acquisition property rights arise and continue in testators and expectant beneficiaries whenever one has validly executed a will and remains willing to transfer property that a recipient remains willing to accept.⁹² This approach requires that the relationship be fully explored and carefully circumscribed to ensure that it neither impinged upon testator's freedom to freely and unilaterally revoke the will nor ascribed consequences of ownership to the intended beneficiary prior to the decedent's actual death. Protection from private interference with that relationship already exists. For example, an heir who fraudulently induces the revocation of a will might nominally acquire the decedent's property through intestacy but must hold it in a constructive trust for the intended will beneficiary. Extending the concept here, a statute forcing escheat could be viewed as affecting the property of *either* testator or intended beneficiary and at any stage between their formation of the "agreement" (execution) and the actual transfer of title at the decedent's death.⁹³

B. FORCED ESCHATE TAKES TRANSFER AND INHERITANCE RIGHTS

Casting either transfer or acquisition rights as "property" does not necessarily mean that the ILCA took them. Traditional shibboleths instruct that the government can always regulate the "statutory creatures" of devise and descent, particularly when exercising its plenary powers over Indian affairs. The opposite presumption should prevail. The government should not be entitled to abolish all rights of descent and devise, and *especially* within the context of Indian-allotted lands.

Drawing from the Court's recent jurisprudence, a taking occurs either

is entirely conferred through statute, and the rights of beneficiaries, whose status (although enforced through statute) is conferred through specific property owners' intent.

92. Support for the proposition arguably inheres in cases assigning limited property status to expectancy rights. *See, e.g.*, *Von Bulow v. Von Bulow*, 634 F. Supp. 1284, 1308 (S.D.N.Y. 1986) (explaining that New York recognizes expectancy interests as transferable property interests); *In re Estate of Dawes*, 891 S.W.2d 510, 522-26 (Mo. App. 1994) (protecting expectancy interest by imposing constructive trust); *Stein v. Brown*, 480 N.E.2d 1121, 1123 (Ohio 1985) (renouncing inheritance post-death can be set aside as a fraudulent transfer); *Hale v. Badouh*, 975 S.W.2d 419, 422 (Tex. App. 1998) (enforcing transfer or assignment of expectancy notwithstanding its potential extinguishment by the testator or by operation of law). *But see In re Estate of Baird*, 933 P.2d 1031, 1035 (Wash. 1997) (holding that the heir held no interest to disclaim prior to death of intestate ancestor).

93. Again, this would not mean that any regulation of either right would equal a taking, but merely that the threshold question of whether private property existed could be met.

categorically (by physical invasion⁹⁴ or regulatory destruction of economic viability⁹⁵) or after a determination that a regulatory burden shifts too much public responsibility onto private shoulders.⁹⁶ Although the Supreme Court chose the latter course in finding that the ILCA effected an unconstitutional taking,⁹⁷ forced escheat fails to satisfy constitutional requirements under either approach, rendering the Supreme Court's ultimate holding that much more correct.⁹⁸

1. Forced Escheat Effects a Categorical Taking

a. Physical Appropriation

Critiquing the structural inconsistencies of the Supreme Court's takings jurisprudence, Professor Jed Rubenfeld notes the absurdity of the Court's upholding regulation foreclosing lifetime alienation of personal property while striking legislation foreclosing deathtime alienation of real property.⁹⁹ Nevertheless, the timing of the actual transfer restraint critically distinguishes one regulation from the other, both in terms of whose property is affected and how. Lifetime inalienability maintains, and to some extent, actually enforces, an owner's ability to exclude others from the regulated property. In this regard, the ILCA is critically distinct. Rather than "forced escheat," § 207 comprehends "forced transfer," which denies owners the right to exclude and in fact, equals the exclusion of the allottee from the property at hand.¹⁰⁰

94. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that even slight and temporary physical invasion of private property constitutes a taking).

95. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (noting that a court need not balance factors of public policy and scope of regulation before finding a taking where regulation deprives a property owner of all economically viable use).

96. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

97. The Court explicitly sidestepped analyzing the ILCA under the more stringent categorical approach set forth in *Lucas* by finding *Irving* and its balancing results dispositive. *Babbitt v. Youpee*, 519 U.S. 234, 243 n.3 (1997).

98. One might even argue that neither the *Lucas* nor the *Penn Central* analysis should apply within this context. Both cases developed tests and standards for determining whether land use regulation constitutes a taking. To the extent that the ILCA did not regulate "use" at all but only "transfer," perhaps an entirely different approach should apply, unconstrained by the confines of the Court's extant jurisprudence. Nevertheless, because the Court has previously invoked these rules in analyzing the takings constitutionality of market inalienability and deathtime transferability, I approach the ILCA through a similar course.

99. See generally Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (comparing *Andrus v. Allard*, 444 U.S. 51 (1979) (permitting ban on tribal sale of lawfully acquired eagle feathers) with *Hodel v. Irving*, 481 U.S. 704 (1987)).

100. See generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (positioning the "right to exclude" as the *sine qua non* of property and illustrating how

Unless the regulated property is already the subject of a valid contract, lifetime inalienability affects transfer rights only. While it precludes an owner from the market, it neither prohibits her personal use of the property, denies her ability to exclude others from it, forces its transfer to others, or forbids its donation or at-death disposition.¹⁰¹ This is not the case with deathtime inalienability, depending on the form taken.

One approach would deprive the owner of testamentary freedom, shifting the property to the decedent's intestate heirs or to some other "deserving" taker. Several illustrations of this approach exist. For example, testamentary freedom over all property is limited by age and capacity requirements, and testamentary freedom over some property is limited by elective share statutes and survivorship rights.¹⁰² Note the majoritarian safeguard normally in place. State statutes determine who is entitled to heirship status; intestacy schemes are most legitimate when they mirror the distribution most decedents would have chosen had they written a will. A property owner displeased with the applicable intestacy scheme remains able to execute a will or lobby the state legislature for change. Alternatively, the owner could be deprived of the right to transfer some or all property through will or intestacy,¹⁰³ forcing it instead to some other person or entity.¹⁰⁴ The ILCA adopts this approach under the misleading rubric of escheat.

If the term is properly used, "escheat" can never be forced. It signifies that an owner has failed to exercise testamentary freedom, that no competent heirs within the requisite kinship exist, and that the property reverts to its original, underlying owner, thereby permitting its return to the market.¹⁰⁵ By contrast, the ILCA destroys testamentary freedom, removes the possibility for ordinary heirs, and forcibly transfers the property to the

the right to devise at death directly derives therefrom).

101. The Court carefully highlighted in *Andrus* that although the tribes were prevented from making the most profitable use of their property, the challenged regulations did not compel its surrender, and instead (and to the Court, "crucially") preserved owners' rights to possess, transport, donate, and devise it. *Andrus*, 444 U.S. at 66. Indeed, the Court noted that owners could still derive economic benefit from the eagle artifacts should, for example, its owners "exhibit the artifacts for an admissions charge." *Id.*

102. For example, if A and B hold Blackacre in joint rather than common tenancy, A's testamentary transfer of the property to C is ineffective to accomplish the desired result and B survives to Blackacre as the sole remaining joint tenant.

103. Although intestacy statutes are normally viewed as a default for failure to exercise testamentary freedom, some owners *consciously* choose intestacy, presumably because they know and endorse its specific results.

104. The same result would occur where a state manipulated the intestacy scheme to a certain end and denied a competent testator the right to devise property unencumbered by superior claims.

105. See generally *In re O'Connor's Estate*, 252 N.W. 826 (Neb. 1934).

third-party tribe rather than recognizing its return to the prior proprietor, which is the state or federal government.¹⁰⁶ In many instances the disappointed heir or beneficiary would not even be a member of the tribe to which the property escheats.¹⁰⁷

An ILCA scheme positioning the tribe as the first, or even sole, heir of a decedent's property, leaving testamentary freedom unimpaired, probably would have been constitutional and fair. Any competent owner could have always avoided its application by simply writing a will. Instead, the ILCA not only forced the tribe as "heir" upon the owner, but prevented any other deathtime transfer to anyone else, and, thus, precluded the owner's exclusion of the tribe from the property. The ILCA thus worked in tandem to deprive individual owners and takers of transfer and acquisition rights and concomitantly shift title to the tribe. By working an actual title shift, it is vastly more intrusive into property rights than mere market inalienability, and arguably constitutes physical appropriation from the disappointed property recipient to the extent he or she owned a vested interest therein.

b. Regulation to Zero

Even if the ILCA does not effect a physical taking, its "merely" regulatory stance does not insulate it from takings analysis. The Supreme Court has long maintained and recently reaffirmed that regulation unaccompanied by physical invasion can require compensation,¹⁰⁸ even categorically so when it reduces the economic viability of the regulated property to zero.¹⁰⁹

106. For an extended discussion of the technical definition of "escheat" and its role in conferring vested rights on heirs/beneficiaries, see *Irving v. Clark*, 758 F.2d 1260, 1263-64 (8th Cir. 1985).

107. The case of *Quileute Indian Tribe v. Lujan*, No. C91-558C, 1992 WL 605423 (W.D. Wash. Aug. 28, 1992), *aff'd* in *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (1994), provides an indirect example of such a scenario. There, the intestate's estate included escheatable interests in trust land on the Makah, Quinault, and Quileute reservations; although the decedent was a member of the Makah Tribe, much of his property was passing to tribes to which neither he nor (presumably) his lineal descendants belonged.

108. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (holding that a forced dedication constituted a taking); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that a deprivation of total use can equal a compensable taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that an outright taking of a public access easement would violate the Takings Clause). Interestingly, while *Lucas* is often cited as the first time since *Pennsylvania Coal* that the Supreme Court found that regulation went "too far," *Hodel v. Irving*, 481 U.S. 704 (1987), actually did so in 1987, and without the benefit of the *Lucas*-created categorical taking.

109. See *Lucas*, 505 U.S. at 1003. If the plaintiff can establish a total reduction in economic viability, a presumptive taking has occurred which the state cannot "balance away" through competing concerns. The state can only avoid the compensation requirement if the regulation was permissible anyway under background principles of property law or restrictions inhering

Finding whether such a wipeout has occurred demands delineating the parameters of the property being regulated, alternately termed “the denominator problem,”¹¹⁰ “conceptual severance,”¹¹¹ or “entitlement chopping.”¹¹² The more physically and conceptually discrete that identification is, the more likely it is that regulation will destroy its value and, therefore, be deemed a categorical taking. Consider the following illustrations:

Example #1 [Physical Severance]: A buys 6 contiguous acres of property (Lot 1 shorefront, Lots 2-5 inland), upon which he plans to develop and sell 6 single-family homes. The state thereafter prohibits all coastal development; evidence would show that market value of Lot 1 has decreased by 100%, while that of Lots 2-5 have each increased by 25% in anticipation of ocean views. Has A suffered a categorical taking?

Yes, if the property regulated is Lot 1.

Property Affected: Lot 1 = $1/1 = 1 = 100\%$ = “wipeout.”

Property Owned: Lot 1

No, if the property regulated is all of A’s land (shifting analysis to a balancing approach):

Property Affected: Lot 1 = $1/6 = @ 16.5\%$ = “no wipeout.”

Property Owned: Lots 1-6

Example #2 [Conceptual Severance]: Assume the same facts as above, except that instead of regulating the right to develop, the state forbids all lifetime transfers of any property. While A can still develop Lot 1, perhaps for personal use, prohibiting its transfer (and that of the other 5 lots) has rendered market value zero. Has A suffered a categorical taking?

Yes, if the property regulated is the right to transfer.

in the property owner’s title. *Id.* at 1022-23.

110. See, e.g., *id.* at 1016 n.7 (“[T]he rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967) (“The difficulty [of determining diminution in value] is aggravated when the question is raised of how to define ‘the particular thing’ whose value is to furnish the denominator of the fraction.”).

111. Radin, *supra* note 25, at 1674-78. To Radin, the practice involves

delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that the particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually “severs” from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.

Id. at 1676.

112. Michelman, *supra* note 17, at 1618.

Property Affected: Transfer Right = 100% = "wipeout."

Property Owned: Transfer Right

No, if the property regulated is all of A's rights in the land (use, possession, exclusion, enjoyment, consumption, transfer)(shifting the analysis to the balancing approach).

Property Affected: Transfer Right = 1/6 = no "wipeout"

Property Owned: All 6 Rights

Manipulating the boundaries of the property interest affected determines a plaintiff's ability to invoke the protective categorical taking mantle, which in turn could determine the result given the superior litigation position into which categorical takings place owners. Some theorists fault this approach as "making takings." To those so concerned, severing any discrete regulated stick in the bundle of rights cuts against laypersons' property notions and makes finding its total depletion, and thus taking, that much easier.¹¹³

What property interest regulated by the ILCA supplies the denominator for the "regulation calculation?" The answer is more complex than either example presented above. First, of the six conceptual property rights, the ILCA only affected the right to transfer. Moreover, it affected only the right to transfer at death, and only through descent or devise.¹¹⁴ Rights to transfer during life and through will substitutes remained intact. Second, the ILCA only affected deathtime transfers of those low-percentage and low-income "escheatable interests." Rights to transfer non-escheatable interests remained intact.

Defining the "property interest" regulated by the ILCA at the most narrow level, i.e., as the entitlement to effect deathtime transfers of escheatable interests through descent or devise, would mean that the ILCA took 100% of that entitlement. If so, the government would be hard-pressed to rebut a taking claim, as splintering the ownership interests of property would never be noxious under tort principles. This analysis is strengthened by turning to the would-be recipient's loss. If the relevant property regulated is the right to acquire the escheatable interest, then forcing it to the tribe entails the loss of every single other right in that property and completely diminishes its value to the recipient. The response, that the ILCA did not regulate away *all* rights in the affected land,

113. See *McUsic*, *supra* note 25, at 627 (citing, inter alia, Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988)). As Professor Radin argues, the property interest ends up "consisting of just what the government action has removed from the owner." Radin, *supra* note 25, at 674-78.

114. Depending on how narrowly one parses entitlements, the cases either reflect rights-chopping or the further chopping of those already chopped.

can be easily anticipated. As such, regulating but one entitlement or fraction of the decedent's property—even to nil—would not impair the owner's ability to enjoy it in such non-regulated ways as lifetime transfer, possession, and use.

At what level—that most broad or most narrow—should the property interest regulated by the ILCA be defined? The Court endorsed the narrow view. Although *Irving* and *Youpee* were not subjected to categorical analysis, the Court identified the regulated property interest as the right to transfer property at death.¹¹⁵ Beyond the observation that the determination is result-oriented, a few additional comments supporting the Court's conceptual severance pertain.

In theory and practice, law has been perfectly willing to accommodate property splintering, and more than just conceptually.¹¹⁶ Property interests may also be physically, temporally, and proportionately stratified, even simultaneously, as where X and Y jointly purchase Blackacre, then voluntarily transfer to Z a ten-year subsurface lease and necessary surface easements across a defined portion of it. Z usually pays for his conceptual, physical, temporal bit of Blackacre.

Property that can be voluntarily transferred can be involuntarily transferred, as through condemnation. Why should the government avoid paying for a taking what a private purchaser would pay? What compels a special no compensation result where entitlements are inversely condemned? If legal theory is true in its definition of property, then a transfer right is property capable of supporting a condemnation award equaling its value on an open market.¹¹⁷

115. The point remains relevant, however, for analyzing regulation under the balancing approach. "Distinct investment-backed expectations are a factor in both *Lucas*-type total deprivation cases and *Penn Central*-type partial deprivations . . . in defining the proper unit of property used to measure the economic impact of a regulation." JUERGENSMEYER & ROBERTS, *supra* note 73, at 436-37.

116. Note, however, the belief by some theorists that this conceptual image is fading. "As the bundle-of-rights image waxes in judicial decisionmaking, it is waning in property theory. In separate conversations, Gregory Alexander suggested that a new metaphor is due, and Brian Simpson argued that the time has come for a rigorous philosophical analysis that takes apart Hohfeld and Honoré." Heller, *Boundaries*, *supra* note 16, at 1194 n.162; see J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 819 (1996) ("I believe in giving dead concepts [such as the bundle of rights metaphor] a decent burial.")

117. See *infra* note 147 and accompanying text (discussing the valuation of transfer rights).

Although the discussion exceeds the present issue, not all regulation is a taking demanding compensation notwithstanding the theoretical implications that conceptual severance suggests. Depending on the facts, the right regulated might not be "property"; it might not be "privately owned"; conceptual severance might not reduce the entitlement's value to zero, shifting analysis to a *Penn Central* balancing approach and permitting competing social welfare claims to factor in; or "just" compensation might be little to none.

At least from one side of its mouth, the Supreme Court disagrees.¹¹⁸ Although it declared that it “explicitly rejects conceptual severance within takings law,” the Supreme Court recognized severance more than once, and in fact elevated interference with such “essential” entitlements as physical possession¹¹⁹ and the right to exclude¹²⁰ to the level of categorical takings.¹²¹

Finally, whether strategic or suspect, conceptual severance is uniquely appropriate within the Indian land context. By leaving land use and occupancy intact but distinct from transfer and its corresponding value, federal law has thrice conceptually severed Indian property interests through the creation of tribal “Indian title,” the withholding of alienability in trust and restricted allotments, and the development of the trust doctrine.¹²² That federal law has already significantly whittled Indian stick bundles counsels more fair and exacting treatment when regulating the entitlements that remain.

2. Forced Escheat Effects a Taking on Balance

Any regulation that survives the categorical takings tests described above must still confront a balancing test weighing its public/private and social/economic costs and benefits. It is here that the *Irving* and *Youpee* Courts ultimately invalidated the ILCA.

118. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (rejecting the severance approach urged by Justice Rehnquist's dissent); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (“[A]t least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”).

119. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that physical intrusion is a taking no matter how slight or temporary the physical intrusion or economic result).

120. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (imposing public navigational servitude on private marina equals taking).

121. Perhaps *Andrus v. Allard* either spoke precipitously or was wrongly decided after all. Professor Michelman gently chides the Supreme Court for failing to reconcile *Irving* with *Andrus*. He notes “[t]he tug of war among the six Justices who joined Justice O'Connor's opinion for the Court in *Hodel v. Irving* over where that opinion leaves [*Andrus v. Allard*] . . . a question upon which Justice O'Connor herself kept the discretion of the Sphinx.” Michelman, *supra* note 17, at 1600 n.2(iii); see *Hodel v. Irving*, 481 U.S. 704, 718 (1987) (Brennan, J., joined by Marshall & Blackmun, JJ., concurring) (arguing that *Irving* does not limit *Andrus* to its facts); *id.* at 719 (Scalia, J., joined by Rehnquist, C.J., & Powell, JJ., concurring) (stating that *Irving* limits *Andrus* to its facts).

122. See *supra* Part II.A (discussing the unique rights-composition of reservation and allotment lands).

In *Penn Central Transportation Co. v. New York City*,¹²³ the Court conceded that takings decisions were “essentially ad hoc, factual inquiries.”¹²⁴ Yet the Court proposed three significant factors: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character or scope of the governmental action.¹²⁵ Although naming consolidation a public purpose of “high order”¹²⁶ and the ILCA’s interference with reasonable investment-backed expectations slight,¹²⁷ the Court determined that the potentially extraordinary economic impact and scope of the Act rendered it a constitutional taking. By invalidating the ILCA on takings grounds, the decision intimates that if compensation had been a component of the Act, it would have withstood constitutional scrutiny and thus would not have violated substantive or procedural due process.

The Court’s analysis and result have been squarely challenged.¹²⁸ Critics maintain that contrary to the Court’s holdings, the ILCA serves pressing public interests while engendering almost zero economic consequences to either the decedent landowner or the disappointed heir. Although legitimate, that criticism is non-determinative as well as incomplete.

a. *Investment-Backed Expectations*

The probability that a regulation is a taking increases commensurately with the degree to which the property owner held reasonable and distinct investment-backed expectations in the property to which the regulation applies. Critics thus seize upon the Court’s admission that it was “dubious” that any affected landowner held such an expectation in the regulated property.¹²⁹ Assuming that Justice O’Connor’s statement is true does not negate the ILCA as a taking, as expectations are but one of many factors in the regulatory taking calculus. More critically, the assertion may be wrong depending upon how the regrettably elusive term “investment-backed expectation” is defined and applied.¹³⁰ Finding that the right to transfer

123. 438 U.S. 104 (1978).

124. *Id.* at 124.

125. *Id.* The Court elaborated on this last factor in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), by requiring that a land use regulation “substantially advance legitimate state interests.” *Id.* at 485 (quoting *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980)). The Court also added the “economically viable use” and “public purpose” tests to the equation. *Agins*, 447 U.S. at 260.

126. *Irving*, 481 U.S. at 712.

127. *Id.* at 714.

128. See Kmiec, *supra* note 17, at 1664 (noting that “it cannot be fairly said that the case was properly decided even under *Penn Central*”).

129. See *id.* (citing *Irving*, 481 U.S. at 715).

130. Professor Mandelker notes that “the Court is confused about the meaning of this

property at death is an "investment-backed expectation" turns on two key questions: Is it an expectation? If so, is it investment-backed, and when?

Perplexingly, the Supreme Court has not clearly defined an "expectation," using it to describe (1) compensable property interests ("legitimate expectations"), (2) non-compensable, non-property interests ("mere expectations"), and (3) what property owners should anticipate by way of future governmental regulation.¹³¹ Nevertheless, original and current allottees indisputably hold expectations in all or part of the allotted tract itself, as rights to it became vested upon the issuance of the trust or restricted patent.¹³² The conundrum is whether any expectation exists in the ability to transfer it at death.

The right to transfer property at death is commonly perceived to exist. One might counter that if the government is the sole definer of property, both the transfer right and any expectation in its continuation evaporate once government regulates it away. Such circuitry is improvident and impracticable. Stating that property equals "what law says" to justify finding no property "because law says" renders private property a chimera and takings law a sham.¹³³ Logically extended, property could never be constitutionally taken because it would never really be privately owned to start—a feudalized, totalitarian position indeed. To the contrary, asserting that property is "whatever I say," i.e., any "right expectation" no matter how

term, federal and state courts divide on how to apply it, and its role in taking law remains a puzzle." Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 215 (1995); see Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 107 (1995) ("The net outcome of all of the Court's efforts [in defining the term] is that the meaning of [investment-backed expectations] remains uncertain, rendering its effectiveness as a legal doctrine questionable at best.") (citing Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993)).

131. Oswald, *supra* note 131, at 99-115.

132. *Choate v. Trapp*, 224 U.S. 665, 669-72 (1912) (holding that tax exemption on allotment is "a property right" incident to the land which vested in allottees pursuant to the statute and the patents); *County of Thurston v. Andrus*, 586 F.2d 1212 (8th Cir. 1978) (noting that vested original allottees' rights may pass to their successors in interest).

133. In the positivist tradition, Jeremy Bentham defines property metaphysically as established expectations of deriving advantage from a thing and solely a creature of law. To Bentham, "[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." JEREMY BENTHAM, *PRINCIPLES OF THE CIVIL CODE, THEORY OF LEGISLATION* 11.1-13 (Dumont ed., Hildreth trans., 1864). Whatever truths inhere in Bentham's assertion (from a legal realist's perspective, there are many), its reactionary invocation to a takings claim is politically costly and suspect. See *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998) (casting as "specious" state's argument that interest earned on IOLTA account is "governmentally created value," thus not property for takings purposes); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (finding that interest earned on an interpleader fund is property subject to the Takings Clause).

unreasonable, is similarly dissatisfying if not anarchistic. Law mediates the extremes by limiting protectable expectations to legitimate and enforceable ones, which should certainly include testamentary freedom given its esteemed position¹³⁴ and the search for its assurances throughout Western European history.¹³⁵

For takings purposes, this Western expectation should survive the forced escheat context, especially given the overt assimilationism of the allotment policy that precipitated it. If the allotment tract was not to pass to allottees' heirs or devisees but was to revert to the tribe instead, what was its function? Senator Dawes explained:

When the Indian begins to understand that he has something that is exclusively his to enjoy, he begins to understand that it is necessary for him to preserve and keep it, and it is not a great while before he learns that to keep it he must keep the peace; and so on, step by step, the individual is separated from the mass, set upon the soil, made a citizen.¹³⁶

Such grandiose plans could not have been achieved through one generation of crippled private ownership. Without the right to transfer at death, an allotment would be little more than a heavily restricted life estate, probably entailing fewer land rights than those enjoyed by tribal members on unallotted reservations. Government, which created the expectation, should not be permitted to deny it.¹³⁷

Neither should the expectation of transferability at death be diminished by the comprehensive regulation of Indian lands through allotment

134. See *In re Estate of Foss*, 202 A.2d 554, 558 (Me. 1964) (reaffirming that testamentary freedom is among "the most sacred rights attached to property"); BLACK'S LAW DICTIONARY 1475 (6th ed. 1990) (defining testamentary freedom as "the highest right a man can have to anything").

135. See Chester, *supra* note 17, at 1195-96 (citing prevalent utilitarian-based perspective that rights to transmit or receive property at death were "civil" instead of "natural," but noting the competing view, gaining strength, that inheritance or some component thereof is a natural right—a "short step" away from its constitutional protection). See generally WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAW OF ENGLAND 11 (1775) ("[T]he universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions [either by will or by statute]."); SUSAN REYNOLDS, *FIEFS AND VASSALS* (1994) (outlining the historical importance of deathtime transfers).

136. BORDEWICH, *supra* note 3, at 118.

137. See *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (disallowing, on constitutional grounds, the government's attempt to create a public easement in private land partially premised upon government's failure to exact servitude when initially granting development rights to private owner).

and beyond.¹³⁸ To permit the government to dodge compensating allottees by asserting that it had already “taken” so much that no expectations regarding future rights exist would create a painfully unfair situation.¹³⁹ That the Court is willing to imbue government-created expectancies with constitutional protection “suggests that reliance on tacit or explicit government approval is a factor courts should consider when deciding whether investment-backed expectations were frustrated.”¹⁴⁰ If so, the ILCA impermissibly interferes with the tribal and individual expectations implicit, and perhaps even explicit, under the General Allotment Act that in trading tribal reservations for private allotments, each allottee would ultimately be entitled to transfer it.

Any expectation in the allotment and its transferability at death must also be “investment-backed,” implicating the timing of that investment vis-à-vis the alleged taking. It remains unclear whether the expectation must be investment-backed when acquired, when regulated, or at some point in between. Read most literally, “investment” parallels contract-based consideration, necessitating capital, time, or labor outlay on an expectation at acquisition. Read metaphorically, “investment” embraces emotional or ideological attachment to the property or its intended use, and at any time between acquisition and regulation. Must an owner have *purchased* property to further a *specific economic plan* before it can be constitutionally taken?

If investment means capital demanded when the regulated property is acquired, as an actual inducement to invest, property gained through gift,

138. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992) (stating that property owners “necessarily” expect periodic regulation); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (explaining that for government to properly function, it must interfere with property rights, but there are obvious limits to this power).

139. Discussing the Supreme Court’s recent takings jurisprudence, the comments of David Coursen, senior takings counsel in the Office of General Counsel, instruct:

There is a critical distinction [] between expectations regarding title and ownership, and expectations regarding regulation. You expect . . . that property will be regulated from time to time as the government exercises its police power, and you live with that kind of regulation. And when you acquire property, you acquire it subject to the full body of law that’s in place at the time you acquire it[.] But the plurality concluded that was a line of reasoning that didn’t work very well for ownership[,] while your expectations with regard to regulation are that it will increase. You do not have an expectation that the government will pass a law whose operation will mean that although you used to own the property, you no longer do. That’s a different kind of thing. I think if you look back at all the Supreme Court taking findings, you will find that that reasoning is almost invariably in operation.

The Fifteenth Annual Judicial Conference of the United States Court of Appeals for the Fifth Circuit, 180 F.R.D. 467, 684-86 (1997).

140. Mandelker, *supra* note 131, at 218.

devise, or inheritance could never achieve investment-backed status,¹⁴¹ a result both strange and unfair. For example, assume the government simply fenced in all allotments, fencing out all current owners. Under the preceding reading of "investment backed expectation," perhaps no taking would occur, as the original allotments were "given" by the federal government to allottees, who in turn "gave" them to current owners through descent or devise. Barring the unlikely purchase of a fractionated parcel or the equally unlikely existence of a will contract, there would be no investment thus no investment-backed expectation, whether focus fell on the real property itself, the right to its deathtime transfer, or the right to its deathtime acquisition. Besides being peculiar, that view functionally destroys the possibility that any abolition of the right to "gift" property would be a taking because, presumably, precious few individuals ever purchase property intending to profit from "willing" it away. Surely, the government holds no license to "take" anything acquired by gift or anything purchased with the intent to so transfer it.

Surprisingly, Justice O'Connor apparently endorses this restrictive view of investment in *Hodel v. Irving*, casting as "dubious" the existence of investment-backed expectations in descent or devise by reminding that allotments were overwhelmingly acquired "by gift, descent, or devise."¹⁴² That view is too strained. As the Court notes, massive land cessions to the federal government often preceded individual allotments; tribes' allottees sometimes ceded land to the federal government in exchange for individual allotments.¹⁴³ But even if the original allotments were not purchased from the government with actual dollars (and why would they be, given that the allotted reservations belonged to the tribes to begin with), the allotments ended up costing their owners dearly in cultural and economic loss. Significant investments were made in the form of faith in the dominant ideology and in the government's word. Investment-backed expectations should not be limited to the mind of a current property owner. Instead, one should consider whether *any* predecessor in interest, including the original allottee, held such expectations, and whether of pecuniary or other value.

If instead the expectation must be investment-backed when the regulation applies to accommodate post-acquisition "expense," donative acquisitions could morph into investment-backed expectations once a new owner formed *and acted upon* the requisite intent.¹⁴⁴ Discerning the specific prop-

141. Notwithstanding the non-pecuniary "labor" (rent-seeking) occasionally expended in ensuring that one is the recipient of such a donative transfer.

142. *Hodel v. Irving*, 481 U.S. 704, 715 (1987).

143. *Id.* (noting that many of the allottees' ancestors "agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation").

144. The *Penn Central* holding suggests this view. Plaintiffs sued for inverse condemnation

erty interest being regulated thus becomes critical. If the regulated interest is the undivided real property ownership itself, the ILCA could clearly interfere with distinct investment-backed expectations wherever the affected co-owner had already invested in a plan for its use or had entered into its possession.

Recall that the affected allotments are co-owned. Irrespective of fractional ownership, any single cotenant enjoys rights to possess and use (perhaps even by living on) the entire parcel and must accord equivalent rights to all other cotenants. As such, by taking away the right to devise an interest in the fractionated allotment, the ILCA essentially takes homesites from any family so using it.

b. Economic Impact on the Claimant

The low market value and weak income capacity of the escheatable interests suggest the slight economic effect of the ILCA on those subject to it. Nevertheless, broadening the economic inquiry renders that observation relevant but incomplete.

Accepting momentarily the triviality of the interests affected by the ILCA, the takings clause demands appraising the extent to which the regulated interest retains post-regulation value rather than solely focusing on that which it initially possessed. Pre- and post-ILCA values differ markedly. Before the ILCA, the transfer value of the escheatable interest tracked the economic value of the interest itself. Although the Court has been chastised for engaging in such "crude assessment,"¹⁴⁵ it is difficult to comprehend alternate economic valuation. Dollarwise, the fair market value of the transfer entitlement should equal or fall slightly below that of the underlying property,¹⁴⁶ just as the worth of a power of appointment roughly hews

after being barred from erecting a multi-story office building over their "landmark" property. By characterizing as "quite simply untenable" their assertion that the regulation prevented exploitation of a property interest they had believed was available, the Court suggests that subjective, "non-exploited" intentions will not support a takings claim. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978).

Daniel Mandelker nevertheless notes the Court's apparent willingness to modify that rule if a landowner's subjective intent is nevertheless "primary." Mandelker, *supra* note 131, at 217. As he continues, however, the case "did not state whether a landowner's primary expectations are determined at the time he purchases his land or at some date later in time. The reliance on use as a terminal to defeat the taking claim suggests [the Court] may have meant the primary expectation at the date of purchase is decisive." *Id.* at 217 n.12.

145. Kmiec, *supra* note 17, at 1664.

146. The sum of each entitlement value (except for transfer) should approximate the fair market value of the property itself less the "bonus" value of fully bundling all entitlements, thus maximizing control and flexibility over land use decisions.

to the present value of the property over which it is held and a remainder interest generally equates to the value of the relevant corpus, discounted by the preceding life estate. After the ILCA, the market value of the deathtime transfer right is zero, and that of the underlying parcel plummets in the same way as the value of a life estate carved out of a fee. Taking 100% of a mere dollar still takes everything; doing so from a million persons or from the same person a million times still equals \$1,000,000—not a small sum by any means.¹⁴⁷ To that end, the potency of the ILCA becomes immediate after expanding the loss beyond one disappointed taker losing one “low-value” interest in one allotment to fifty different takers each losing fifty “low-value” interests in as many tracts.

More importantly, the ILCA disregards non-income factors demanding account. Assuming that “the *income generated* by [escheatable parcels was] *de minimis*”¹⁴⁸ does not mean the parcel value was as well.¹⁴⁹ A privately-owned Van Gogh will not generate income, nor will the average mansion, notwithstanding their worth in hundreds of thousands of dollars. Even resource-rich lands yield no economic gain unless all co-owners agree on a course of development or use. Imagine that the ILCA required the escheat of entire original allotments failing to generate more than \$100 in a given year. Many would be lost given the economic despair pervading much of Indian Country. Extrapolating from the values assigned the 2% interests at issue in *Irving*,¹⁵⁰ land parcels ranging from \$5,000 to \$135,000 would be taken from co-owners with no compensation in turn.

To the extent that a purely income-oriented focus is appropriate, the ILCA disregards the cyclical nature of resource discovery, development, and profit. Renewable interests are ill-suited to yearly harvest or valuation.¹⁵¹ Income earned in a non-harvesting year could be zero not-

147. For cases discussing how the taking of mere cents can constitute a taking, see *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

148. *Hodel v. Irving*, 481 U.S. 704, 714 (1987) (emphasis added).

149. *Id.* at 709. The *Youpee* Court agreed. *Babbitt v. Youpee*, 519 U.S. 234, 243 (1997). Notwithstanding a four-year increase in the window within which to assess the income-generating capacity of the property interest, the amended ILCA did little to mitigate the economic impact of the Act. As the Court explained, amended section 207 still “train[ed] on the income generated from the land, not on the value of the parcel.” *Id.* at 244.

150. The value of the 2% interests scheduled for escheat ranged from \$100 to \$2,700. That amount could be even higher depending on the size of the original allotment tract. See Amicus Brief for Respondents, *Babbitt v. Youpee*, 519 U.S. 234 (1997) (No. 95-1595), available in 1996 WL 528318, at *14 (discussing 640-acre allotments on Colville Reservation).

151. *Indian Trust Fund Mgmt.: Testimony Before the Subcomm. on Env't, Energy and Nat. Resources of the House Comm. on Gov't Operations*, 103d Cong. (1994) (statement of Rebecca Adamson, President, First Nations Dev. Institute) [hereinafter *Hearings on the Mgmt. of Indian Trust Funds*], available in 1994 WL 519908. The ponderosa pine is typically harvested every 40 years.

withstanding past performance or future potential beyond the 5-year window. Income earned in a productive year often results in net loss where prices are depressed by high supply and low demand. Property could thus be worth many times over its income value to one who happened to die during a recession or depression. Additionally, some blame for marginal returns must be shouldered by the federal government. An allotment's primary income value inheres in its natural resources, whether water, grass, or more valuable mineral deposits. Allotments were hardscrabble to start, and their physical landscape has not much changed. Their condition as marginal from an economic perspective is inevitable given the effects of fractionation and alleged management inadequacies at the federal level.¹⁵²

Perhaps the most troubling aspect of the ILCA's valuation lies in the subtle effect of its income-production slant¹⁵³ in penalizing land stewards over land exploiters. Use rights provide an example. Depending on its location, aesthetics, and resources, one might pay well for an easement or profit over 640 acres of real property, which is essentially¹⁵⁴ what ownership

Between 1960 and 1990, its value grew from \$25 to \$400 per 1000 board feet, with an estimated increase to \$1,000 by the year 2020. *Id.* at *7. Ms. Adamson thus urged that "[a]ppraised and potential land values [] be considered when lands become eligible for escheat, not earned income alone." *Id.*

152. For detailed accounts of mismanagement estimating that tribes had lost more than \$330 million in the last decade alone, see SPECIAL COMM. ON INVESTIGATIONS OF THE SENATE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 216-105 (1st Sess. 1989). Professor Mary Christina Wood unequivocally makes the point:

Although the [duty to maximize return to the Indian beneficiary] seems obvious, the government has utterly failed to meet this duty in many instances, causing staggering losses to Indian beneficiaries. A 1989 Senate special-committee report concluded that governmental mismanagement had left tribal resources subject to "outright theft by unscrupulous private companies." Indeed, mismanagement is evident in nearly every area, including mineral leasing, oil and gas leasing, timber operations, and agricultural and grazing leasing.

Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 162-63 (citations omitted). Additionally, *Cobell v. Babbitt*, 188 F.R.D. 122 (D.C. 1999) involves a class action suit brought against federal government for alleged mismanagement of individual Indian money trust accounts resulting in loss exceeding \$10,000,000,000.

153. Professor Michael Heller provides intriguing perspective in noting colleague Don Herzog's suggestion that "non-use need not be viewed as tragic." Heller, *The Tragedy of the Anticommons*, *supra* note 52, at 687 & n.319. Herzog suggests that the General Allotment Act, although fueled by capitalism and entrepreneurship, might actually promote stewardship given the difficulties of efficiently using fractionated lands. "This alternative view suggests that the idea of 'underuse' may assume the values of a pre-existing market economy." *Id.*

154. "Essentially" because technically, the right is not an easement at all; the ability to use one's own property never is. RICHARD R. POWELL, *POWELL ON REAL PROPERTY* 597 (1968).

of any fractionated interest in an allotment means to those who do not live there.¹⁵⁵ More abstractly and far more importantly, real value inheres in spiritual connection to the land. Although original allottees may or may not have invited the private land ownership conferred through allotment, their descendants could view its transfer at death by one generation and continued ownership by the next generation as a link with the past and proof of Indian endurance.¹⁵⁶ If so, prohibiting its transfer at death could sever more than the economic connection that ownership entails.

c. Character or Extent of the Government Action

The Supreme Court ultimately hinged its determination that the ILCA was a taking on the inordinate reach of its forced escheat provision. Originally barring both descent or devise of an escheatable interest to anyone irrespective of family or tribal status, the effect of the ILCA was minimally alleviated by its amendment permitting testamentary transfers to existing allotment owners. Devise remained unavailable to minor and incapacitated decedents and irrelevant to testators whose intended beneficiaries (usually spouses or descendants) were unlikely to already hold interests in the tract. As the *Youpee* Court trenchantly observed, the “ever-so-slight” class of potential devisees created by the amended Act was unlikely to include many objects of the decedent’s bounty.¹⁵⁷

Testamentary freedom, or the ability to designate what property will be transferred and to whom, is an organizing principle of estates law. The Supreme Court’s sweeping pronouncement that “the dead hand rules succession only by sufferance”¹⁵⁸ is belied by the few instances in which law

155. Paradoxically, those who might argue that the ILCA was constitutional as no value was taken would presumably also argue that a total development ban prohibiting construction but preserving all other use was constitutional as “real value remained.” Justice Blackmun’s dissent in *Lucas* illustrates: “Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1991) (Blackmun, J., dissenting); see Maureen Straub Kordesh, *I Will Build My House with Sticks: The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 452-53, 462-63 (critiquing *Lucas* by noting that the property owner retained many property rights such as erecting non-permanent structures like trailers or tents, yet critiquing *Irving* by finding that “the Court inadvertently protected not a property principle, but rather the status of the native populations as victims of the market”).

156. For extended treatment of the non-economic value of land to its Indian owner, see *infra* Part V.A and accompanying notes.

157. *Babbit v. Youpee*, 519 U.S. 234, 244 (1997).

158. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942); see *Mager v. Grima*, 49 U.S. (8 How.) 489, 493 (1850) (holding that a state may regulate manner and terms upon which real or personal property may be transferred by will); *Decker v. American Univ.*, 20 N.W.2d 466,

actually interferes.¹⁵⁹ Beyond widespread limits on spousal disinheritance,¹⁶⁰ few stated limits emerge.¹⁶¹ Generally, a testator may not direct the outright destruction of property or condition its receipt or use on constitutionally prohibited bases. Law employs its nullification or redistributive option only when the negative public consequences of the transfer greatly outweigh the more “private” public policy of effectuating testamentary intent.

None of these concerns existed here. Decedents constrained by the ILCA were those who attempted to transfer property to family members, not destroy, waste or squander it on entities with vastly inferior claims and through unconstitutional conditions. That the tribe might also be a proper (or even to some minds, the better) beneficiary is irrelevant.¹⁶² Asserting otherwise injects legislative intent into an arena in which government assiduously avoids; doing so solely due to the “Indian Context” makes the regulation no more virtuous.

The Supreme Court appreciates this tension. While conceding that testamentary freedom is not constitutionally grounded, *Irving* boldly flirts with making it so by recognizing its tradition within Anglo-American jurisprudence and characterizing it as an extraordinarily valuable right over which restraint must be carefully exercised.¹⁶³

While the Act’s probable oversight in preserving will substitutes might mitigate its harshness, critics under appreciate salient distinctions and similarities between those transfers and testate ones.¹⁶⁴ First, underage and

470 (Iowa 1945) (holding that neither state nor Federal Constitution guarantees individual’s right to control or dispose of property after death); *Hall v. Vallandingham*, 540 A.2d 1162, 1164 (Md. Ct. Spec. App. 1988) (stating that the right to receive property by devise or descent is privilege granted by state).

159. “Property owners have the nearly unrestricted right to dispose of their property as they please.” RESTATEMENT THIRD OF PROPERTY § 10.1 cmt. A (1996).

160. See UNIF. PROBATE CODE §§ 2-201 to -214 (amended 1993), 8 U.L.A. 102-32 (1998) (providing for surviving spouse’s election to take up to 50% of augmented estate depending on length of marriage).

161. *Sub rosa* limits arguably exist in judges’ and juries’ tendency to uphold will challenges brought by disinherited “natural objects of the decedent’s bounty,” forcing the decedent’s estate through intestacy and to that disappointed heir. See generally Leslie, *supra* note 27, at 235 (presenting the failure of the justice system to effectuate wills exhibiting non-conforming values); Spitko, *supra* note 22, at 275 (discussing the challenges faced by minority testators in a legal system biased against non-traditional testamentary dispositions).

162. Escheat guarantees no reciprocal advantage except in the abstract conception that what benefits a group benefits its members. However, the individual losing the interest may not belong to that tribe or even self-identify as Indian, and “a member’s right to tribal property is no more than prospective and inchoate unless federal or tribal law recognizes a more definite right.” COHEN, *supra* note 1, at 606.

163. *Hodel v. Irving*, 481 U.S. 704, 715-16 (1987).

164. The merits of at-death versus inter vivos transfers consist of owners’ retaining full

incapacitated persons are less able to use will substitutes, as inter vivos capacity requirements usually exceed testamentary ones.¹⁶⁵ Second, similar to drafting a will but dissimilar to dying intestate, will substitutes shift transactional and administrative costs to transferors, exacerbated within the allotment context by the requirement of seeking secretarial approval of the transfer itself. To the extent that subject property already bears low value, these costs might consume the benefits of its transfer. Third, will substitutes can be more sophisticated and complex (thus unfamiliar) than straightforward wills. Because they are often tax driven, they become more foreign as wealth and education decrease.¹⁶⁶ Assuming as true that Native Americans are little-inclined to write wills,¹⁶⁷ their use of the will substitute is even less likely. Last, some will substitutes (such as joint tenancies and accounts) engender lifetime gifts and thus frustrate the purely testamentary intent of their creators.

One can alternately convey the stunning breadth of the ILCA by assessing whether it would be legitimate if imposed during the property owner's life, as the other deathtime restraints are. For example, barring spousal disinheritance at death roughly corresponds to equitable property division upon divorce. Both acknowledge the contribution of the non-titled partner to the marital res, yet neither is considered a taking of the titled partner's property. Courts cannot enforce racial restrictions in wills or trusts, nor can they implement inter vivos ones, even when thereby extinguishing vested property interests.¹⁶⁸ Taxes can be imposed during life, just as they can at death.¹⁶⁹ If deathtime inalienability equals lifetime inalienability, the ILCA appears justified as the Court has upheld market-restrictive legislation. This poses the question: Does death matter?

Transfer rights seem more valuable and protectable when exercised

lifetime rights in the property, including the ability to change intended recipients. Demerits include the time, expense, and inefficiency of probate. Will substitutes, i.e., life insurance, joint and pension accounts, and revocable trusts, permit owners the relative best of both worlds: property control during life, probate avoidance at death. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (discussing will substitutes and proposing that they are harbingers of succession law's future).

165. Alexander M. Meiklejohn, *Contractual and Donative Capacity*, 39 CASE W. RES. L. REV. 307, 356 (1988-89).

166. This difficulty could of course be overcome were the government willing to infuse its BIA budget with capital to cover educational and estate planning opportunities.

167. See Skibine, *supra* note 7, at *1 (discussing legal and sociocultural dimensions contributing to fractionation).

168. See *Shelley v. Kraemer*, 334 U.S. 1 (1968) (holding that racially restrictive covenants are unenforceable); *Capitol Fed. Sav. & Loan Ass'n v. Smith*, 316 P.3d 252 (Colo. 1957) (holding racially restrictive executory interests unenforceable).

169. See *Bromley v. McCaughn*, 280 U.S. 124, 139 (1929) (upholding federal gift tax); *New York Trust Co. v. Eisner*, 256 U.S. 345, 350 (1921) (upholding federal estate tax).

by the living. Sellers convert property to gain—dollars earned or costs foregone—actualizing other needs or wants. Donors benefit through advantageous tax consequences,¹⁷⁰ heightened bargaining power through moral capital,¹⁷¹ or the non-economic value of just feeling good. As well as rendering most property rights such as use impossible, death attenuates these values, particularly when effected through intestate succession where the owner cedes dispositive control to the state.

Nevertheless, weighty goals support testamentary transfers as well. Testate designation preserves economic stability for transferors, recipients, and society by encouraging saving over spending.¹⁷² More personally, it protects autonomy by permitting the decedent and none other to designate who will take the estate at death. At some level, naming beneficiaries defines family. The perhaps disappointing inability to carry property beyond the grave is mitigated by being able to determine with whom it stays, irrespective of need- or blood-based criteria. Thus, policies unique to testation support relatively unimpeded dispositional rights.¹⁷³ More crucially, deathtime inalienability concomitantly transfers the underlying property—usually to heirs, but in this case to the tribe.¹⁷⁴ Congress could not compel the non-compensated lifetime transfer of an allottee's interest to the tribe. Thus negating every right bound up with property, including the "essential" rights of possession and exclusion, is the quintessential taking.

IV. EXPANDING TAKINGS

Although the Supreme Court justifiably invalidated the ILCA with traditional takings tools, the peril in attacking mandated escheat solely thereon is twofold. Coupled with the volatile political context in which property rights are defined and collide, the "ad-hocery" and elasticity of the takings doctrine leave *all* takings decisions vulnerable to attack,¹⁷⁵ par-

170. For example, charitable deductions or contributions, or reducing a capital gains burden on the donee of rapidly appreciating property.

171. Broadly, status is conferred on donors through gift-giving and patronage. Individually, donors can manipulate or induce behavior through the promise of a future gift or by the reminder of a past gift. See Paul W. Tappan, *The Sociology of Inheritance, in SOCIAL MEANING OF LEGAL CONCEPTS* (Edmond N. Cahn ed., 1952).

172. See Lawrence Zelenak, *The Reification of Metaphor: Income Taxes, Consumption Taxes and Human Capital*, 51 TAX L. REV. 1 (1995) (noting savings disincentive of death taxes on transferors). Because tax rates never reach 100%, the savings disincentive would skyrocket were there no mechanism through which to transfer the property at all.

173. See *infra* Part V.B (discussing testamentary freedom and restraints thereon within the tribal context).

174. See *supra* notes 100-08 and accompanying text (contrasting lifetime and deathtime restrictions).

175. "Supreme Court decisions over the last three-quarters of a century have turned the

ticularly those like *Irving* and *Youpee*, given the strength and near-unanimity of their opposition.

More critically, the Court's analysis leaves ample room for Congress to craft an act permissible and palatable under the Takings Clause but unjust nevertheless. What if the Court's critics are right? What if, irrespective of its ignominious past and fragile wisdom, the ILCA effected no more a taking than scores of other legitimate limits on private entitlements? That the question can even be posed reveals that forcing discussion into a takings box constrains important exploration of the more subtle equities at play.

The Takings Clause is increasingly (albeit superficially) economic in language and design. Legislatures gauge cost-benefit effects prior to regulating¹⁷⁶ and whether so described, takings decisions are made and measured by the conformance of their outcomes to utilitarian criteria.¹⁷⁷ Takings language reflects and reinforces the primacy of the economic position: a categorical taking results when the "economic viability" of the property is wiped out, while a balanced taking weighs "legitimate investment-backed expectations" and considers explicit and implicit "reciprocities of advantage." Ultimately, takings violations earn property owners the "just com-

words of the Takings Clause into a secret code that only a momentary majority of the Court is able to understand." Heller & Krier, *supra* note 26, at 997. Other scholars note that "[t]he absence of consistent standards has made the constitutional protection of property susceptible to change, as different social and judicial outlooks have gained power over time." JUERGENSMEYER & ROBERTS, *supra* note 73, at 414. For example, since the 1970s, judicial and legislative branches of government have been quite active in the takings field and increasingly solicitous of private property rights; "[p]roperty owners have surely found a new friend" in the Court. *Dolan v. City of Tigard*, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting). There are no guarantees that the friendship will continue.

176. See WILLIAM FISCHEL, *THE ECONOMICS OF ZONING LAWS* 150-230 (1985) (explaining how and why the takings clause should be used as a reform device); Robert Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) (discussing the legal and economic impacts of growth control devices developed by municipalities); William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581 (1988) (discussing an economic-utilitarian approach to land use regulation). *But see* Rubenfeld, *supra* note 99, at 1106, 1131-34 (noting that "the interpolation of economic analysis into takings law has been a wish consummated far more in the commentary than in the case law").

177. See *Central Ariz. Water Conservation Dist. v. United States EPA*, 990 F.2d 1531, 1534 (1993) (discussing attempts to explore pareto optimal solutions to emissions regulation at tribal generating station). Perhaps the most influential article tying takings with efficiency is Michelman, *supra* note 111, at 1230-33, which notes that courts' compensation determinations do not always flow from what utility or fairness would suggest. For more recent treatment of the issue, see David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997) (employing Kaldor-Hicks efficiency concepts whereby a transaction is efficient if dollar gains to the winners exceeds dollar costs to the losers); John Burritt McArthur, *Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?* 47 AM. U. L. REV. 775 (1998) (recognizing hidden pareto arguments in courts' decisions); Oswald, *supra* note 131, at 93 (recognizing the "prominence" of economic factors in ad hoc balancing).

pensation” of “fair market value.”

By effecting a triple-win for tribes, members, and the federal government, the ILCA initially appears a pareto-optimal dream. Its provisions forced near-valueless ownership units to the tribe, which would presumably improve tribal and member economic landscapes and BIA budgets, attract private investment in Indian Country, and alleviate costs of federal micromanagement. Nevertheless, the superficial economics of that argument are cursory and uninformed. More importantly, as not all systems singularly view real property as an economic unit to be maximized, framing the issue in efficiency terms masks equally relevant concerns¹⁷⁸ and suggests the debility of applying current taking theory to all alleged takings.

One possible perspective would recast the *Irving* and *Youpee* decisions as substantive due process in disguise.¹⁷⁹ Working the cases backward, this perspective poses testamentary freedom as a near-constitutional or fundamental right, requiring heightened scrutiny when analyzing the goals of the ILCA and the means used to achieve them. Pragmatically, this is not necessarily a bad way to look at the cases, but it adds to the confusion over whether legislation that violates the due process clause is also a taking,¹⁸⁰

178. Professor Michelman seems to capture the argument through considering “demoralization costs” in his takings analysis. Although cast in economic jargon, the term might be loosely analogized to the types of sociological factors suffered by the allottees here. See Michelman, *supra* note 110, at 1230-33.

179. See Chris Schwab, *Constitutional Law—Fifth Amendment Just Compensation Clause—Estate of Indian Trust Lands*, 65 TENN. L. REV. 805, 825-27 (1998) (arguing that the technical difficulties of applying takings law to the ILCA led the Court to invoke its “fundamental rights” aspects when comparing the ends sought by the regulation with the means employed).

180. Legislation that only violates the takings clause remains constitutionally permissible, as takings theory (1) implies legislative power to so act as long as just compensation is paid and (2) sets a fairly low bar in terms of proper legislative goals. The requirement of “public use” rings hollow given its legal conflation with any public purpose. Upon passing the takings test, it is the rare property regulation indeed that will run afoul of a means-ends review under the Due Process Clause, which denies the regulatory power altogether rather than conditioning it upon the payment of just compensation.

The two clauses seem and are distinct: one seems more a property rule, the other, a liability rule. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (explaining that an entitlement is protected by a property rule if one who desires that entitlement must negotiate a voluntary transaction on the seller's terms, and that an entitlement is protected by a liability rule if one who desires that entitlement may take it irrespective of its owner's volition upon paying some objective value). Nevertheless, recent Supreme Court decisions reflect an increased willingness to invalidate development exactions as takings after applying the means-ends review traditionally reserved for substantive due process analysis. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (requiring review of nexus between state interest and permit conditions); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that avoiding payment of just compensation requires means “substantially related” to legitimate state goals); *Agins v. Tiburon*, 447 U.S. 255 (1980) (stating that an ordinance that does not substantially

raises the spectre of *Lochnerism*,¹⁸¹ and presents difficulty where unfair property regulation not involving fundamental rights would still pass deferential due process review.

A second approach would instead ask that in theory and application, takings jurisprudence more carefully and explicitly include non-economic factors when balancing the public and private interests at hand.¹⁸² “Perspectives that aim either to complement or to displace the normal science of law and economics” are critical; “the insights of the economist must be placed in a larger structure in which sociological, psychological and historical theory have their rightful place.”¹⁸³

Building such sentiments into property theory requires neither new constitutional principles nor radical redefinition of the takings clause. Rather, the disconnection experienced by many academics between takings law and the *Irving* and *Youpee* decisions suggest their utility in presenting additional non-economic takings factors preserved within the Supreme Court’s articulated balancing test.¹⁸⁴ I offer and apply two non-exclusive examples: (1) the history of the affected parties and property vis-a-vis the regulating body and (2) the ideological relationship between the affected parties, the affected property, and property in general.

advance legitimate state interests would be a taking).

181. For example, responding to a developer’s claim that a regulation effected a taking, the court responded that “[s]ubstantive due process’ has the distinct disadvantage, from plaintiffs’ perspective, of having been abolished in the late 1930s when the Supreme Court threw over *Lochner*.” *Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995), cited in JUERGENSMEYER & ROBERTS, *supra* note 73, at 461.

182. See *supra* Part V.A (discussing individual Indians’ spiritual, historical, geographical, and sociological ties to the land).

183. ROBERT ELLICKSON ET AL., *PERSPECTIVES ON PROPERTY LAW* at xii (1995). To be fair, all three would probably prefer to limit rather than expand the factors considered in analyzing regulation under the Takings Clause. Economic theory counsels that clear rules, sometimes at the expense of fairness, are more efficient and more desirable than ambiguous or contextualized ones. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 604-05 (1988); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988). But see Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 55-56 (1990) (discussing how narrative can explain actions not motivated by utility-maximizing preference explained in game theory).

184. Neither *Penn Central*, its subsequent application, nor its academic dissection limited the potential balancing factors to those enumerated in the case. *Agins* specifically explains that “no precise rule determines when property has been taken,” 447 U.S. at 260-61, permitting analysis such as that employed by a California court listing ten factors for consideration. See *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (1997).

V. RETELLING THE TALE OF THE ILLCA AND THE REAL TRAGEDY OF THE ANTICOMMONS

The history of Native American land policy memorializes serial confrontations between property ideologies, and the history of Native American land law encodes the outcome: the subordination of Native American property norms to Western European,¹⁸⁵ and later, Anglo-American, property ideals. At the risk of characterizing either the participants or their property norms as fixed binarisms,¹⁸⁶ comparing the relevant land ideologies permits fuller legal and ethical evaluation of the ILLCA by positioning it within normative and historical context.

A. ANTIETHICS, ANTITHETICS

1. Land as Status, Status is Land

In feudal England, land “negat[ed] independence”¹⁸⁷ and expressed

185. “To tell the history of the West without pursuing . . . Old World linkages is to miss a simple but powerful truth: Connections matter.” William Cronon et al., *Becoming West: Toward a New Meaning for Western History*, in UNDER AN OPEN SKY: RETHINKING AMERICA’S WESTERN PAST 9, 9 (William Cronon et al. eds., 1992). Those connections are particularly potent here, as to tell the post-conquest history of most North American tribes is largely to recount the series of laws controlling them. “No American comes within the sweep of as many laws as the Indian living on a reservation . . . [L]aw dominates Indian life.” COHEN, *supra* note 1, at 47 & n.1 (quotations omitted).

186. Although brevity compels oversimplification in contrasting the land ideologies at play, danger inheres in

depicting Indian and white cultures in antiethical terms . . . [which makes] it virtually impossible to imagine an approach in which Indian history can be incorporated into the mainstream of American historiography. The plots render Indians more interesting and important as foils for white history than as significant participants in it. Indian history becomes a tragic chapter in the creation of modern America, with the inevitable clash between incompatible cultures the price of America’s glory or the source of its shame, and Indians the necessary enemy or victim.

George Miles, *To Hear an Old Voice: Rediscovering Native Americans in American History*, in UNDER AN OPEN SKY: RETHINKING AMERICA’S WESTERN PAST 52, 55 (William Cronon et al. eds., 1992). Far more troubling is the belief that by nature, differing ideologies cannot find common ground. A fully integrated system encompassing all dissimilar (and perhaps competing) approaches toward property may well be impossible; Aldo Leopold’s visionary hope for a comprehensive land ethic has neither been developed nor appears foreseeable. See ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 201 (1949); Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439 (1994) (arguing the futility in searching for a unified land ethic). Nevertheless, confronting shared issues such as fractionation facilitates collaboration in which both Anglo- and Native American ideologies, past and present, play real roles rather than merely play off each other. See *infra* Part V.B.

187. G.C. CHESHIRE, *THE MODERN LAW OF REAL PROPERTY* 9 (6th ed. 1949). The term

status quo.¹⁸⁸ More than a mere unit of capital, real property bound serf to lord and vassal to king, securing an elaborate and mutually reinforcing social structure in the process.¹⁸⁹ The relative scarcity of land both ensured and was caused by royalty's jealous hold over its economic and political values of "maint[aining] [] the existing hierarchy of land tenure . . . [which] determined 'not only the wealth and taxable capacity of the subjects of the state, but [their] political and social position [as well].'"¹⁹⁰

Under the feudal tenurial system, much of the land was held in common, but he who looked like an owner was often closer to a slave, owing homage, rents, and services to those of whom he held and acquiring protection in return.¹⁹¹ Ultimately, all land, and thus sole sovereignty, "belonged" to the king¹⁹²; only its use was acquirable through substitution or subinfeudation.¹⁹³

Vestiges of feudalism and its underpinnings very likely had a heavy influence on the property concepts, and, thus, economies, of the colonies,¹⁹⁴ as "[f]rontiers generally reflected the class structure of the societies that produced them, albeit in simplified form."¹⁹⁵ But to the extent that the

"feudalism" and its derivations are ambiguous descriptors, particularly since the word "was certainly unknown to the peoples to whom it is applied." *Id.*

[I]t is extremely doubtful whether feudo-vassalic institutions formed a coherent bundle of institutions or of concepts that was structurally separate from other institutions and concepts of the time . . . they are too incoherent, too loosely related, and too imperfectly reflected in medieval evidence to be envisaged as anything like an ideal type.

REYNOLDS, *supra* note 135, at 11. Nevertheless, I use the term as Cheshire does: to suggest hierarchical rights in land and the "negation of independence."

188. For example, early views of the common law of waste prevented any change to real estate, whether beneficial or not to the future interest holder and irrespective of any changed conditions under which the present interest was held. *See, e.g.*, Bishop of Winchester's Case, Court of Chancery (Eng. 1638).

189. Bryce Lyon, *The Emancipation of Land Law from Feudal Custom*, 86 YALE L.J. 782, 783-84 (1977) (reviewing S.F.C. MISLON, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* (1976)).

190. Bosselman, *supra* note 187, at 1448 (quoting 2 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 55 (3d ed. 1923)).

191. *See* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 232-36 (1968) (recounting the nature of land ownership during the feudal period).

192. 1 MARC BLOCH, *FEUDAL SOCIETY* 439 (1961). For definitive treatments of the interrelationship between land and freedom, see WALTER LIPPMAN, *THE METHOD OF FREEDOM* (1934) and Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

193. *See generally* REYNOLDS, *supra* note 136, at 323-95. Of course, the use of property is itself a property right. *See supra* Part III.A.1.

194. *See* Cohen, *supra* note 193, at 9-11 (recognizing feudalism in the American money economy).

195. Cronon et al., *supra* note 185, at 20.

feudal vision retained vitality in fifteenth century England,¹⁹⁶ it quickly lost purchase (at least as applied to land) in the pre- and post-revolutionary thought of the New World.¹⁹⁷

2. In the United States there is more land where nobody is than where anybody is. This is what makes America what it is.¹⁹⁸

The land mass and population density of the colonies and the seemingly-unowned expanse of land beyond their frontiers represented sharp change from Western European conditions at the turn of the fifteenth century. For the first time, land supply appeared to exceed demand with no perceived limit to the West. Coupled with the puritanic and agrarian mindset of early colonists,¹⁹⁹ and the unforgiving New England landscape within which many lived,²⁰⁰ such conditions could have resulted in a communal or communitarian real property regime.²⁰¹ This did not happen, however, and property doctrine remained inspired by the Western European ideal of private ownership. Nevertheless, the revolutionary spirit tended away from the "stifling conformity"²⁰² of feudalism to embrace the

196. Original colony charters granted lands subject to feudal duties already abolished in England. For example, the patent granted by King Charles II to William Penn required that he "bee holden of Us Our heirs and Successors, Kings of England, as of Our Castle of Windsor . . . in free and common Socage, by fealty only for all Services, land not in Capite or by Knights Service: Yielding and paying therefore to Us, Our heirs and Successors, Two Beaver Skins[.]" William R. Vance, *The Quest for Tenure in the United States*, 33 YALE L.J. 248, 248 (1924). Feudal tenures were finally abolished in England in 1660. See REYNOLDS, *supra* note 135, at 7.

197. As Vance writes in 1924, "what can have become of that Colonial tenure, which was so very real and active as to keep the colonists in unceasing conflict and turmoil with the royal governors . . . and which did so much to bring on the Revolution?" Vance, *supra* note 196, at 248.

198. GERTRUDE STEIN: *THE GEOGRAPHICAL HISTORY OF AMERICA 17-18* (1936).

199. See generally WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 127-56* (1983) (discussing agrarian practices of European settlers); STEPHEN INNES, *LABOR IN A NEW LAND: ECONOMY AND SOCIETY IN SEVENTEENTH-CENTURY SPRINGFIELD* (1983) (exploring the social and economic conditions of an earlier New England settlement).

200. Rutherford H. Platt describes the circumstances that shaped the evolution of the New England town as including a harsh climate and "an intractable terrain requiring cooperative effort for productive utilization." RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 122* (1996).

201. The rise of private property often accompanies increased population (thus increased scarcity of resources), industrialization, and concern for material wealth or status, which suggests that converse conditions would permit communitarianism to flourish. Blackstone adverts to this theory when he suggests that private property ownership was inevitable as man increased in "number, craft, and ambition." BLACKSTONE, *supra* note 77, at 4.

202. PLATT, *supra* note 201, at 67.

previously unattainable²⁰³ possibility of allodial ownership to anyone willing to work hard enough to acquire and maintain it. "Resources, wealth, and power, although hardly within reach of all, were nonetheless more up for grabs [] than in the more rigidly hierarchical societies the invaders had left behind."²⁰⁴

Although initially seeing land more as habitat than territory, Americans soon recognized that its value was "derived from wealth that could be created by using it rather than [from] the social status that accrued from its mere possession."²⁰⁵ This perspective extended when land came to be valued as a tradeable unit of ownership distinct from its agricultural use.²⁰⁶

Colonial property views thus simultaneously replicated and reacted to their Western European origins.²⁰⁷ Land escaped the ideological metaphor of a status shackle binding serf to lord to king to become the corporeal instrument and expression of freedom, opportunity, and success.²⁰⁸

203. "The government offered land to potential English immigrants in fee simple, something few residents of England could ever expect to obtain." Bosselman, *supra* note 186, at 1469-70 (citing HERMANN LEVY, *LARGE AND SMALL HOLDINGS: A STUDY OF ENGLISH AGRICULTURAL ECONOMICS* 118-19 (1911)); see MARCUS LEE HANSEN, *THE ATLANTIC MIGRATION 1607-1860*, at 157 (Arthur M. Schlesinger ed., 1940) (noting that the purchase price of land in America was often less than a year's rent in Europe).

204. Cronon et al., *supra* note 186, at 9.

205. Bosselman, *supra* note 187, at 1467 & n.108 (quoting KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 99 (1989)).

206. Land speculation, already well underway during the colonial era, reached a feverish pitch by the mid-1830s, with townsite parcels being bought for the hundreds only to be sold in the thousands of dollars. See WILLIAM CRONON, *NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST* 23-54 (1992) (detailing the rate of speculation and "boosterism" in the settlement, sale, and urbanization of Chicago); see also INNES, *supra* note 200 (tying the commodification of land with the advance of capitalism).

207. Professor Cronon makes this point when he notes that the "displaced migrants" of the New World incorporated aspects of the familiar world into a new, chosen vision. Cronon et al., *supra* note 186, at 10.

208. Ironically, all these values eventually collapsed back into "status": individual freedom still depends in part on racial, economic, and gender status; economic opportunities exist because of status; and success remains most commonly measured by the status of wealth. As one legal economist writes:

When forced to acknowledge [] differences in ability, luck, and educational opportunity, we admit that we do not play ["the capitalism game"] on a completely level field. But because each of these differences seems beyond our control, we tend to believe the field is as level as we can make it. It is not. For no particularly good reason, we allow some players, typically those most culturally and educationally advantaged, to inherit huge amounts of wealth, unearned in any sense at all. So long as we continue to tolerate inheritance by healthy, adult children, what we as a nation actually proclaim is, "All men are created equal, except the children of the wealthy."

Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 71 (1990); see JOHN A. BRITAIN, *THE INHERITANCE OF ECONOMIC STATUS* (1977) (studying effects of family eco-

3. The earth is my mother. With your plow you are ripping her bosom.²⁰⁹

Traditional Native American philosophies infused real property with a spiritual and cultural component far beyond that observable under more market-based systems.²¹⁰ Neither fetter nor possession, land bridged and interconnected people, things, and time, providing the medium through which individuals, clans, tribes, past, present, future, worldly, spiritual, and divine coexisted and within which they inherited.²¹¹ Native American philosophy was, therefore, imbued with a poignant notion: "I walk on the dust of thousands who have gone before."²¹²

Charlotte Black Elk explains that distinction through competing ori-

monic status on children and future generations via inheritance); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1871-91 (1996) (discussing the role of inheritance in mediating inequality of wealth and therefore life chances).

These observations are not limited to the twentieth century. Commenting on land views in the mid-1800s, Cronon writes:

For many, if not most, Americans, 'the discovery, cultivation, and capitalization' of land meant bringing it into the marketplace and attaching it to the metropolis. They might articulate their visions in terms quite different []—speaking of freedom, or community, or family, or getting ahead in the world—but even those noneconomic dreams generally presupposed a growing commercial intercourse between city and country.

CRONON, *supra* note 207, at 54.

209. Robert J. Conley, *The Earth*, in THE REMEMBERED EARTH 72, 72 (1979).

210. See FRANK POMMERSHEIM, BRAID OF FEATHERS 13-14 (1995) ("Land is basic to Indian people: they are part of it and it is part of them; it is their Mother. Nor is this just a romantic commonplace. For most Indian groups, . . . land is a cultural centerpiece with wide-ranging implications for any attempt to understand contemporary reservation life."). See generally RUSSEL L. BARSH, NAVAJO PROPERTY LAW AND PROBATE 1940-1972 (1974) (reconstructing Navajo judges' thoughts over inheritance); E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASELAW IN PRIMITIVE JURISPRUDENCE (1960) (conducting an anthropological and legal field investigation of jurisprudence among the Northern Cheyenne); RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975) (tracing evolution of Cherokee laws and court system before and after Anglo-American contact).

211. Acoma poet Simon Ortiz conveys the role of "location" to Native American individual and group identity:

"Where you from?"

"Juneau/Pine Ridge/Sells/Tahlequah . . ."

"That's my name too./Don't you forget it."

Simon Ortiz, *Some Indians at a Party*, in WOVEN STONE (1992), cited in Tsoie, *supra* note 22, at 361. An Oglala official expresses the idea more concretely: "Our relationships to one another as Lakota are defined by our relationship to the earth. Until we get back on track in our relationship to the earth, we cannot straighten out any of our relationships to ourselves, to other people." POMMERSHEIM, *supra* note 211, at 33 (citation omitted).

212. "The bones of ancestors . . . tie you to th[e] land, so you develop something beyond just simple ownership, you're part of it." ALVIN JOSEPHY, 500 NATIONS 412 (1994) (quoting Nez Perce Albert Andrews).

gin theories.²¹³ Judeo-Christian tradition equates the earth with banishment. Once outside Eden's Garden, it was a place of exile or pilgrimage to which humans were relegated pending their potential acceptance into another place, another time. By contrast, many tribes viewed land as "heaven on earth" and in fact, merged the two by recognizing and revering its divine properties. While Christians felt bound to the land, and thus virtuous when dominating and cultivating it,²¹⁴ most tribes viewed the man/earth relationship from a more egalitarian perspective.²¹⁵

213. Videotape: *The Way West: Westward, the Course of Empire Takes Its Way* (1845-1864) (Writer/director Ric Burns 1995) (on file with author).

214. William Blackstone's imperialistic views instruct. Defining property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe," Blackstone asserts that "the all-bountiful creator gave to man 'dominion over all' the earth; 'and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the 'earth.'" BLACKSTONE, *supra* note 135, at 2-3 (quoting *Genesis* 1:28). He stresses that "[t]his is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator." *Id.* at 3. Similar theories inhere in justifying resource exploitation as ordained by "He who is the Author of Nature." See CRONON, *supra* note 206, at 35-36, 72-74 (setting forth this argument).

Blackstone's account of things neatly (but ethnocentrically) disposes of many doctrinal questions. Ownership, even of land, is made possible through God's benevolence and grace. His tripartite hierarchy explicitly ranks God above Mankind above Everything Else (including land and nature), blessing a culture of earthly domination and control, exploitation and consumption. This perspective ignores competing views of Man as part of Nature, Nature as part of God, or even God as part of Man, all of which are variously reflected in indigenous religions.

Apart from [the tribe, primal peoples] sense little independent identity. To be separated from the tribe threatens them with death, not only physically but psychologically as well. The tribe, in turn, is embedded in nature so solidly that the line between the two is not easy to establish. In the case of totemism it cannot really be said to exist.

HUSTON SMITH, *WORLD'S RELIGIONS* 238 (1994).

215. Professor Carol Rose speaks to the point when analyzing the doctrine of first possession:

[P]erhaps the deepest aspect of the common law text of possession lies in the attitude that this text strikes with respect to the relationship between human beings and nature. At least some Indians professed bewilderment at the concept of owning the land. Indeed they prided themselves on not marking the land but rather on moving lightly through it, living with the land and with its creatures as members of the same family rather than as strangers who visited only to conquer the objects of nature. The doctrine of first possession, quite to the contrary, reflects the attitude that human beings are outsiders to nature. It gives the earth and its creatures over to those who mark them so clearly as to transform them, so that no one else will mistake them for unsubdued nature.

These contrasting land ethics found expression in communal use versus private ownership. To those in power, North America could be neatly packaged and parsed to the highest bidder, most efficient user, or quickest runner,²¹⁶ who would then enjoy a relatively complete bundle of rights therein, limited only by paramount state concerns.²¹⁷ Jefferson's rectangular surveys did just that by rigidly sectioning off the land with geometric precision; equal land translated into equality,²¹⁸ which, with the independence it ensured, was the primary goal of the revolutionaries. Modern doctrines advance that vision by encouraging the acquisition,²¹⁹ accumulation,²²⁰ and retention²²¹ of private property; they promote its effi-

Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 87-88 (1985) (citation omitted). See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (arguing that Western belief in its superiority and its law was the basis for Western conquest and colonization of the American Indian).

216. See generally Terry L. Anderson & Peter J. Hill, *The Race for Property Rights*, 33 J.L. & ECON. 177, 178 (1990) (discussing optimal property rights timing under the high bid sale, squatter preemption, and homesteading disposal policies of the United States' "first privatization movement"). Professors Anderson and Hill elaborate that "politicians rallied around the free-land position" and cite the Homestead Act of 1862, the Timber Culture Act of 1873, the Desert Land Act of 1877, the Timber and Stone Act of 1878, the Enlarged Homestead Act of 1909, and the Stock-Raising Homestead Act of 1916 as proof of the federal government's desire to transfer land to "anyone willing to endure the hardships of frontier life." *Id.* at 185.

Offering public property through land runs implemented a first-come, first-served policy, and not always fairly. For example, when a large area of Oklahoma was offered for public settlement in 1889, 36,000 potential settlers "raced off to stake a claim, only to find that many 'sooner' had beat[en] them to it." Douglas W. Allen, *Homesteading and Property Rights; or, "How the West Was Really Won,"* 34 J.L. & ECON. 1, 9 n.16 (1991), citing MARION CLAWSON, *UNCLE SAM'S ACRES 70* (1970) (arguing that homesteading was actually the federal government's way of privatizing the enforcement of United States' land claims against the Indian tribes).

217. Thomas Jefferson's "platform of fee simple land ownership became a basic element of United States policy." Bosselman, *supra* note 187, at 1469, citing Richard P. Codle, *Community Justice and Formal Law: The Jurisprudence of the Western Ordinances*, 16 LEGAL STUD. F. 263, 275 (1992).

218. See RICHARD MANNING, *GRASSLAND* 94-97 (1995) ("Politics is power, and agrarianism is an attempt to invoke the power of the land, translate it as property, and so divide and confer that power equally among the many yeoman.").

219. For example, real property acquisition is encouraged by streamlining and reducing transfer processes and costs, allowing tax deductions for mortgage payments, offering attractive lending options for first-time buyers, and subsidizing housing costs through assorted federal programs and grants.

220. The ability to transfer property at death encourages property accumulation over lifetime consumption. See RICHARD E. WAGNER, *INHERITANCE AND THE STATE* 5-22, 81-85 (1977) (noting that as the transfer of wealth to one's heirs is taxed more heavily, accumulation of wealth is discouraged); Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 9 (1995) (explaining that giving benefactors broad license to craft their estate plans encourages them to produce and save more wealth).

cient and productive use,²²² place little substantive controls over its employment²²³ or transfer,²²⁴ and invite equality of treatment in its distribution or disposition.²²⁵

By contrast, individual land ownership was not only conceptually foreign, but in a sense, blasphemous to most tribes.²²⁶ Denying the validity of a cession treaty, Sac Chief Black Hawk declared that "land cannot be sold." To Black Hawk, "not even [he and his people] had the power to alienate it, since their lives and the land's were one."²²⁷ Tribal philosophy seemed committed to a more limited notion of ownership, characterized by need-based use, with a more community-oriented flavor.²²⁸ "Sell a country? Why not sell the air, the clouds and the great sea, as well as the earth? Did not the Great Spirit make them all for the use of his children?"²²⁹ In the Native American culture, owning the earth would approach trading in humanity, if

221. The maxim that "law abhors a forfeiture" and its application in foreclosure and defeasible fee contexts clearly demonstrate law's preference for individuals to retain their real property in the face of adverse claims. For example, courts admit to constructional biases favoring fees simple absolute and restrictive covenants over defeasible fees, and the fee simple subject to a condition subsequent over a fee simple determinable. *See Oldfield v. Stoeco Homes, Inc.*, 139 A.2d 291, 296-99 (N.J. 1958) (demonstrating constructional preference for defeasible fee permitting waiver of the condition to prevent loss of property to the present interest holder).

222. Consider government subsidies for "preferred" land uses; adverse possession as a way to acquire title; "efficient use" as a defense to waste and/or nuisance claims; limitations on the creation and enforceability of private land restrictions; and the entire Doctrine of First Possession.

223. Although owners are clearly constrained in their land use by zoning and environmental laws, private agreements to restrict use, particularly those imposed by persons no longer alive, meet with clear judicial antipathy unless some reciprocity of advantage is gained by the person restricted.

224. Property owners can generally transfer any interest to any person in any manner, subject only to the relatively light burden of written memorialization under the Statute of Frauds or of Wills.

225. For example, the fee tail, a feudal relic designed to ensure intra-familial land transfer to the eldest male heir, has been abolished or heavily modified in most states. Additionally, the common law presumption for the creation of a joint tenancy with rights of survivorship has been replaced by one favoring the creation of a tenancy in common, whereby all heirs acquire equally alienable, descendible and devisable interests in the property transferred.

226. *See* STRICKLAND, *supra* note 211, at 22 (postulating the Cherokee Indians' belief that "[a]ll natural resources are free or common goods. . . . Property is to be used but not accumulated, for wealth is not a desired social goal.").

227. CRONON, *supra* note 207, at 27, *citing* BLACK HAWK, AN AUTOBIOGRAPHY 114 (Donald Jackson ed., 1955).

228. Tribal properties were often held similarly to a tenancy in common. The predominant difference is that upon death, a member's interest did not descend to his or her heirs or devisees; instead, they acquired rights by virtue of tribal membership. *See generally* KIRKE KICKINGBIRD & KAREN DUCHENEAX, ONE HUNDRED MILLION ACRES (1973).

229. JOSEPHY, *supra* note 213, at 311 (quoting Tecumseh).

not divinity.

Tribal, as opposed to individual, property ownership thus proceeded from cultural and religious bases reinforced through experiential and economic reward. Common toil was efficient and produced common gain. Accumulation was less important, either because no close or regular market existed to internalize its benefits²³⁰ or because it was neither needed nor valued within the cultural tradition of the tribe.²³¹ While such systems largely worked,²³² they were viewed with Puritan suspicion and disparaged in religious, economic, sociological, and political terms as heathen, inefficient, savage, and more modernly, communist.

As these critical normative differences suggested the impossibility of any "purely integrated" federal Indian land policy,²³³ the resulting clash on legal and physical landscapes appeared as inevitable as its consequences predictable: conquest and possession, or in legal lexicon, a series of "takings." Reprocessing the history of the Indian/White land conflict and the physical and ideological landscapes affected thereby through a takings lens makes clear that to many inside, and outside, observers, the ILCA can be viewed as one more taking in the ongoing experiment of federal Indian land policy.

B. INDIAN TITLE AND FEE TITLE: AND NEVER THE TWAIN SHALL MEET

Audre Lord's observation that one cannot dismantle the master's house with the master's tools²³⁴ is borne out through the discovery doctrine,

230. Roback, *supra* note 48, at 5.

231. See generally Laura Ketchmark Breckenridge, *Double Standards in the Probate of Estates: Should Indians Have the Unequivocal Right to Pass Their Property Upon Death?* (1998) (unpublished manuscript, on file with author) (detailing probate policies of Cherokee, Cheyenne, Navajo, and Comanche tribes).

232. See generally Roback, *supra* note 48, at 5 (recounting contract theory and economic rights in property to show how same and Indian history reflect features of Native/Anglo relations).

233. A similar critique can be levied against takings theory as a whole, given the ongoing and perhaps intractable debate between private property, democracy, and majoritarianism. As Professor Michelman expresses, "I see the recent outcroppings of formality in the Supreme Court's takings jurisprudence not as harbingers of a possible second coming of the liberal conception of American constitutional law, but symptoms of the historical impossibility of consummating such an event." Michelman, *supra* note 17, at 1625.

234. Audre Lord, *The Master's Tools Will Never Dismantle the Master's House*, in *THIS BRIDGE CALLED MY BOOK: WRITINGS BY RADICAL WOMEN OF COLOR* 98, 99 (Cherrie Moraga & Gloria Anzaldua eds., 1981). On this score, see the point-counterpoint over the plenary power between Professor Robert Williams and Professor Robert Laurence. See Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (proposing that Eurocentric structure legitimized colonization of the Native Americans and their nations, and has become an intractable

which by limiting tribal ownership to use and occupancy, took fee title and corollary rights to transfer.²³⁵ *Johnson v. M'Intosh*, through which the doctrine was applied, would not have alarmed tribal leaders to whom land was not an alienable commodity anyway.²³⁶ However insignificant the actual holding may be characterized,²³⁷ it left tribal property, and thus power, compromised in two key ways.

First, subsequent entrenchment of *Johnson's* intimated "trust doctrine" fixes the tribes as wards dependent on the federal government for sustenance and protection from the states and themselves.²³⁸ While the supposition is that tribes' ability to self-determine would dismantle the wardship status, classic Anglo-American economic theory asserts that translating land

barrier to "americanization of" the American Indian); Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams's Algebra*, 30 ARIZ. L. REV. 413 (1988) (responding to Professor Williams's theory); Robert Laurence, *On Eurocentric Myopia, the Designated Hitler Rule and "The Actual State of Things,"* 30 ARIZ. L. REV. 459 (1988) (summarizing the debate and contrasting positions set forth in the preceding articles); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988) (continuing the debate).

235. Lindsay G. Robertson, *John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine*, 13 J.L. & POL. 759, 760 (1997) (critiquing Justice Marshall's historical precedent for and invocation of the discovery doctrine to Indian land claims).

236. Of course, that view questions why the Piankeshaw and Illinois Indians supposed they had the right to transfer title circa 1775 to the plaintiffs at all, which again cautions against overgeneralizing historic or modern tribal land policies.

Given its apparent maintenance of the historical and philosophical status quo, *Johnson* presumably represented political compromise demanded by the vulnerability of the incipient federal government and its land transactions to internal and external threat. Dispossessing the tribes entirely, such as by granting the federal government full fee simple ownership by conquest, would have been inexpedient given their formidable presence in 1823 when the opinion was rendered. Recognizing true "first in time" ownership to accede full tribal title would have been similarly imprudent by destabilizing 300 years of treaties, federal patents, and land sales. Doing so might have delegitimized the federal government, particularly the Supreme Court; to most land-hungry settlers, the Revolutionary War would have become an ironic joke without the spoils of land and the freedom thereby ensured. To Professor Cohen, the "cruel dilemma" posed by the case was that "either Indians had no title and no rights or the Federal land grants on which much of our economy rested were void." Felix S. Cohen, *Original Indian Land Title*, 32 MINN. L. REV. 28, 48 (1947). See generally WILLIAMS, *supra* note 215, at 316-17, 325-26 (arguing that Western belief in its superiority and its law was the basis for Western conquest and colonization).

237. See DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW CASES AND MATERIALS* 79 (3rd ed. 1993), quoting Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 25 ("A close look at the [*Johnson*] opinion reveals that Marshall's version of the doctrine of discovery has small consequence for the tribes.").

238. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) ("[The tribes] are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.").

into power requires its free alienability²³⁹—foreclosed under *Johnson's* cloak. The tautology is clear. “Measured separatism” becomes almost unachievable, at least under systems dominated by private property rights and the maximization of their economic value.²⁴⁰

Second, *Johnson* implies ominous threats. However politically unlikely, hovering over any tribe's land claim is the possibility that the government could elect extinguishment (appropriation by conquest) over compensation (appropriation by purchase), which enables the federal government to invoke the moral high ground and cite “fair dealing” in purchasing tribal interests instead.²⁴¹

As this first property shift was conceptual rather than physical, it did little to sate the settlers' land hunger.²⁴² And that land ownership ideologies

239. Positing universality, relative exclusivity, and transferability as three criteria for an efficient system of property rights, Professor Richard Posner states:

If a property right cannot be transferred, there is no way of shifting a resource from a less productive to more productive use through voluntary exchange. The cost of transfer may be high to begin with; a legal prohibition against transferring may, depending on the penalties for violation, make the costs utterly prohibitive.[] [W]hen the costs of transferring property rights are high, the attempt to achieve our second criterion, exclusivity, may actually reduce the efficiency of the property rights system.

RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (1973).

240. Additionally, the structural “cultural racism” of the discovery doctrine—“that normatively divergent ‘savage’ peoples could be denied rights and status equal to those accorded to the civilized nations of Europe”—ensures that however implicitly, its status as “good law” continues the subjugation of Native peoples on all fronts, including societal and economic ones. WILLIAMS, *supra* note 215, at 317.

241. See, e.g., Cohen, *supra* note 237, at 34:

Every American schoolboy is taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia As for the original Indian owners of the continent, the common impression is that we took the land from them by force and proceeded to lock them up in concentration camps called “reservations.” Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchases not from Napoleon or any other emperor or czar but from its original Indian owners.

The Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70v, acknowledged potential causes of action for property claims premised on “Indian title,” the taking of which is normally deemed non-compensable under the Fifth Amendment. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (denying taking claim premised upon original Indian title, leaving to Congress whether to grant “gratuities” to the tribes for “the termination of Indian occupancy of Government-owned land”); Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commissions*, 49 N.D. L. Rev. 359 (1973); Steven Paul McSloy, *Revisiting the “Courts of the Conqueror: American Indian Claims Against the United States*, 44 AM. U. L. REV. 537 (1994).

242. The holding presupposes the point; if there was no ownership to begin with, then

did not overtly collide in *Johnson* might explain the devastating result when they were eventually exposed. If so, the western wars, reservation policy, and particularly allotment embodied not only territorialism, but a more intellectual struggle over competing land epistemologies and all they represent.

C. THE ILCA AS TAKING

1. The Federal Government Created and Perpetuated the Problem the ILCA Seeks to Correct

Depending on one's level of cynicism, allotment was either driven by protection, assimilation, or termination. No matter how viewed, the federal government imposed Anglo-American property norms on entities that neither required nor requested them, paving its progress with immense Native American loss. By undercutting the centralized power and group identity protected by shared ownership, allotment might well have even effected a "reverse taking." Quasi-public property was given over for private use with neither just compensation nor justification.²⁴³

Critics overlook that widespread fractionation did not spring forth overnight. It arose and proliferated only after Anglo-American property norms were imposed on the tribes through allotment. As one scholar observed in general terms, "once governments create anticommons property, it may be difficult for them to redefine rights without either paying compensation or suffering a blow to their credibility."²⁴⁴ Such is the case with the ILCA. Although superficially remedial, the ILCA compounds the inequities of allotment by attempting to correct the difficulties spawned by its own past policies by again forcing a land ideology, but this time diametrical to that formerly proposed. The ILCA transmutes allotment's command to accept individual land parcels from the tribe into a command to return them, free of charge. This constitutes inverse allotment, barely disguised. While consolidation sounds good for strengthening collective rights, allotment rhetoric was as potent, yet view its effects.

That Congress's ILCA is thus pure response to the successes and failures of its own past policies heightens the inequity of shifting the costs of its

nothing was taken away and instead, rights were "given" by conquest.

243. Given the relatively lengthy historical discussion found in both *Irving* and *Youpee*, it is conceivable that the Court viewed invalidating the ILCA as a roundabout way of compensating for its past policies, particularly as somewhat similar deconcentration of fee policies have resulted in compensation to the property owner. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (finding "public use" in shifting fee ownership from concentrated group of lessors to lessees).

244. Heller, *The Tragedy of the Anticommons*, *supra* note 52, at 687.

correction to individual tribal members, which differs critically from requiring individuals to internalize negative externalities flowing from chosen conduct.²⁴⁵ And by forcing, rather than encouraging, escheat, the ILCA "punishes" the very individuals who actually capitulated to the individualistic pressures of allotment. While remedial and facially furthering tribal interests, the ILCA is actually just another federal mandate many decades late and many dollars short.

Quite apart from Congress's role in creating fractionation is its alleged role in perpetuating the economic hardships plaguing allotments and other trust property. Recent litigation alleges gross mismanagement in the federal government's handling of trust properties.²⁴⁶ As plaintiff Eloise Cobell asserts, "the Government regulates national banks to the highest standards, and yet when it comes to Indian money, look at what they've done. If a national bank had handled a trust fund the way the Department of Interior has handled Indian trust funds, the bank would have been closed and the people running it would be in jail."²⁴⁷

2. The ILCA Mis-Allocates the Costs and Benefits of Its Correction

Whether designed to consolidate property, streamline its administration, or increase its productive use, it is difficult to conceive of any malevolence lurking within the ILCA. That said, blind faith that its primary commitment is to Indian concerns is as much, if not more, of a challenge. All things considered, it appears as though the ILCA is actually designed to help the government more than either the tribes or their members.

Although proponents of mandated escheat champion its ability to revitalize tribal economies with minimal damage to those tribes' members, such superficial utilitarianism masks hidden costs and benefits. First, individuals owning potentially escheatable interests suffer a double hit but no direct gain. Preventing escheat would require that the owner incur related legal and transactional fees for keeping fastidious records; researching ownership to determine potential devisees; effecting life time transfers and hiring an attorney to effect same; appraising the property and its capacity for income; drafting a will or a will substitute; removing the property from trust or restricted status. Depending on the relevant interest, it is quite likely that such costs would exceed the real property value. As a result, keeping family property within the family causes more economic harm than

245. Consider, for example, environmental and coastline regulations, where the market participant is earning gain but at the expense of "neighbors" both local and global.

246. See, e.g., *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999); *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998).

247. Timothy Egan, *Indians Win Major Round in Fight Over Trust Accounts*, N.Y. TIMES, Feb. 23, 1999, at A1.

good.

While escheat would reduce the BIA budget drain and permit reallocation, such benefits, if privatized at all, would certainly not be enjoyed by the affected decedents and would probably remain inconsequential until land consolidation progressed to a noticeable point. Collective individual costs might proportionately outweigh governmental benefit, an unfairness compounded in that the net effect of the ILCA is to force individuals to internalize costs she or he played no role in creating or perpetuating.

3. The Supreme Court's Stance Is Not Ethnocentric

The Court's position survives challenges of ethnocentricity. Neither *Irving* nor *Youpee* impose individualistic norms and practices on anyone. They merely apply constitutional and majoritarian concepts to invalidate mandated federal escheat legislation, leaving tribes capable of creating their own escheat policies and leaving individuals fully able to devise real property to the tribe should those entities so choose. What is more, supporting federally-mandated escheat implicitly rests on one of two equally unpalatable theories: "Native Americans do not value real property rights anyway" or "isn't consolidation through escheat what Native Americans really want, or in any event, need?" Dominant norms thus pervade both the Supreme Court's decisions and the ILCA, but at different levels. If the key is to determine which approach meddles less with tribal self-determination and measured separatism, then the Supreme Court does the better job.

First, although law should avoid reductionist assumptions that individual ownership is necessarily inimical to tribal cultures or reverence toward land to Western ones, the ILCA treats tribes and members as unidimensional on the private property score.²⁴⁸ Whether parallel to Anglo institutions, private property was tribally recognized, sometimes even in land.²⁴⁹ In a classic piece, Harold Demsetz asserts that new (within this context, "private") property rights emerged in response to the interactors' adjustment to "new benefit-cost possibilities,"²⁵⁰ which suggests that even consoli-

248. See William Cronon & Richard White, *Indians in the Land*, AM. HERITAGE, Aug-Sept. 1986, at 19-25 (discussing competing conceptions over Native Americans' legal, ethical, and sociocultural relationship with the land).

249. See Bruce L. Benson, *Customary Indian Law: Two Case Studies*, in PROPERTY RIGHTS AND INDIAN ECONOMIES 29-37 (Terry L. Anderson ed., 1992).

250. Demsetz theorizes that unlike the private ownership assumed by some Northwestern fur-trading tribes, plains Indians held no comparable views largely because it was not cost-effective to pen lower-value grazing and range animals. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967) (citing Eleanor Leacock, *The Montagnais "Hunting Territory" and the Fur Trade*, AM. ANTHROPOLOGIST (American Anthropological Assoc.) Vol. 56, No. 5, Part 2, Memoir No. 78 (tying the development of commercial fur trade with private rights in land)); Frank G. Speck, *The Basis of American Indian Ownership of Land*,

dated, communal property holdings might have decentralized over time. Perhaps some tribal philosophies never excluded land or its entitlements from private ownership.²⁵¹ Of those that did, their philosophies might have changed either by bending to Western hegemony²⁵² or through the last century's radical changes in geographical, sociocultural, and economic conditions. Merits aside, it is difficult to disprove the tendency of communitarian property systems to shift towards individualistic, capitalistic ones given big enough carrots or sticks. Congress cannot assume that such a shift cannot or has not happened through the ILCA, nor for that matter can the Supreme Court assume that it has through *Irving and Youpee*. If the current government policy promoting tribal self-determination counts for anything, then the answer must come from the affected quarter—the particular tribe—and nowhere else.

Whatever tribal property beliefs were held before or during the allotment era, supporting modern legislation with presumed retrospective positions perilously oversimplifies realities on both tribal and individual levels. After all, were the rejection of aggregative, accumulative, and dispositive rights pervasive and constant “Indian” norms, there would be no disgruntled heirs challenging forced escheat and no tribal briefs rejecting the ILCA.²⁵³ As with any collective concern, group views do not necessarily mirror individual ones, nor vice-versa.²⁵⁴ One can only imagine the outcry were

OLD PENN WKLY. REV., Jan. 16, 1915, at 491-95. See generally PROPERTY RIGHTS AND INDIAN ECONOMIES (Terry L. Anderson ed., 1992) (discussing, in a collection of essays, how modern theories of contract, property, and political economy related to North American Indian policy concerns). For an engaging modern read revealing the author's spiritual relationship with land, see KEN CAREY, FLAT ROCK JOURNAL: A DAY IN THE OZARK MOUNTAINS (1994).

251. See Benson, *supra* note 250, at 27-39 (assessing Yurok and Comanche property systems to show that even if not identical to its Anglo counterpart, private property existed in Native American cultures).

252. “[A private property system] will not necessarily emerge on its own nor always maintain its dominance against all competitors. Perhaps more frequently, property rights are defined, not by common law or customary rules of acquisition, but by government intervention or direction.” Fred S. McChesney, *Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets*, in PROPERTY RIGHTS AND INDIAN ECONOMIES 109 (Terry L. Anderson ed., 1992).

253. Nine of eleven tribal governments represented at the Senate Hearings on the 1984 amendments opposed uncompensated escheat, including the Yakima Indian Nation, Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes, Northern Arapaho Tribe, Blackfeet Tribe, Nez Perce Tribe, Oglala Sioux Tribe, Wichita and Affiliated Tribes, and Shoshone-Bannock Tribes. The Indian Land Working Group and the Intertribal Agricultural Council also opposed section 207. See Amicus Brief for Respondents, *Babbit v. Youpee*, 519 U.S. 234 (1997) (No. 95-1595), available in 1996 WL 528318, at *17 n.9.

254. Professor Carl Hakansson notes that “[t]he response by most tribal members at Pine Ridge [to the ILCA] has been one of confusion and mistrust. The remoteness of many of the districts on Pine Ridge, the absence of telephones in many homes, and the fact that public

state legislation to socialize quality of life chances through similar measures.²⁵⁵

4. Allottees Have a Special Relationship with the Land

After massive attempts to mold “the Indian land vision” into a Western and individualistic one, it is manifestly unfair to now divest individual property interests in favor of tribal ones, particularly when aside from a cultural inheritance, an interest in a fractionated allotment might be the only piece of property an allottee even has to devise. This suggests the final factor: the relationship between an owner and the regulated property. As Professor Margaret Radin argues, person-constitutive (“personal”) property is entitled to higher protection than property that is merely instrumental or fungible.²⁵⁶

The whole question of government regulations and “taking” of private property is the most difficult, yet most promising area for applying the personhood dichotomy. The personhood perspective cannot generate a comprehensive theory of property rights vis-a-vis the government; it can only add another moral inquiry that helps clarify some cases.²⁵⁷

Generally, this factor favors a taking given the esteem with which testamentary freedom is held, its role in protecting autonomy, and its role in defining family—particularly so given the types of bequests accommodated through a will. Although some testamentary instruments contain broad and generic distributive clauses, many testators instead specifically match devises with devisees, rendering both the res and the entitlement to its testamentary transfer “personal.”

Applying Professor Radin’s view specifically to the ILCA supports the Court’s holdings. The testamentary freedom entitlement might seem less revered within the tribal context. If each value presupposes liberal, individualistic notions of property as a fungible unit of capital, the policy hyst-

transportation is almost nonexistent provides for a communication problem not only between tribal members and the federal government, but between tribal members and the tribal government as well.” Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231, 255 (1997).

255. See Edward J. McCaffery, *Why People Play Lotteries and Why It Matters*, 1994 WIS. L. REV. 71 (recounting response to Presidential Candidate George McGovern’s proposed \$500,000 cap on inheritance).

256. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) [hereinafter Radin, *The Liberal Conception of Property*]; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) [hereinafter Radin, *Property and Personhood*].

257. Radin, *Property and Personhood*, *supra* note 257, at 1002.

ings for testamentary freedom are inapposite to collectivist tribal contexts. First, accumulating property could be motivated by concern for the larger tribal group rather than self or immediate family, a view strengthened where strong community and cultural ties ensure provision for decedent's families in any event. Second, self-definition through private property and its transfer is unnecessary where one's world view provides alternate routes to autonomy, is unconcerned with its establishment, or is not convinced of its possibility. Third, property as other-reference (defining family) is unnecessary where the group to which one belongs already ensures interconnectivity not limited by lineal biological ties. Fourth, there is no need to secure social status or position through death time transfer if material status is not a valued goal or if merely transferring property cannot confer it.

Nevertheless, the specific real property at issue carries great potential for defining and shaping the identities of its owners and might be the truest cultural inheritance a member can leave to his family. In Fergus Bordewich's elegant words,

[T]he resanctification of the earth has become for a great many Indians a medium of salvation that far outweighs its economic cost, a way to reconnect with the tribal past and with the lives of ancestors who, during generations of systematic cultural repression, seemed beyond reach across a vast divide[.] [O]ne can hear [Chief Seattle] struggling to explain the fusion of the earth and the tribal dead. "The ground beneath your feet responds more lovingly to our steps than yours . . . because it is the ashes of our grandfathers. Our bare feet know the kindred touch. The earth is rich with the lives of our kin."²⁵⁸

D. ADDRESSING FRACTIONATION TOGETHER

The inability to imagine shared policies is voiced with alacrity irrespective of the speaker's politics: "There is no more running away to territory. This is it, for most of us. We have no choice but to live in community. If we're lucky we may discover a story that teaches us to abhor our old romance with conquest and possession."²⁵⁹ There is a lesson here for the ILCA. History warns of trusting in Congress to determine what is best for tribes or their members. To the extent that the medium is the message, any federal Indian policy designed without tribal input, no matter how salutary,

258. BORDEWICH, *supra* note 3, at 160-61.

259. WILLIAM KITTREDGE, *OWNING IT ALL* 68 (1987).

might be philosophically rejected on that basis alone.²⁶⁰

Although enacted to reenergize and preserve tribal existence through land consolidation, the ILCA works the opposite effect. Tribes derive power from land and members.²⁶¹ The ILCA strengthens one source but weakens the other by assuming that member and tribal interests always coalesce. Forcing member-to-tribe donations actually divides and conquers, much like allotment, but by different means. While allotment severed a connective/collective sense of place, the ILCA instills in individuals a distrust of the tribe²⁶² and deepens mistrust of the federal government, both of which undermine the coalition necessary for economic and political inclusion. This is especially so given the absence of guarantees that consolidation is the promise and panacea to tribal and individual poverty.²⁶³

Adding to the Act's folly is that to the extent consolidation would reverse the downward economic spiral plaguing many reservations, its attendant benefits can be met pragmatically through far less divisive methods. Although Congress bears no constitutional responsibility to ascertain and implement the least intrusive solution to fractionation,²⁶⁴ doing so should be necessary under its moral and ethical trust responsibilities and in any event would be more helpful than passing overly stringent and ultimately unconstitutional regulations.

The most elementary approach would retain the ILCA's basic framework but require the government's negotiated purchase or condemnation of the fractionated interest. At least in inception, this method might be economically and politically costly. Congress has long-opposed federal property purchases, citing both the costs of maintaining such "public" lands

260. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 195 (1984) (noting that the Supreme Court has never held federal legislation in the area of Native American affairs to exceed its plenary power and proposing protection from same and for sovereignty based on Due Process Clause).

261. See Stephen Cornell, *American Indians, American Dreams, and the Meaning of Success*, 14 AM. INDIAN CULTURE & RES. J. 59-70 (1987) (positing that tribal councils primarily justify centralized control over resource as a means of protecting Indian culture and tradition, i.e., self-preservation).

262. See Seth H. Row, *Tribal Sovereignty and Economic Development on the Reservation*, 4 GEO. J. ON FIGHTING POVERTY 227, 234 (1996) (noting distrust of tribal members in ability of tribe to fairly and efficiently increase returns on the property given the "rent-seeking and patronage problems endemic to the tribally controlled development enterprises").

263. See *id.* at 233 (discussing economist Terry Anderson's argument for individual fee ownership on grounds that federal control of individual trust ownership is inefficient and that tribal management would replicate same).

264. As Due Process only requires that economic legislation reasonably relate to legitimate governmental ends, mandated escheat would not trigger heightened scrutiny absent the constitutionalization of testamentary freedom.

and their removal from private development spheres.²⁶⁵ But if the interests are worth as little and their management costs as high as the government claims, then the already-low expense of this option is immediately offset by the administrative costs and moral capital saved.²⁶⁶ Additionally, costs could be at least partially recouped through immediate resale to tribes or individuals already holding interests in the designated parcel. A similar option would limit the government's role to lending purchase capital to the tribes on favorable terms or delegating condemnation powers and compensation funds to the tribes should negotiated transactions break down. If the government wanted to avoid either owning or financing the acquisition, it could merely amend the ILCA to provide for escheat upon intestacy, leaving testamentary transfers intact.²⁶⁷

But these quick fixes still speak in power-based and economically utilitarian terms when they should be aiming higher. Because its effects ripple from the minor descendants of Geraldine Poor Bear Cross²⁶⁸ to the United States Department of Interior, fractionation offers a peerless opportunity for collaborative rather than dictatorial solutions. Such a decisional framework fosters tribal-state-federal communication and fortifies intratribal relations. The most conceptual model would recognize the tribes' reserved sovereignty regarding issues of descent, distribution, and

265. See James Brooke, *U.S. Forest Service Hopes to Buy a Costly, Picture-Perfect, Slice of the West*, N.Y. TIMES, Aug. 23, 1998, at A1. But if the federal government can enter "serious negotiations" over the purchase of a \$55 million-dollar ranch (1980 valuation), it can surely afford the "trivial sums" involved in paying often-impoverished tribal members for their highly fractionalized interests.

266. For example, by the government's own account, a pilot program in which the BIA has purchased land portions from the Wisconsin Chippewa tribe "will eventually save the BIA more than \$2.5 million in administrative costs." *Indian Land Plan Could Save Millions*, OK. DAILY, Nov. 5, 1999, at 4.

267. Numerous other creative and workable options exist at legal, educational, and transactional levels, such as providing the tribe with an option or right of first refusal to purchase fractionated interests from the estates or permitting a grace period during which an intended heir could locate a potential assignee. For insightful discussion, see Michelle Lindo, Youpee v. Babbitt—*The Indian Land Inheritance Problem Revisited*, 22 AM. INDIAN L. REV. 223 (1997) (discussing alternatives such as tying escheat to land values rather than land income; permitting single beneficiary designation; facilitating the trade, sale, or other transfer of fractionated interests; educating tribal members both as to the existence and effects of escheat legislation and means to avoid them). See also *Hearings on the Mgmt. of Indian Trust Funds*, *supra* note 152 (propounding major overhaul of land reform policy including: education and technical assistance; reprioritized BIA budgets; reenergized tribal inclusion in land reform; streamlined computerized records; reconsidered accounting and check issuance policies; increased BIA staffing, and improved trust fund management and accounting practices).

268. Whose minor children lost at least 26 separate interests in property through application of the ILCA to her will. See Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellees at 14, *Hodel v. Irving*, 481 U.S. 704 (1987) (No. 85-637) (setting forth these facts).

consolidation and the broader effects flowing from them, and therefore position the federal government as facilitator to, rather than creator of, tribal policies.

This balance respects both individual and collective identities. Specific tribes are best positioned to assess their own circumstances, including the necessity of land consolidation, the most appropriate means to achieve it, and the political consequences of that determination.²⁶⁹ That tribal councils better represent, and are more accountable to, their Native American constituencies than Congress also safeguards the voice of each individual allottee.

Allowing tribes to choose or avoid land consolidation and the means to reach it places the responsibility for ensuring tribal welfare on itself and its members. "Tribes should be empowered to take a candid look at what they are willing to compromise on—land, culture, environment—to gain employment or income. Sovereign nations should be allowed to choose inefficiency just as easily as they choose development. Perhaps that is true freedom for a people."²⁷⁰

VI. CONCLUSION

The Indian Land Consolidation Act provides the perfect vehicle through which to explore both the insularity of takings doctrine and the false dichotomies of Native- and Anglo-American ideologies. From the

269. As I am not a member of any tribe, suggestions for internal policy are presumptuous but well-intended. Aside from financed consolidation strategies, the best internal approach to consolidation, if possible, would seem to be voluntary member-tribe transfers. In its unity, gifting strengthens donor/donee relationships and obligations. But if emanating from the tribe, even an escheat policy should be legitimate. Individual opponents of the policy and its component choices could of course elect to sever tribal connections. Although that would be a tragic and perhaps the penultimate consequence of allotment, it would force the tribe and its constitutive elements (such as family) to better inculcate any communitarian values that the tribal philosophy demands. There is always a price for being a self-identified member of a group, particularly where membership confers value.

Although tribal members are entitled to full constitutional protection against state action, the Indian Civil Rights Act (ICRA) permits greater tribal authority, particularly when protecting tribal culture, and is not coordinate with its federal counterpart. *See* The Civil Rights-Riots-Fair Housing-Civil Obedience Act of 1968, 25 U.S.C. §§ 1301-1303 (1984). ICRA prohibits Indian tribes from "tak[ing] any private property for a public use without just compensation." *Id.* § 1302(5). Nevertheless, the interpretation and application of ICRA are largely intra-tribal concerns. The Supreme Court has "correctly sensed that Congress did not intend that the equal protection and due process principles of the Constitution disrupt settled tribal customs and traditions." COHEN, *supra* note 1, at 670. This view suggests that distinct tribal property norms, such as those reflected within consolidation programs, might immunize a tribal escheat plan from attack.

270. Row, *supra* note 263, at 236.

Congressional perspective, fractionation is problematic enough to compel uncompensated property transfers from individuals to groups, and is justified on unsubstantiated musings over the anti-individualism of Native American property norms. From the judicial perspective, fractionation is not so troublesome as to require such "takings" given equally facile invocation and application of Anglo-American property norms. Whatever view taken, and however supported, the unfairness of burdening individual tribal members with the costs of its correction is unassailable after expanding the narrow economic confines within which takings in general and the ILCA in specific are normally framed.

The Supreme Court's rejection of the ILCA need not signify the unadulterated protection of individual rights at the expense of all civic regulatory efforts. Far from heralding *Lochner* redux, one should instead process the Supreme Court's ultimate stance as sensitive to both individual *and* collective rights, the context within which those rights collide, and the domain from which their curtailment flows. Ad-hocery? Perhaps. But how better to appraise the effects of "objective" legislation than to apply them to subjective facts? Our constitutional jurisprudence demands no less.