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OF DINOSAURS AND INDEFINITE LAND TRUSTS: A REVIEW OF INDIVIDUAL AMERICAN INDIAN PROPERTY RIGHTS AMIDST THE LEGACY OF ALLOTMENT

MARK D. POINDEXTER*

I. INTRODUCTION

The time-honored adage that a person’s greatest investment is his or her house fails to acknowledge adequately what every first-year property law student will learn: the house is but a glorified “fixture” of the real property—the land.1 Houses rise and fall with the vicissitudes of human whim, and the relentless, often unpredictable course of nature. The land, however, largely remains steadfast; it is, in a sense, eternal.

Although most people recognize the potential economic value of land, few understand or appreciate this “spiritual” dimension. The American Indian, however, not only has understood this special value of land, but indeed has incorporated it as part of his or her cultural existence.2 Nowhere will one find greater respect for the land and what it can teach than in American Indian culture.3

Arguably, it is precisely this special relationship between the American Indians and their lands which prompted the United States gov-

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* Solicitations Editor, Boston College Third World Law Journal.


2 See generally Sam Gill, Mother Earth (1987). Although varied in form and interpretation, the concept of “Mother Earth”—the female personification of the nurturing and healing qualities of the land—has received almost universal acceptance among the major American Indian tribes. See id. at 6. This concept, however, cannot be fully comprehended merely by observing its meaning within a vacuum of American Indian culture: “Mother Earth, as she existed in North America, cannot be adequately understood and appreciated apart from the complex history of the encounter between Native Americans and Americans of European ancestry.” Id. Accordingly, the increasingly overt emergence of Mother Earth in American Indian culture was probably as much an internal phenomenon relating to shared cultural teaching and beliefs, as it was a kind of collective response to oftentimes threatening external provocations regarding the use (and abuse) of heretofore American Indian lands. See id. at 40; see also Duane Champagne, Cultural Survival Report 32: American Indian Societies—Strategies and Conditions of Political and Cultural Survival 5-14 (1989).

3 See generally Gill, supra note 2.
ernment’s allotment policies of the late nineteenth and early twentieth centuries. Legislators, whose motives were idealistic at best, decided that the then-prevailing policy of segregating lands for aggregate tribal use should give way to a policy of allotting those lands to individual tribe members. The much heralded purpose behind this policy change was to create more assimilation of the individual American Indian into the “dominant” culture: a goal considered by both numerous legislators and American Indian rights advocates as being in the best interest of the American Indian. Running a close second to this primarily “benevolent” aim, however, were the twin goals of directly and completely undermining tribal sovereignty, and the large-scale opening of portions of former reservation lands to white settlement.

By most accounts, the federal government’s initial individual allotment policy of the 1870s created far more problems for the American Indian than it solved. For example, because most allotted lands could be alienated as soon as they were granted, many American Indians were stripped of their individual parcels through imprudent and often fraudulent transactions with unscrupulous parties. In an attempt to rectify many of these problems, Congress imposed various prohibitions on the alienation of allotted lands during the 1880s and 1890s. Although the federal government’s allotment policy was later abandoned in the 1930s, many of those previously introduced prohibitions on the alienation or encumbrance of American Indian land remain to this day.

This Note examines the modern effects of the allotment process on the individual American Indian’s ability to execute agreements

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6 See id.
8 See generally Otis, supra note 4, at 8–32.
9 See infra notes 49–51 and accompanying text. Subsequent legislation in this area imposed a trust period of 25 years during which the new allottees would not be able to sell or make contracts touching their lands. See infra notes 49–51 and accompanying text; see also County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 686 (1992) (discussing trust periods for allotted lands).
which concern his or her land. Although the federal government discarded the allotment policy more than half a century ago, the policy’s effects continue to curtail many of the commercial freedoms of certain modern American Indian landholders. This result is largely inconsistent with the more recently stated governmental goals of limited intervention and the promotion of American Indian self-determination.\textsuperscript{11}

Part II of this Note reviews a recent property rights case involving the Cheyenne River Sioux tribe in South Dakota, and examines how the effects of allotment and trust periods continue to encumber alienability of individual American Indian lands. Part III reviews some of the more relevant history and legislation affecting individual American Indian property rights.\textsuperscript{12} Finally, Part IV reconvenes the discussion of American Indian property rights based on the case study presented in Part II and the historical and legislative discussion presented in Part III. In addition, Part IV critically assesses the extent to which continued encumbrances of certain American Indian lands are consistent with the federal government’s post-allotment policy goals of promoting American Indian self-determination and limited government intervention.

\section*{II. The Story of "Sue"}

In August 1990, researcher Sue Henderickson of the Black Hills Institute of Geological Research in South Dakota noticed something odd protruding from a cliff face near the area in which she was participating in a fossil excavation.\textsuperscript{13} From a cursory inspection, large, reptilian-like fossils appeared encrusted in the cliff. Further examination proved necessary, however, to be certain of the identity of the fossils.

In order to secure excavation rights, Peter L. Larson, president of the Black Hills Institute, paid the landowner, Maurice A. Williams,

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\textsuperscript{11} See infra note 126.
\end{flushleft}
$5000. Mr. Williams is a Cheyenne Sioux rancher, and the land on which the fossil was discovered was actually held in trust by the United States "for the sole benefit of Williams."

What paleontologists initially thought to be a few interesting relics turned out to be a sixty-five million-year-old skeleton of a Tyrannosaurus rex. Nicknamed "Sue" for its discoverer, paleontologists regard this fossil as "the best-preserved and most complete tyrannosaur fossil ever found." In short, the Black Hills Institute, for an initial expenditure of $5000, obtained a virtually priceless find.

Leaders of the Cheyenne River Sioux tribe were outraged by the excavation agreement between Mr. Williams and the Black Hills Institute. They contacted Acting U.S. Attorney Kevin Schieffer for the District of South Dakota in an attempt to nullify the excavation agreement and to have Sue returned to the reservation. The Sioux leaders argued that because Mr. Williams's land was still being held in trust by the federal government, any unauthorized contract touching this land (such as an excavation agreement) violated federal law.18

14 See id.
15 The land is within the boundaries of the Cheyenne River Sioux Indian reservation. Id.
17 Browne, supra note 13, at Cl.
18 This windfall may be tempered somewhat by the fact that Mr. Larson notified academic paleontologists of the find and invited them to participate in a broad study of the fossil. See id. In addition, Mr. Larson announced that his institute eventually would donate the fossil to a nonprofit museum to be built in Hill City, South Dakota. Id.
19 See Black Hills Inst., 967 F.2d at 1238.
20 Historically, upon completion of a trust period, the federal government would release to the American Indian beneficiary an unrestricted “fee-patent” to his or her land. This unrestricted fee-patent meant that the land was now owned outright (both legally and equitably) by the former beneficiary. In turn, the former beneficiary was free to do what he or she wished with the land. While these lands remained in trust, however, it was the trustee—in this case the federal government—which held ultimate discretion over the use of the beneficiary’s land. See generally Casner & Leach, supra note 1 at 90; Otis, supra note 4; see also Black Hills Inst., 812 F. Supp. at 1022.
21 See, e.g., 25 U.S.C. § 348 (1988) (any conveyance of restricted lands held in trust by the United States, without the express permission of the Secretary of the Interior, is absolutely null and void); see also Heckman v. United States, 224 U.S. 413, 438 (1912) (finding an unauthorized conveyance of restricted lands violates not only the proprietary rights of the American Indian, but the governmental rights of the United States); Bailey v. Banister, 200 F.2d 683, 685 (10th Cir. 1952) (holding where an American Indian holds legal title to lands with a restriction against alienation, the title may be transferred only under rules and regulations prescribed by the Secretary of the Interior, and with his or her consent and approval); United States v. Gilbertson,
On May 14, 1992, Schieffer led a task force of approximately thirty-five FBI agents and twenty National Guardsmen to Hill City, South Dakota for a raid on the Black Hills Institute. The federal officers seized the tyrannosaur fossil (approximately ten tons of bones) as evidence in the preparation of possible criminal charges against the Black Hills Institute. The bones are being stored in a machine shop at the South Dakota School of Mines and Technology pending the final resolution of this controversy.

111 F.2d 978, 980 (7th Cir. 1940) (concluding purchases in good faith, for valuable consideration and without knowledge of restrictions on conveyance of trust land, are not defenses in an action by the government to avoid the conveyance as a violation of restrictions against alienation); Haymond v. Scheer, 543 F.2d 541, 545 (Okla. 1975) ("A conveyance of ... restricted [American] Indian lands made in violation of a federal statute authorizing the alienation of such lands is against public policy and absolutely void, and in no manner can any right, title or interest in such land be acquired under such a conveyance.") (emphasis added) (citations omitted).

The seizure was based, inter alia, on an alleged violation of the Antiquities Act, 16 U.S.C. § 433 (1988). Under the Antiquities Act, the removal of any object of antiquity from federal lands is punishable by a $500 fine and/or 90 days in prison.

In May of 1992, the first phase of litigation regarding Sue developed. The Black Hills Institute sought a preliminary injunction requiring the federal government to return the fossil to it for safekeeping until the question of ownership was settled. See Black Hills Inst. v. United States Dep't of Justice, 967 F.2d 1237, 1238 (8th Cir. 1992) (citations omitted). The Institute argued that the fossil was being irreparably damaged because of the government's lack of expertise in handling a find of this magnitude. Id. The district court, Judge Richard H. Battey presiding, denied the Institute's motion without addressing the damage claim. Id. The district court viewed the matter as merely an attempt by the Institute to regain evidence lawfully seized in a criminal investigation. Id.

The Institute appealed the matter to a panel of judges of the U.S. Court of Appeals for the Eighth Circuit. Id. at 1237. The circuit court upheld the district court's finding that the government had the right to retain seized goods for a reasonable time while a criminal investigation was in process. Id. at 1240. The circuit court found, however, that the lower court did not properly take into account the damage to the fossil allegedly occurring while in the government's possession. Id. at 1241. The circuit court remanded the case to the district court with directions to "hold a hearing at [the district court's] earliest possible convenience to determine proper custodianship of the fossil during the pendency of this case." Id.

On remand, the district court named the South Dakota School of Mines and Technology as the custodian of the fossil pendente lite. See Black Hills Inst. v. United States Dep't of Justice, 978 F.2d 1043, 1044 (8th Cir. 1992). The court determined that moving the fossil back to the Black Hills Institute would do more damage than merely leaving it where it was. Id. On appeal of this decision, the Eighth Circuit upheld the lower court's decision, remanding the case for further proceedings on the merits with the hope that the "litigious legal maneuvering that has resulted in several interlocutory matters that we have considered will not recur." Id. at 1045.

On February 3, 1993, the district court, Judge Battey presiding, ruled that Sue had been excavated illegally from federal land being held in trust, and that the excavated bones therefore belong to the federal government. See Black Hills Inst. v. United States Dep't of Justice, 812 F. Supp. 1015, 1022 (D.S.D. 1993); see also Malcolm W. Browne, Dinosaur Fossil Belongs Not Just to the Ages but to the Government, N.Y. Times, Feb. 5, 1993, at A12. For a more complete discussion of this ruling, see infra part IV, sec. A.
III. An Historical Survey of the Allotment Policy

The district court's ruling that Sue was illegally excavated invokes the legacy of well over a century of federal policy regarding individual American Indian property rights. Because many volumes of scholarship would only scratch the surface of such a rich history, this section provides an overview of some of its more influential moments.25

A. Origins of the Allotment Theory: The Call for American Indian Assimilation

Although historians have dated the introduction of the concept of individual allotments of American Indian lands as early as 1798,26 the federal government's policy of general allotment gradually took form during the 1870s.27 Many legislators and American Indian rights advocates at the time felt that the prevailing policy of segregating land for the exclusive use and control of the American Indian tribes simply was not furthering the "best interests" of the individual American Indian.28 The tribe, once considered a source of cultural strength and sustenance, increasingly was viewed as a bar to the progress of American Indian civilization.29 An agent for the Yankton Sioux tribe wrote in 1877: "As long as Indians live in villages they will retain many of their old and injurious habits. Frequent feasts, community in food, heathen ceremonies, constant visiting—these will continue as long as the people live together in close neighborhoods . . . ."30 Proponents of assimilation believed that only by lessening the influence of the tribe on the individual American Indian would he or she be able to become a part of the larger culture, and reap the benefits of a "civilized" lifestyle.31

25 For a more extensive review of this history, see generally Otis, supra note 4; Cohen, supra note 12; Price, supra note 12; American Indian Policy, supra note 12.
26 See Cohen, supra note 12, at 206.
27 See Otis, supra note 4, at 3.
28 See Price, supra note 12, at 531-44.
29 See Otis, supra note 4, at 9.
30 Id. (citation omitted).
31 Congressman Bishop W. Perkins of Kansas commented in 1886: In the judgment of the great mass of the American people the time has come when the policy of keeping the Indians together in their tribal organizations and restraining and controlling them by bayonets and shotguns must be abandoned and a new era inaugurated—an era of the allotment of lands to the Indians in severalty, an era of education, an era in which they shall be enabled and required to qualify themselves for the duties of American citizenship, and to support themselves by industry and toil. Dippie, supra note 5, at 139-40 (citation omitted).
1. The Land as the Key to American Indian Assimilation: A Theory of Commonality

Arguably, the critical question for lawmakers was how American Indian assimilation should be accomplished most efficiently. There is little direct evidence indicating which competing legislative means Congress considered for achieving this assimilation. Indirect evidence, however, indicates that Congress probably utilized a type of sociological model. The simple premise of this model is that which a group holds in common often serves to strengthen and unify the group.\[^{32}\]

The tribe, like any other narrowly defined group or cohort, shared certain common characteristics. Most obviously, the members of a particular tribe shared a common racial and ethnic heritage. In addition, members of a tribe often shared a common cultural bond of spiritual and secular beliefs, which served to sustain and define the tribe in the midst of sometimes radical outside challenges to its established ways.\[^{33}\]

There was something else, however, that the tribe held in common: the land upon which it was “permitted” to live as a result of the federal government’s reservation policies. Arguably, more than any racial or cultural definition, the most overt example of that which defined the tribe was its common land. To the uninformed outside observer, the boundaries of the land reserved for the tribe defined it in much the same way that the borders of a country define a nation. In addition, the land was the one common feature of the tribe which was historically least likely to be controlled by the tribe itself.\[^{34}\]

In turn, when lawmakers decided that tribal influences should be lessened to promote American Indian assimilation, the most efficient means to achieve this end no doubt became rather evident: it would

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\[^{32}\] That this premise probably served as the basis of this new American Indian land policy was revealed by President Theodore Roosevelt's comments heralding the allotment policy as a "mighty pulverizing engine to break up the tribal mass . . . ." O'Brien, supra note 7, at 43 (citation omitted). Another historian observed that "[w]hen land is held in common the possibility of dissolving the group is difficult." Price, supra note 12, at 541.

\[^{33}\] See Gill, supra note 2, at 8–11.

\[^{34}\] The federal government's domination over American Indian lands can be traced back at least to the 1790s. For example, one historian notes:

A major victory over the northwestern tribes at the Battle of Fallen Timbers in 1794 had redressed the earlier [governmental] setbacks in establishing control over the region and had resulted in a substantial cession of Indian land north and west of the Ohio River . . . . To the south, meanwhile, the Cherokees, Chickasaws, and Creeks, under unremitting governmental pressure, reluctantly ceded lands in Georgia and Tennessee.

Dippie, supra note 5, at 5; see also Champagne, supra note 2, at 6.
be impossible to change the tribe's commonly shared racial and ethnic characteristics; it would not be feasible to attempt to alter directly the commonly shared cultural bonds within the tribe. The land, however, was a wholly different matter. Tribal lands, unlike race or cultural beliefs, could readily be manipulated to promote the assimilationists' policies.\textsuperscript{35} Lands, previously parceled out to the tribe, would now be allotted to individual American Indians so as to "further minimize the functions of tribal leaders and tribal institutions and to continually strengthen the position of the government representative and his subordinates, and to improve the effectiveness of their programs to break down traditional patterns within the Indian communities.\textsuperscript{36}

In summary, through the federal government's usurpation of the traditional power of the tribe over American Indian lands and its policy of creating individual allotments of those lands, lawmakers believed the American Indian would be better prepared for assimilation.\textsuperscript{37} According to the theory, if he or she could be made independent of the tribe and could be taught the lessons of industry\textsuperscript{38} and private ownership from the dominant culture, the American Indian surely would become "civilized."

2. Other Motivations Behind the Movement for American Indian Assimilation: Their Supporters and Critics

Certainly there were other, less "philanthropic" motives behind this new allotment policy. Stripping away tribal influence over the disposition of American Indian lands actually made those lands more

\textsuperscript{35} As one historian observed: "Land [held by the American Indian] was always to be used [by the federal government] for a specific educational purpose. Land held in common teaches certain sorts of conduct and attitudes, while land held in individual allotments teaches other ways." Price, infra note 12, at 541.

\textsuperscript{36} American Indian Policy, supra note 12.

\textsuperscript{37} In debating the need for federal legislation addressing Indian allotment, a member of Congress remarked in 1886:

What shall be [the American Indian's] future status? Shall he remain a pauper savage, blocking the pathway of civilization, an increasing burden upon the people? Or shall he be converted into a civilized taxpayer, contributing toward the support of the Government and adding to the material prosperity of the country? ... We desire, I say, that the latter shall be his destiny.

Otis, infra note 4, at 17 (citation omitted).

\textsuperscript{38} The term "industry" as used here refers only to a kind of affection for hard work as described by the sociologist Max Weber. See generally Max Weber, The Protestant Ethic and the Spirit of Capitalism (Talcott Parsons, trans. 1985). According to the assimilationist theory, the American Indian was best suited for an agrarian vocation. See generally Otis, infra note 4.
freely alienable. Governmental and business concerns could now deal directly with the individual American Indian regarding his or her land, thereby possibly avoiding the often complicated and potentially humiliating discussions associated with tribal negotiations. Proponents of the new allotment policy argued that such a development might also ease the long-standing tensions between American Indians and white settlers regarding the use of tribal lands. Thus, the policy of individual allotments seemed to be the perfect compromise between both philanthropic and pragmatic goals.

Critics, however, viewed this newly emerging allotment policy with great skepticism. Many American Indian rights advocates pointed out

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39 See County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 686 (1992). In analyzing this phenomenon, one historian noted:

The reservation... locked into tribal ownership, could be viewed as a resource withdrawn from the main direction of economic development in the United States. Vast stretches, held in trust and in common, would not be available for non-Indian ownership; and under then-existing rules, investment and development by non-Indians was difficult. All this the allotment legislation changed.

Price, supra note 12, at 541-42.

40 The meeting between General William H. Harrison and the Shawnee leader, Tecumseh, in 1809 at Vincennes provides a good example of such a potentially humiliating encounter. See Gill, supra note 2, at 8-11. The United States government's purpose in holding this meeting was to fashion an agreement in which the Iroquois tribes would forfeit to the government some three million acres (thus opening them to settlement), in exchange for specified goods and annuities in the amount of $10,000. See id. In the face of this great governmental power, Tecumseh was reported to respond:

The Great Spirit said he gave this great island to his red children. He placed the whites on the other side of the big water. They were not contented with their own, but came to take ours from us. They have driven us from the sea to the lakes. We can go no farther. They have taken upon themselves to say this tract belongs to the Miami, this to the Delawares, and so on. But the Great Spirit intended it as the common property of all the tribes, nor can it be sold without the consent of all. Our father [the government] tells us we have no business on the Wabash; the land belongs to other tribes. But the Great Spirit ordered us to come here and we shall stay.

Id. at 10. Although there was little chance that the tribes would be able to retain their lands—whether they agreed to the proposal or not—Tecumseh emerged from this meeting a much heralded figure, while General Harrison was greatly reduced in stature, resorting to categorizing Tecumseh's words as "sufficiently insolent" and "arrogant." See id. at 11.

41 Secretary of the Interior Carl Shurz commented in 1880:

[Allotment] will eventually open to settlement by white men the large tracts of land now belonging to the reservations, but not used by the Indians. It will thus put the relations between the Indians and their white neighbors in the western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions.

Otis, supra note 4, at 17 (citation omitted).

42 Id. at 20-21.
that the later stages of the allotment process were forced upon the tribes by Congress rather than entered into voluntarily. The judiciary showed almost complete deference to such legislative action. As one legal scholar commented:

The Court aided in this [federal control over tribal lands] process, holding that the plenary power of Congress, derived from the Indian's "condition of dependency," somehow converted Indian property, even fee simple property, into quasi-public land 'subject to the administrative control of the government.' This authority permitted Congress, acting through the Secretary of the Interior, to lease, sell, or allot any tribal land without tribal consent, even in violation of solemn treaty promises.

Because American Indian land was considered "public" (even land held in fee simple), the courts facilitated the unilateral imposition of the allotment policy—regardless of the tribe's vested rights or contrary wishes.

In addition to this "compulsion factor," some lawmakers argued that despite any alleged philanthropic goals of allotment, the real motivation behind the policy was simply to wrest from the American Indians land which was rightfully theirs. Indeed, some critics suggested that the most powerful force motivating the allotment process was not concern for American Indian assimilation at all, but for western settlers who aggressively sought an increasingly expanding land base.

The influence of such stinging criticisms grew as the allotment process itself appeared to frustrate its more substantive policy goals.

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44 See Cherokee Nation v. Hitchcock, 187 U.S. 294, 307-08 (1902) (ruling congressional control over administration of tribal lands is a "political question," the manner of its exercise not being within the province of the courts). See generally Newton, supra note 43.
45 Newton, supra note 43, at 219-20 (citations omitted).
46 Id.
47 Otis, supra note 4, at 20.
48 A minority report of the House Indian Affairs Committee in 1880 noted: The real aim of this [allotment] bill is to get at the indian lands and open them up to settlement. The provisions for the apparent benefit of the indian are but pretext to get at his lands and occupy them . . . If this were done in the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of an ardent desire to promote the indian's welfare . . . is infinitely worse. Id. at 19 (citation omitted).
Because many allotted lands could be sold soon after they were received, numerous allottees lost their lands through hasty transactions with unscrupulous parties that were often marked by fraud.\textsuperscript{49} In many cases, the land was out of the allottees' hands as soon as it was granted by the government.\textsuperscript{50} As a result, the allotment process as it existed severely compromised the goal of American Indian economic self-sufficiency.\textsuperscript{51}

\section*{B. The Indian General Allotment Act of 1887}

In an attempt to preserve what was "good" about the allotment policy while at the same time safeguarding the American Indian against the policy’s apparent ravages, Congress passed the Indian General Allotment Act of 1887.\textsuperscript{52} This Act, more commonly known as the Dawes Act (named for its sponsor, Senator Henry Laurens Dawes), solidified the government's heretofore splintered allotment policies.\textsuperscript{53} The chief provisions of the Act required:

\begin{itemize}
\item \textsuperscript{49} See County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 686 (1992). Reflecting upon the federal government's allotment policy, Rep. Edgar Howard, Chairman of the House Committee on Indian Affairs, commented in 1934:

The conduct of Indian affairs by the Federal Government for the past century has been a scandal and a blot on our name in every part of the world. Predatory interests have systematically and continually robbed the Indian of his property; the Government, by law, has supinely permitted this robbery, cloaking it under a sterile and sinister legality that was a travesty of justice and national honor and under a Federal "guardianship" that, with incredible complacency, watched through generations the destruction of the Indian estate and the Indian character.

73 CONG. REC. 11,727 (1934).

\item \textsuperscript{50} An historian commenting on the pre-Dawes Act allotment policies of the federal government somewhat caustically noted:

Where Indians had the right of selling their lands it was in the nature of things that those lands should slip from their grasp. In 1878 the Mackinac agent said that a treaty of 1855 had granted lands in severalty to certain adult Chippewas but "through the shameful neglect of the agents then and since in charge, they have frittered a large portion of them away, and today, I am of the opinion, not one in ten who have had these lands owns an acre, and they are as poor as if they had never owned them." In his report of that year the Commissioner [of Indian Affairs] noted that five-sixths of the 1,735 Chippewas in Michigan who had received patents had lost their lands.

Otis, supra note 4, at 50 (citations omitted).

\item \textsuperscript{51} County of Yakima, 112 S. Ct. at 686.


\item \textsuperscript{53} See Otis, supra note 4, at 3–7; see also Cohen, supra note 12, at 207–10.
\end{itemize}
(1) a grant of 160 acres to each family head, of eighty acres to each single person over eighteen years of age and to each orphan under eighteen, and of forty acres to each other single person under eighteen;

(2) a patent in fee to be issued to every allottee but to be held in trust by the Government for twenty-five years, during which time the land could not be alienated or encumbered;

(3) a period of four years to be allowed the Indians to which they should make their selections after allotment should be applied to any tribe—failure of the Indians to do so should result in selection for them at the order of the Secretary of the Interior;

(4) citizenship to be conferred upon allottees and upon any other Indians who had abandoned their tribes and adopted "the habits of civilized life."54

Most significantly, the Dawes Act gave the President virtually unfettered discretion in allotting tribal lands nationwide—with or without the consent of the American Indian nations involved.55 In this way, the government could avoid the often time-consuming, tribe-by-tribe regulation of lands associated with the pre-Dawes Act era.56

Nowhere was this new efficiency more apparent than in the actual application of allotment to the reservations.57 In all the years prior to the passage of the Dawes Act, the government approved 7463 allotments with a total acreage of 584,423; from 1887 through 1900, it approved a total of 53,168 allotments with an acreage of nearly 5,000,000.58

54 Otis, supra note 4, at 7 (citation omitted). The grant of citizenship to the American Indian who took his or her allotment was one of the cornerstones of the assimilation policy. See Dipple, supra note 5, at 192-96. The Burke Act of 1906, however, dampened this advance under the Dawes Act by deferring citizenship until the expiration of the trust period for the allotted lands. See The Burke Act of 1906, ch. 2358, 34 Stat. 182 (1906).

55 25 U.S.C. § 331 (1988) ("the President shall be authorized to cause ... allotment to each Indian located thereon [former Indian lands of tribes or bands] to be made in such areas as in his opinion may be for their best interest . . . .") (emphasis added). See also supra notes 43-46 and accompanying text (judicial recognition of congressional plenary power over the administration of American Indian lands).

56 See Newton, supra note 43, at 220.
57 See Otis, supra note 4, at 86.
58 Id. at 87 (citation omitted).
Supporters of the Act were anxious to see it work. As one commentator queried, "What reason would there be for the delay in starting the Indian on the free high road to wealth and civilization?" In addition, western land seekers and business promoters no doubt were elated at the prospect of the soon-to-be opened American Indian lands which, until that time, had been wholly reserved for tribal use.

C. Leasing: A Good Solution, But a Worse Problem

If the number of allotments granted were the only measure, few could question the apparent success of the government’s new land policy. Lands, previously closed to western settlers, were quickly opening. The new allotment system introduced thousands of American Indian allottees to the "civilized" concept of private ownership. Those who fought hard for allotment—friend and potential foe of the American Indian alike—could revel in the hopeful genesis of this policy.

The number of allotment applications under the Dawes Act, however, was but one indication of success. As discussed earlier, the federal government adopted the allotment policy principally to create a climate whereby the American Indian could maintain a successful agrarian lifestyle. Allotment was to give the American Indian a stake not only in the fruits of the land, but in the fruits of a self-sustaining, "civilized" future.

Much of the allottees’ land, however, was not at all suitable for agrarian purposes. Moreover, those American Indians fortunate enough to have been allotted arable land often did not have the tools or skills necessary to become successful farmers. Along with the allotment system, the government established little to no educational or financial support to assist the new landowners. As a result, many of

59 Id. at 83.
60 Although under the Dawes Act a portion of former reservation land was reserved for individual allotments, school funds, and certain tribal purposes, a larger percentage of those lands became open for settlement. See id. at 87. In turn, the allotment process created the classic conundrum whereby the sum of the parts (i.e., individual allotments) was often substantially less than the whole (i.e., pre-allotment reservation lands).
61 See supra note 58 and accompanying text.
62 See supra note 58 and accompanying text.
63 See Otis, supra note 4, at 98.
64 See id. at 4.
65 See Price, supra note 12, at 531-42.
66 See Otis, supra note 4, at 100.
67 See id. at 102, 108-15.
68 The Farm Equipment Appropriations Act of 1888 provided for the allocation of $30,000
the new allottees increasingly were becoming even more dependent on the government than was the case before allotment. The federal government quickly learned that the mere allotting of land and the promise of citizenship alone would not make the American Indian independent.

In response to these early problems in the allotment policy, lawmakers considered new ideas regarding the better utilization of allotted lands. One such idea was the concept of leasing. If the introduction of the allotment policy could serve as a reliable indication, many of the new American Indian allottees had no real interest in becoming independent farmers. In addition, many of the allotted lands lay idle, having been granted to the sick, the aged, or the young. Proponents of leasing argued that if these persons were free to lease their holdings—a concept that was forbidden under the Dawes Act as it then stood—they would then at least be able to support themselves through rents and fees. Proponents also argued that the leasing process would provide a kind of "agricultural diversity" whereby experienced and capable farmers might be able to lease land next to the new American Indian allottees and show them "the way" to civilized farming and a civilized life.

Assuredly, there were many involved in American Indian affairs who vehemently opposed the leasing of newly allotted lands. Certain critics viewed the leasing proposal as yet another shameless attempt by western settlers and other business concerns to make further inroads in acquiring American Indian lands. Other opponents, however,

to the purchase of seed, farming implements, etc. See id. at 101 (citations omitted). In 1888 alone, 3568 allotments had been made. Id. Hence, on average, the $30,000 appropriation granted approximately $8.40 to every new allottee about to begin his or her farming career. Id.

An historian assessed the reasons for this apparent failure of the allotment policy: The reason for this whole failure seems to be that in the first place most of the friends of the Indian showed a great lack of imagination and of any practical notion about what allotment for the Indian involved. They thought the law would work the transformation and would by definition make the Indian a farmer. All he then needed was Christianizing and culture. Therefore, [once the law was passed, t]hey rested from thinking and toiling on behalf of the Indian . . . .

Otis, supra note 4, at 108.

70 See supra notes 66–69 and accompanying text.

71 See Price, supra note 12, at 551–62; see also Cohen, supra note 12, at 227–29.

72 See Otis, supra note 4, at 108–15.

73 See id. at 108.

74 Id.

75 Id.

76 See id. at 109.
viewed leasing as chiefly detrimental to American Indians themselves.\(^77\) If the raison d'etre for the allotment policy was to make the American Indian self-sufficient through the cultivation of his or her own land, then, critics argued, leasing that land to another would completely undermine that policy.

After much debate, Congress added a leasing amendment to the Dawes Act on February 28, 1891.\(^78\) This amendment provided that the American Indian could rent his or her land only when unable to work it "by reason of age or other disability."\(^79\) No doubt, Congress intended this restriction as a compromise that would separate those truly "unable" personally to farm their lands from those allottees who merely were unwilling to do so.\(^80\) In addition, Congress further restricted leasing by stipulating that farming and grazing leases of allotted lands could last no longer than three years.\(^81\)

A further expansion of the allottees' leasing rights occurred when Congress passed the General Indian Appropriations Act of 1894.\(^82\) This law expanded the limiting "by reason of age or disability" phrase in the 1891 Act to include the phrase "or inability."\(^83\) Although a seemingly insignificant change, the addition of the words "or inability" had the potential to increase greatly the number of American Indian allottees who would be allowed to lease their lands. The Board of Indian Commissioners interpreted the new Act to provide that:

\[
\text{[t]he term "inability" as used in the amended act, cannot be specifically defined as the other terms [age or disability] have
}\]

\(^77\) Senator Dawes commented at the 1890 Mohonk Conference:
Such a [leasing] law, in my opinion, would speedily overthrow the whole allotment system. The Indian would at once seek to let his land, and relieve himself from work; and there would be whites so ready to take possession that all barriers would soon be broken down. Thus the allotment law would be gradually undermined and destroyed, and the Indian would abandon his own work, his own land, and his own home, which we have talked about as the central pivot of our efforts in attempting to civilize the Indian.


\(^79\) Id. "Other Disability" applied to all unmarried Indian women, married women whose husbands or sons were unable to work the land, widows without able-bodied sons, all Indians with chronic sickness or incurable physical defect, and those with 'native defect of mind or permanent incurable mental disease.'\(^83\) Otis, supra note 4, at 116–17 (citation omitted).

\(^80\) See Otis, supra note 4, at 113–14.

\(^81\) Id. at 112.

\(^82\) General Indian Appropriations Act of 1894, ch. 290, 28 Stat. 286, 305 (1894).

\(^83\) Id.
been. Any allottee not embraced in any of the foregoing classes who for any reason other than those stated is unable to cultivate his lands or a portion of them, and desires to lease same, may make application thereof to the proper agent.84

In addition, farming and grazing leases were extended to five years, and business and mining leases were permitted to be as long as ten years.85 Accordingly, so long as the allottee could convince the federal government that he or she was somehow "unable" to work the land, the land could be leased.86

Some commentators at the time were shocked and outraged by the expanded leasing privileges under the Act of 1894.87 To them, the goals of American Indian self-sufficiency and assimilation were seriously undermined by leasing.88 In an attempt to appease some of these critics, Congress passed yet another piece of legislation, The General Indian Appropriations Act of 1897.89 This Act changed the leasing system largely back to the form first introduced in 1891, fixing the maximum term for mining or business leases at five years and changing farming and grazing leases back to a maximum of three years.90 In addition, the Act of 1897 specifically removed the word "inability" as used in the Act of 1894, such that "age or other disability" once again became the only legal grounds for permitting leases.91

Even with the leasing limitations of the original Act of 1891 largely back in place, many legislators and commentators still viewed the allotment process as forever damaged. The whole idea behind the limitation in alienability as prescribed by the Dawes Act was, in effect, to compel the American Indian to cultivate his or her own land and become self-sufficient—free from the often unscrupulous tactics of

84 Otis, supra note 4, at 118 (quoting Report of the Board of Indian Commissioners, 1894, at 421).
85 Id.
86 See id.
87 Professor Charles C. Painter, national lobbyist for the Indian Rights Association, criticized the relaxed leasing provisions in the 1894 Act:
We have reached a crisis. It is the intention of men in the West, and their efforts are being more and more felt in Congress as the power of the West is becoming greater in controlling national affairs,—it is the intention of these men to sweep away all these limitations and restrictions which the severity [allotment] law put in the Indian's power to alienate his land.
Id. at 119 (citation omitted).
88 See id.
90 Id.
91 Id.; see also Otis, supra note 4, at 120; Price, supra note 12, at 729.
land-hungry settlers and businesses. Critics viewed the leasing of allotted land, however limited in scope, as wholly antithetical to those ends. An agent for the Omaha and Winnebago tribes wrote in 1898:

Leasing of allotted agricultural lands should never be permitted. The Indians should be compelled to live upon their allotments and support themselves by cultivating the land. They can do it, but will not unless compelled to. Not one acre of allotted agricultural land should be leased to a white man... until the Government has so far advanced the Indian, by compulsion if necessary, in the industries of his reservation that they are a self-supporting community... An agent for the Omaha and Winnebago tribes wrote in 1898:

Leasing of allotted agricultural lands should never be permitted. The Indians should be compelled to live upon their allotments and support themselves by cultivating the land. They can do it, but will not unless compelled to. Not one acre of allotted agricultural land should be leased to a white man... until the Government has so far advanced the Indian, by compulsion if necessary, in the industries of his reservation that they are a self-supporting community...

In summary, although the federal government limited its early leasing policy only to those completely unable to cultivate their land (by reason of age or other disability), strong outside pressure—from well-meaning supporters of American Indian self-sufficiency, as well as from land-hungry business concerns—had pushed the government to expand these narrow exceptions. Congress, through its General Indian Appropriations Act of 1894, yielded to this outside pressure and, by some accounts, largely eviscerated the allotment policy. Through leasing, the American Indian "came more and more to look upon land as a source of revenue from the labor of someone else." Clearly, leasing vitiated the whole purpose of the twenty-five year trust period, making a mockery of the notion that the Indians would utilize the opportunity to improve their farming skills in preparation for the day they received clear title to their lands and assumed the duties and privileges of citizenship.

Put into its historical context, the introduction of leasing to the American Indian allottee effectively undermined the higher policy goal of allotment: American Indian self-sufficiency. By the 1890s,
Congress had begun "the process of breaking down the safeguard of inalienability which had been thrown around Indian allotments . . . ." The government's policy of making the American Indian independent had taken an ironic twist: whereas before allotment the American Indians depended on each other through the tribe, the leasing "improvements" now made many of them increasingly dependent on the rents and fees paid by predominately white lessees.

Perhaps one could argue that this latter dependence actually served as a positive step along the road to American Indian assimilation. The veracity of this argument notwithstanding, American Indian dependence upon anyone but the self ran counter to the goals of allotment under the Dawes Act of 1887. The allotment system had seriously broken down, and needed either a major overhaul or, as many critics of the time argued, dismantling.

D. The Indian Reorganization Act of 1934

The federal government's policy of allotment came to an abrupt end in 1934 when Congress passed the Indian Reorganization Act of 1934, also referred to as the Wheeler-Howard Act or the Indian New Deal. For almost half a century, the government had engaged in an overt kind of "social engineering" regarding the American Indian. The underlying policy logic seemed virtually ironclad: (1) tribal strength and identity undermined individual American Indian assimilation and self-sufficiency; (2) the most visible and malleable source of tribal strength and identity was the commonly owned land; (3) individual allotments of that land would undermine tribal strength and identity; accordingly, (4) with the tribal strength and identity weakened, the

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enough, the significance of the leasing question seemed to be dwarfed in the eyes of contemporaries by the pressing matter of equal allotments.

Price, supra note 12, at 553 (emphasis added).

100 See Otis, supra note 4, at 150-51.

101 See supra note 98 and accompanying text; see also Hodel v. Irving, 481 U.S. 704, 707 (1987) (noting "Indians, rather than farming the lands themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off meager rentals.").

102 See supra notes 28-38 and accompanying text.

103 See Dippie, supra note 5, at 309-10.


105 See supra notes 32-38 and accompanying text.
individual American Indian would then be free to assimilate and become a self-sufficient member of the larger, "civilized" society.\(^{106}\)

The linchpin of the government's policy logic, however, was the complete substitution of the American Indian's internal value system for that of the dominant culture.\(^{107}\) Assimilation did not merely mean that the American Indian would elect to participate in the dominant culture: he or she must also wholly embrace it, ideally forsaking his or her own cultural values in the process.\(^{108}\)

Arguably, the allotment policy collapsed because this necessary substitution of values never really occurred.\(^{109}\) For the majority of American Indians, the tribe was not something to be eschewed, but embraced.\(^{110}\) The land was not a source of pecuniary power to be harnessed, but a source of spiritual nurture to be shared.\(^{111}\) Even though the American Indian participated in the external manifestations of the allotment process, i.e., obtaining individual tracts of land, the internal or policy motivations of the allotment process remained largely unrealized.

In addition to the relative failure of American Indian cultural assimilation, opponents of the allotment policy pointed out that "[f]ar from making the Indians self-supporting citizens, the Dawes Act had made them 'virtual paupers' . . . ."\(^{112}\) Moreover, opponents pointed to catastrophic American Indian land loss as a direct result of the allotment policy. Representative Edgar Howard, Chairman of the House Indian Affairs Committee, commented in 1934:

\[^{106}\text{See generally Otis, supra note 4, at 8–33.}\]
\[^{107}\text{See id. at 10.}\]
\[^{108}\text{Rep. Edgar Howard, Chairman of the House Indian Affairs Committee, commented in 1934:}\]
\[^{109}\text{According to one historian, the most forceful proponents of the overthrow of allotment \"assumed that inside every Indian, no matter how assimilated, there lurked a [tribal member] waiting to be freed, a communal being eager to shuck off the trappings of individualistic, materialistic white civilization in order to recapture a long-lost communal past.\" Dippee, supra note 5, at 312 (citations omitted). In reality, such a view was probably as narrow as that of the Dawes Act era assimilationists, only in reverse. Id.}\]
\[^{110}\text{See generally Gill, supra note 2; Champagne, supra note 2.}\]
\[^{111}\text{See Gill, supra note 2, at 10–11.}\]
\[^{112}\text{Dippee, supra note 5, at 314; see also \text{Hodel v. Irving, 481 U.S. 704, 707 (1987)} (discussing the problem of \text{\"fractionation\"} of allotted lands through descent and devise).}\]
In 1887 our Indian wards numbered 243,000. They owned 137,000,000 acres of land, more than one-third good farming land and a considerable portion on valuable timberlands. Today they number about 200,000. Their land holding has shrunk to a mere 47,000,000 acres. Of this remnant only 3,500,000 acres may be classed as farming lands, 8,000,000 acres as timberlands of any value, 16,000,000 acres as good grazing lands, and 19,000,000 acres, almost one-half the Indian land remaining, as desert or semiarid lands of limited use or value.\textsuperscript{113}

Put simply, the allotment process was not working at all as envisioned, and these statistics on land loss provided Congress with one of the strongest arguments for the policy's termination.\textsuperscript{114}

After numerous modifications and compromises concerning the language and scope of certain provisions,\textsuperscript{115} Congress passed the Indian Reorganization Act on June 15, 1934. Under this new Act, allotment in severalty was halted on all reservations, and the trust period was indefinitely extended for allottees who did not already have clear title, though those with holdings on the public domain were exempted from this and other provisions. The Secretary of the Interior was given discretionary power to restore to tribal ownership remaining “surplus” lands on reservations previously opened, as well as to acquire additional territory to augment the Indian land base.\textsuperscript{116}

\textsuperscript{113}73 Cong. Rec. 11,726 (1934).

\textsuperscript{114}Dippie, supra note 5, at 315. Although a large portion of Indian land loss was the result of opening former reservation lands for settlement, another significant source of loss was the behavior of the allottees themselves. See generally 73 Cong. Rec. 11,724-44 (hearings on American Indian self-government). In spite of the twenty-five year prohibition on alienation prescribed by the Dawes Act, many allottees would sell their lands upon the government's grant of the fee-patent. See id. at 11,727. Rep. Howard commented:

The [Dawes Act], so far from being a means of civilizing the Indians, soon became a perfect tool for the capture of Indian lands. As soon as the Indians had begun to receive their unrestricted patents, they flocked in great numbers to the real-estate agents and the land seekers and parted with their deeds for small sums of ready cash . . . .

Id. Although such action was well within the rights of the allottee (or, for that matter, any property owner), it directly conflicted with the government's long-term goals of American Indian self-sufficiency. Arguably, it is precisely this conflict which underlies the later indefinite extension of the governmental trust period for allotted lands. See infra part IV, sec. B (discussing conflict between federal trust provisions and American Indian self-determination).

\textsuperscript{115}See generally Dippie, supra note 5, at 309-16; Comment, supra note 104 (each reviewing the complex procedural history of the Indian Reorganization Act of 1934).

\textsuperscript{116}Dippie, supra note 5, at 316.
In addition to these provisions, the Act provided that tribes had the right to organize for the common welfare and "could adopt an 'appropriate' constitution and bylaws which would become effective when ratified by a majority vote . . . ."  

The Indian Reorganization Act of 1934 did not, however, win unanimous support. Critics of the Act likened it to a monumental step backwards for the policy of American Indian assimilation. One historian notes that those tribes most assimilated were likewise most upset by the changes in the allotment policy. Opponents of the measure charged that it had a "segregationist bias" and was a "radical, communistic measure" designed to strip away individual American Indian property rights.

These criticisms notwithstanding, Congress's passage of the Indian Reorganization Act of 1934 represented a revolutionary approach to American Indian affairs—at least with respect to the legislative methodology employed in the Dawes Act of 1887. First, whereas under the Dawes Act tribal compliance with allotment often was made compulsory, the Indian Reorganization Act of 1934 offered tribes a relatively democratic choice of whether to adopt its provisions. Second, Con-

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117 Id.; see also Comment, supra note 104, at 969–79.
118 Included in this category were the New York Senecas, the Five Civilized Tribes, and the Oklahoma Cherokee, many of which viewed the measure as precipitating a "prejudice which will imperil our social and economic status." Dippie, supra note 5, at 312.
119 See id.
120 See supra notes 43–46 and accompanying text. Rep. Howard observed in 1934:

It is no longer necessary to indulge in theoretical arguments for or against the allotment idea. The cold fact of what has happened to the Indians and their land under that [Dawes] Act conclusively proves that allotment was a costly tragedy both to the Indians and to the Government. The Indians themselves were not consulted in the passage of this Act, and once it was enacted they feared and opposed it. Allotment was literally forced upon them against their wishes both in the adoption of the Act and in its subsequent application to the various reservations.

73 Cong. Rec. 11,727 (1934).
121 "This Act," the critical clause read, "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the secretary of the interior, shall vote against its application." Dippie, supra note 5, at 317 (quoting The Statutes at Large (Washington, D.C., 1934), XLVIII, pt. 1, 984–88, codified at 25 U.S.C. § 478 (1988)). Thus, for the first time in the history of federal Indian affairs, the American Indians themselves would be able to accept or reject a government policy initiative by use of referendum. Id.

In recent years, however, there seems to have been a retreat from the relatively democratic ideals espoused in 1934. As of May 24, 1990, the provision extending indefinitely the trust period for allotted lands was made mandatory for: (1) all Indian tribes; (2) all lands held in trust by the United States for Indians; and (3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands. Pub. L. 101–31, § 3(a), 104 Stat. 207 (1990), codified at 25 U.S.C. § 478–1 (1990 Supp.).

The legislative history for 25 U.S.C. § 478–1 points to the government's need for administrative efficiency in dealing with American Indian lands:
gress's passage of the Indian Reorganization Act of 1934 represented significant progress toward reestablishing a policy of "cultural relativism" regarding American Indian affairs. No longer would the federal government consider the "white way" as the only way for the American Indian, as implicitly was the case under the Dawes Act: "[t]he choice must be given Indians, individually and as a group, whether to preserve tribal relations within the relatively secluded reservation setting or to merge with society at large."122

Thus, a central theme123 of the Indian Reorganization Act of 1934 provided that the American Indian retain a choice in whether he or she wished to assimilate or enjoy a "functioning [tribal] self-government."124 John Collier, Commissioner of Indian Affairs commented in 1934:

Perhaps the most drastic innovation of the last two years has been our effort not only to encourage the Indians to think

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122 DIPPIE, supra note 5, at 321. This choice did not come without its costs, however. For example, under the Act, a $10 million revolving loan fund was established to "promote the economic development of the chartered [tribal] corporations and their individual members." Id. at 317. Because only incorporated tribes could take advantage of this fund, there was great pressure upon all American Indian groups to accept the provisions of the Act or else risk further impoverishment. See id. at 317.

123 The main purpose of the Act was not remedial in nature, but simply to put a halt to the practice of allotting Indian lands in severalty:

Except by authorizing reacquisition of allotted lands in trust, however, Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints on the ability of Indian allottees to alienate or encumber their fee-patented land [those held for the relevant trust period], nor impaired the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands allotted under the Dawes Act. County of Yakima v. Yakima Indian Nation, 112 S. Ct. 685, 686–87 (1992); see also 25 U.S.C. §§ 461, 462 (1988). This phenomenon is probably explained best by recognizing that there were formidable proponents of assimilation who lobbied hard for limits on the sweeping reforms of the Indian Reorganization Act. See supra notes 36–42 and accompanying text. The present form of the Act is most certainly a compromise between the assimilationists' and the self-determinists' camps. See DIPPIE, supra note 5, at 309–15 for a discussion of the Act's multiple revisions.

124 DIPPIE, supra note 5, at 312. Another legal scholar notes: "Of the 252 tribes that voted on whether to adopt the IRA [Indian Reorganization Act], 174 tribes accepted, but only 92 voted to accept an IRA constitutional government and only 71 adopted economic development corporations under its provisions." CHAMPAGNE, supra note 2, at 128; see also supra note 122.
about their own problems but even to induce them to . . . .
Our design is to plow up the Indian soul, to make the Indian again the master of his own mind. If this fails, everything fails; if it succeeds, we believe the Indian will do the rest.125

American Indian self-determination, then, became the federal government’s policy regarding the modern American Indian.126

IV. LIMITATIONS ON AMERICAN INDIAN SELF-DETERMINATION—THE INDEFINITE LAND TRUST

The federal government’s policy of promoting self-determination for the American Indian in general has been tempered somewhat as applied to the American Indian allottee in particular.127 Although the government has long since abandoned the policy of individual allotment, current vestiges of that policy’s impact remain.128 Under the Indian Reorganization Act of 1934, lands that previously had been allotted but not yet fee-patented would continue to be held in trust indefinitely.129 In actuality, this is a much more drastic prohibition on alienability than any prescribed by the now “infamous” Dawes Act, which only required a twenty-five year trust period, after which the land would be held by the allottee in fee simple absolute.130 In turn, certain lands that had been allotted under the Dawes Act of 1887 may continue

125 DIPPIE, supra note 5, at 321 (citation omitted).
126 President Richard M. Nixon announced a new era of American Indian self-determination in the early 1970s. See O’Brien, supra note 7, at 44. The President’s action allegedly was taken in response to a resurgence of assimilationist strength in the 1950s and 1960s which created the federal government’s “termination” policy: “This policy involved the unilateral termination of the United States’ relationship with the tribes, with the ultimate goals of assimilating all Indian people by breaking down cultural and tribal bonds.” Id.; see also CHAMPAGNE, supra note 2, at 128. The termination policy was discarded in the 1970s, heralding the idea that “[t]he time [had] come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.” O’Brien, supra note 7, at 44 (quoting Message From the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970); see also Indian Self-Determination and Education Assistance Act, 88 Stat. 2203 (1975) (codified, as amended, at 25 U.S.C. §§ 450–450n, 455–458e (1988)); Price, supra note 12, at 778–80; Champagne, supra note 2, at 6.
127 See infra notes 128–31 and accompanying text.
129 Id.; see also United States v. Mitchell, 445 U.S. 535, 541 (1980). Note, however, that extension of this trust period was conditioned on the acceptance of the Act’s provisions by a majority of the adult American Indians residing on the particular reservation in question who were eligible to vote. See 25 U.S.C. § 478 (1988). Arguably, the American Indian allottee had some semblance of a choice in accepting this restriction. The recent changes in this provision, however, do not seem to provide the same sense of democratic determination of American Indian land use as did the original Act. See 25 U.S.C. § 478–1 (1990 Supp.); see also supra note 121.
130 See supra note 54 and accompanying text.
to be held in trust and thus subject to alienation and encumbrance restrictions.  

A. The Story of "Sue" (Revisited): A Variation on the Allotment Theme

On February 3, 1993, Judge Richard H. Battey of the United States District Court for the District of South Dakota ruled that Sue's bones had been illegally excavated by the Black Hills Institute and should be returned to the government. The court based its ruling on the fact that Mr. Williams's land is trust land, "held by the United States in trust status." By the terms of the trust-patent held by Mr. Williams and the laws and regulations of the United States, an alienation by sale of an interest in the land must be made with the express consent of the Secretary of the Interior. Although the Black Hills Institute paid Mr. Williams $5000 for the right to excavate the fossil, no prior consent to this agreement was obtained from the Secretary of the Interior. The court held that without this consent, Mr. Williams's attempted sale of Sue to the Black Hills Institute was absolutely null and void.

On its face, the relationship between Mr. Williams's land and allotted lands may seem tenuous at best. For example, Mr. Williams apparently is not an allottee for purposes of the indefinite trust period

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133 See id.; see also Deroy Murdock, Bam Rap for a Dinosaur Named Sue?, WASH. TIMES, June 12, 1993, at C1 (discussing prosecution's argument that because Mr. Williams voluntarily accepted the tax-free advantages of his trust-patent, it is equitable that he also abide by the alienation restrictions of the patent). This argument would have greater force but for the possible implication of 25 U.S.C. § 478-1, which could significantly change Williams's "expectation interest" arising from his original trust-patent agreement with the federal government. See supra notes 121, 129 and accompanying text.

134 Sue's bones were ruled to be an interest in the land and not personal property as was argued by the Black Hills Institute. See Black Hills Inst., 812 F. Supp. at 1021.

135 Id.; see also supra note 21.


137 See Black Hills Inst. v. United States Dep't of Justice, 812 F. Supp. 1015, 1022 (D.S.D. 1993); see also 25 C.F.R. § 152.22 (1992) ("(a) Individual lands. Trust or restricted lands, except inherited lands of the Five Civilized Tribes, or any interest therein, may not be conveyed without the approval of the Secretary. Moreover, inducing an Indian to execute an instrument purporting to convey any trust land or interest therein, or the offering of any such instrument for record, is prohibited and criminal penalties may be incurred. (See 25 U.S.C. 202 and 348.").
prescribed by the Indian Reorganization Act of 1934;\textsuperscript{138} technically, he holds a trust-patent deed to his land granted by the federal government in 1969, which is set to issue in fee simple absolute in 1994.\textsuperscript{139}

There are, however, at least two points of significant intersection between Mr. Williams's trust-patent land and lands allotted under the Dawes Act of 1887, which, because of the Indian Reorganization Act of 1934, continue to be held in trust indefinitely. First, because Mr. Williams's land is held in trust, it is subject to all existing governmental laws and regulations regarding alienation of American Indian trust lands in general.\textsuperscript{140} Under the district court's analysis, for example, there is virtually no legal distinction between the restrictions against alienation imposed on Mr. Williams's trust-patent land and those imposed on American Indian allotted lands held in trust.\textsuperscript{141}

Second, although Mr. Williams's trust-patent is scheduled to ripen into full fee simple absolute in 1994, recent federal legislation regarding American Indian lands could conceivably impede this process.\textsuperscript{142} For example, 25 U.S.C. § 478-1 expressly makes the indefinite trust period created by the Indian Reorganization Act of 1934 for lands allotted under the Dawes Act applicable to, inter alia, "all lands held in trust by the United States for Indians."\textsuperscript{143} Although the legal analysis is not conclusive, it would seem that regardless of the terms of Mr. Williams's trust-patent deed—terms which were made expressly subject to all statutory provisions and restrictions—\textsuperscript{144} the language in 25 U.S.C. § 478-1 would not allow Mr. Williams's land to become fee-patented in 1994 absent the express consent of the Secretary of the Interior.\textsuperscript{145}

Therefore, as a result of the Indian Reorganization Act of 1934 and more recent legislation which draws upon that Act's indefinite trust provision for certain American Indian allottees, even a "non-allottee" such as Maurice Williams is anything but free to determine what he wishes to do with his land. This phenomenon certainly begs the general question with respect to certain American Indian property

\textsuperscript{138} Although the practice of allotment of American Indian lands ceased under the Indian Reorganization Act, federal law continued to provide that trust-patents could be issued. The most likely reason for this policy is the creation of a tax-free status for land held by the patent holder. See Black Hills Inst., 812 F. Supp. at 1020; see also 25 U.S.C. § 348 (1988); supra note 133.

\textsuperscript{139} See Black Hills Inst., 812 F. Supp. at 1017.

\textsuperscript{140} See id. at 1019-21; see also supra note 10.

\textsuperscript{141} See Black Hills Inst., 812 F. Supp. at 1019-21.

\textsuperscript{142} See supra note 121.


\textsuperscript{144} See Black Hills Inst. v. United States Dep't of Justice, 812 F. Supp. 1015, 1017 (D.S.D. 1993).

\textsuperscript{145} See 25 U.S.C. § 483 (1988); see also supra note 121.
rights: whatever happened to the federal government’s heralded policy of promoting American Indian self-determination?\textsuperscript{146}


The federal government’s policy of American Indian self-determination, as espoused by the Indian Reorganization Act of 1934, may be somewhat of a misnomer—at least with respect to the property rights of certain American Indian landholders. Under the Dawes Act of 1887, the government held allotted land in trust for a period of no more than twenty-five years.\textsuperscript{147} Upon the expiration of this trust period, the government released to the allottee an unrestricted fee-patent to the land, to do with what he or she wished.\textsuperscript{148}

Apparently, to the chagrin of many legislators and American Indian rights advocates, rather than work it as envisioned, the allottee often wished to sell the land as quickly as possible.\textsuperscript{149} This behavior severely undermined the government’s long-term goals of American Indian assimilation and agrarian self-sufficiency.\textsuperscript{150} As a result, the Indian Reorganization Act of 1934 not only eliminated further individual allotments, but also indefinitely extended the period of trust for existing lands that were already allotted but not yet released in fee.\textsuperscript{151}

In reviewing the rather extensive legislative history of the Indian Reorganization Act of 1934, one would be hard put to discover any evidence of nefarious intent on the part of Congress against the American Indian in creating the indefinite trust provision.\textsuperscript{152} To the contrary, the genuine aim of the provision appears to be one of “protecting” the American Indian from the catastrophic land loss that occurred under the allotment policy.\textsuperscript{153} In a way, the reasons for implementing the indefinite trust provision of the Indian Reorganization Act of 1934 seem to mirror the reasons cited for imposing the twenty-five year trust period under the Dawes Act of 1887. Put simply, Congress opined that American Indians needed protection—not only from land-hungry settlers, but from themselves.\textsuperscript{154}

\textsuperscript{146} See supra notes 122–26 and accompanying text.
\textsuperscript{147} See supra note 54 and accompanying text.
\textsuperscript{148} See supra note 54 and accompanying text.
\textsuperscript{149} See supra notes 112–14 and accompanying text.
\textsuperscript{150} See supra notes 112–14 and accompanying text.
\textsuperscript{151} See supra note 116 and accompanying text.
\textsuperscript{152} See generally Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934); Hearings on S. 2755 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934); 73 Cong. Rec. 11,724–44, 12,001–04 (1934) (Comm. Rep. on S. 3645).
\textsuperscript{153} See supra notes 112–16 and accompanying text.
\textsuperscript{154} See supra notes 112–16 and accompanying text.
To the modern observer, however, it is rather curious that few legislators at the time realized that the government's ongoing "benevolent guardian" role was largely antithetical to a policy of true American Indian self-determination.\(^\text{155}\) Certainly, this is not to say that the American Indian allottees would not need any governmental assistance or guidance in the utilization of their newly granted individual parcels.\(^\text{156}\) Rather, the threshold question is: at what point does this necessary governmental assistance become, in a sense, dictatorial in nature, thereby significantly undermining the primary goal of American Indian self-determination?

There is no simple answer to this exceedingly complex dilemma. Implicitly, self-determination requires not only that one have the opportunity to make one's own decisions, but indeed the ability to do so as well. When, as a result of selling off their lands upon the expiration of the trust period, numerous American Indian allottees became government-dependent paupers,\(^\text{157}\) their independent decisionmaking ability probably was rendered nonexistent. In our competitive, market-driven economy, where one's "purchase power" is often held in highest esteem, abject poverty would not appear to be a socially or politically empowering condition.

Viewed in this light, Congress's imposition of the indefinite trust provision in the Indian Reorganization Act of 1934 is not without merit.\(^\text{158}\) By keeping and maintaining their lands, the American Indian allottees conceivably would retain something of significant value; something that could facilitate at least their economic assimilation.\(^\text{159}\) Be-

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\(^{155}\) Many critics of the Indian Reorganization Act of 1934, however, were quick to point out this policy inconsistency. See generally \textit{73 Cong. Rec.} 11,733–42 (1934) (Comm'n Rep. on S. 3645).

\(^{156}\) This is particularly so where, as under the Dawes Act, many tribes were forced to participate in the allotment policy. See supra notes 43–46 and accompanying text. It would hardly seem equitable to compel a people to adopt a heretofore unknown policy with no subsequent guidance.

\(^{157}\) See supra note 113 and accompanying text.

\(^{158}\) This argument applies with equal force to the modern adaptation of the indefinite trust provision. See \textit{25 U.S.C. § 478–1} (1990 Supp.) (applying the indefinite trust period created under the Indian Reorganization Act of 1934 to all American Indian lands presently held in trust); see also supra note 121.

\(^{159}\) Rep. Howard, commenting on the merits of the Indian Reorganization Act, noted: This program will pave the way for a real assimilation of the Indians into the American community on the level of economic independence and political respect. The so-called "assimilation" of the past has been largely the Federal abandonment of pauperized and landless Indians to make their own way, as best they might, in the white community. The Indians are now segregated far more through poverty and inferiority feeling than through any possible geographic segregation. The program of self-support and . . . experience in the management of their own affairs . . . will permit increasing numbers of Indians to enter the white world on a footing of equal competition.
yond these financial factors, however, the esteem and confidence which must surely be experienced by the self-sufficient allottees cannot be discounted.\footnote{160}

Notwithstanding these important considerations, Congress’s indefinite trust provision of the Indian Reorganization Act of 1934 sweeps too broadly.\footnote{161} Even if one was to concede that the mere twenty-five year trust period for allotted lands under the Dawes Act perhaps did not adequately protect the welfare of the American Indian allottee, certainly a kind of universal, “perpetual” trust goes too far. Under such a perpetual trust system, any policy of promoting significant American Indian self-determination seems largely devoid of substance. As mentioned above, some limitations on the alienability of trust land along with initial government support and guidance for the allottee are no doubt necessary to provide the best chance for the allottee’s self-sufficiency.\footnote{162} Beyond this, however, any “permanent” restrictions on alienation will inevitably erode the government’s parallel goal of promoting American Indian self-determination.

Ultimately, any viable policy of promoting complete self-determination for American Indian allottees (and, for that matter, anyone else) must incorporate the possibility of some unwise and uninformed decisions being made by them. True self-determination embraces the chance of success equally with the chance of failure; the exercise of free will carries with it no implied or express guarantees. The federal government, in its well-intentioned but overreaching attempt to “protect” the American Indian allottee, arguably has prevented much of this self-determination from occurring.\footnote{163}

Thus, future self-determination for American Indian allottees will be enhanced by the degree to which the federal government’s role as the allottees’ benevolent guardian is diminished. Only when the American Indian allottee is\footnote{164} truly free to make significant decisions regarding his or her own land, i.e., without first having to obtain the “permission” of the federal government, will any kind of significant self-determination be possible. At present, there is little indication that this freedom for the American Indian allottee is forthcoming.\footnote{165}

\footnote{160} See id.
\footnote{161} See supra notes 116, 121 and accompanying text.
\footnote{162} See supra note 156.
\footnote{163} See supra notes 112–16 and accompanying text.
\footnote{164} As one historian prophetically observed: “The trust responsibility of the United States, to the extent that it involves obligations of a binding nature, may limit the power of the federal government to permit complete [American Indian] self-determination as to the trust res.” Price, supra note 12, at 728.
\footnote{165} See supra note 121; see also Champagne, supra note 2, at 6.
V. Conclusion

Although long since abandoned, the hundred-year-old government policy of allotting individual American Indians tracts of land may continue to affect certain modern American Indian landowners. In fact, more recent legislation designed to assuage the deleterious effects of allotment is, in some respects, more restrictive on alienation and encumbrance of allotted lands than were the original allotment laws.

Although not wholly devoid of merit, one consequence of such "protectionist" legislation is that many informed and capable American Indian landholders are unnecessarily restricted in making business or personal agreements that may concern their lands. Where our modern government’s primary stated policy goal for the American Indian is self-determination, the current status of certain individual American Indian property rights makes for a politically inconsistent—and, arguably, socially damaging—result.