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Complexity's Shadow: American Indian Property, Sovereignty, and the Future

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COMPLEXITY'S SHADOW: AMERICAN INDIAN PROPERTY, SOVEREIGNTY, AND THE FUTURE

Jessica A. Shoemaker*

This Article offers a new perspective on the challenges of the modern American Indian land tenure system. While some property theorists have renewed focus on isolated aspects of Indian land tenure, including the historic inequities of colonial takings of Indian lands, this Article argues that the complexity of today's federally imposed reservation property system does much of the same colonizing work that historic Indian land policies—from allotment to removal to termination—did overtly. But now, these inequities are largely overshadowed by the daunting complexity of the whole land tenure structure.

This Article introduces a new taxonomy of complexity in American Indian land tenure and explores in particular how the recent trend of hypercategorizing property and sovereignty interests into ever-more granular and interacting jurisdictional variables has exacerbated development and self-governance challenges in Indian country. This structural complexity serves no adequate purpose for Indian landowners or Indian nations and, instead, creates perverse incentives to grow the federal oversight role. Complexity begets complexity, and this has created a self-perpetuating and inefficient cycle of federal control. Stepping back and reviewing Indian land tenure in its entirety—as a whole complex, dynamic, and ultimately adaptable system—allows the introduction of new, and potentially fruitful, management techniques borrowed from social and ecological sciences. Top-down Indian land reforms have consistently intensified complexity's costs. This Article explores how emphasizing grassroots experimentation and local flexibility instead can create critical space for more radical, reservation-by-reservation transformations of local property systems into the future.

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* Assistant Professor of Law, University of Nebraska College of Law. I appreciate particularly helpful comments on earlier versions of these ideas from Eric Berger, Thomas Geu, Janie Simms Hipp, Richard Moberly, Bryan Newland, Sarah Roubidoux Lawson, Frank Pommersheim, Susan Poser, Kristin T. Ruppel, John Snowden, Jeffrey Evans Stake, Stewart Sterk, Adam Thimmesch, Kevin Washburn, Steve Willborn, and Sandra Zellmer. I am very grateful for opportunities to present and workshop other iterations of this work at events sponsored by the Indigenous Peoples Law and Policy Program at the University of Arizona James E. Rogers College of Law; the Property Law Section of the Association of American Law Schools; the Association for Law, Property, and Society; the American Society of International Law's Rights of Indigenous Peoples Interest Group Works-In-Progress Conference at Princeton University; and the University of South Dakota School of Law. Mistakes and opinions are mine. Special thanks to my research assistants and, always, to Hazel and Annabel.

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“[W]hat happens if we take the law of American Indian property as a central concern rather than as a peripheral one? What happens if it is the first thing we address, rather than the last?”¹

“[E]verything that we see is a shadow cast by that which we do not see.”²

1. Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. REV. 1, 42 (1991).

2. IV MARTIN LUTHER KING, JR., *Questions that Easter Answers*, in THE PAPERS OF MARTIN LUTHER KING, JR. 283, 286 (Clayborne Carson ed., 2007).

INTRODUCTION

Everything we know about property and sovereignty applies differently in the unique legal spaces of American Indian reservations. Characteristically, real property jurisdiction is territorial—meaning the law of the place where the property is located governs. If an Iowan purchases real property in Colorado, there is no question that Colorado governs that real property ownership.³ This framework creates uniformity in matters from zoning to private real estate developments and simplifies property transactions and land use. But it is not so in Indian country.

Instead, in Indian country, different sovereigns define and regulate different properties within reservation territories.⁴ Property jurisdiction varies parcel by parcel depending on factors invisible to an outside observer, including the owner's identity and the land's legal tenure status.⁵ Within reservations, land is owned by both Indians and non-Indians and held in both "fee" and "trust" tenure statuses.⁶ Indian-owned fee lands are subject to tribal and some state law. Indian-owned trust lands are federally governed, with some tribal role. Non-Indians' fee lands are subject to varying degrees of state and tribal control, depending on a list of still other factors.⁷ The result is a strange and hard-to-predict mix of tribal, state, and federal property jurisdictions swirled together within reservation spaces. A sovereign's authority shifts tract by tract, and, in some cases, property right by property right within a single physical piece of land. Two tracts situated immediately adjacent to each other—or even two co-owners joined in shared ownership of the same physical resource—may be subject to entirely different rules set by different sovereigns and may have incongruent property rights.⁸

Within this jurisdictional maze, Indian landowners who hold real property in the special federal trust tenure status face additional challenges.⁹ The federal trusteeship over Indian lands is rigid and restrictive—it includes multiple levels of bureaucratic land-management control and a near-absolute restraint on alienation.¹⁰ The Secretary of the Interior must approve

3. James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 113 (2014) ("This principle, the so-called situs rule, continues to command nearly universal adherence . . .").

4. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 15.02–.03, at 995–99, § 15.04[5], at 1015, § 16.03[1], at 1071 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

5. See *id.* I use "property jurisdiction" here to mean both the sovereign authority to define property rights and relationships and the power to regulate or tax any uses and transactions involving the underlying resource.

6. *Id.*

7. See *infra* Section I.A.

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

9. The federal government will generally only hold land in this special trust status for the benefit of Indians or Indian nations. See *Bailess v. Paukune*, 344 U.S. 171, 173 (1952).

10. See COHEN'S HANDBOOK, *supra* note 4, § 5.02[4], at 394–96. The foundations of this special Indian trust status are rooted in paternalism and now-abandoned assumptions about

nearly every land use or transaction involving Indian trust land.¹¹ In addition, in large part because of the restrictiveness of this status, today many Indian trust properties suffer the practical realities of extreme co-ownership or fractionation, perpetuated by many generations of intestate distributions to multiple heirs and the lack of flexible inter vivos transfer options.¹² As of 2012, the average fractionated tract of Indian trust property had thirty-one co-owners,¹³ but “many [parcels] exceed several hundred owners.”¹⁴ From 1992 to 2010, a period of time in which Congress actively sought to reduce or eliminate this fractionation problem, the severity roughly doubled, and the average rate of fractionation continued to increase.¹⁵ For context, consider one sample forty-acre trust parcel that had 439 co-owners in 1987. By 2004, that same parcel had 505 co-owners; the common denominator used to compute fractional ownership interest sizes had increased from approximately 3.4 trillion to more than 220 trillion; and the value of the smallest owner’s share had dropped to \$.00001824.¹⁶

The overarching complexity of the entire Indian land tenure system creates devastating outcomes in American Indian communities. On one hand, the challenge is a straightforward information-cost problem. Property law, in general, benefits from greater simplicity by allowing owners to know what they own and efficiently negotiate around those clear property entitlements.¹⁷ The complexity of the entire Indian land tenure system helps explain the fact that, although Indian people own more than fifty-six million

the incompetence of Indian people. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (describing tribes’ relationship to the United States as like “that of a ward to his guardian”); *Johnson v. M’Intosh*, 21 U.S. 543 (1823) (claiming superior federal title upon discovery of the continent based on an asserted inferiority of indigenous inhabitants). The reason this trust status persists—despite the current federal policy of recognizing tribal sovereignty and self-determination—are complex and explored throughout this Article. *See, e.g.*, *infra* Sections IV.B.1, IV.B.2, IV.B.3.

11. *See infra* Section I.C.

12. *See* Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729 [hereinafter Shoemaker, *Like Snow*].

13. Shoemaker, *Emulsified Property*, *supra* note 8, at 960.

14. Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 598 (2000).

15. *See* Jacob W. Russ & Thomas Stratmann, *Creeping Normalcy: Fractionation of Indian Land Ownership* 3 (CESifo, Working Paper No. 4607, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398273 [<https://perma.cc/F7JR-QFGL>]. Congress is currently undertaking a more aggressive buy-back program to consolidate and transfer some of these small interests in tribal ownership. This is discussed in more detail *infra* Section II.B.2.

16. *To Amend the Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land: Hearing on S. 1721 Before the H. Comm. on Res.*, 108th Cong. 8–9 (2004) [hereinafter Swimmer Statement] (statement of Ross O. Swimmer, Special Trustee for American Indians, U.S. Department of the Interior).

17. *E.g.*, Steven J. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345, 352 (2006) (“Individuals working to grow their assets must be supported by clear laws defining their property rights.”); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110

acres of trust land (not to mention other lands in fee status),¹⁸ they still regularly rank at or near the bottom of nearly every economic and social welfare indicator, including poverty, homelessness, life expectancy, and unemployment.¹⁹ It is estimated that more than half of Indians' jointly owned trust lands are currently idle or generating no income,²⁰ and other economic analyses repeatedly demonstrate that reservation land is categorically less productive than similarly situated off-reservation land.²¹ In many cases, it is simply too expensive to transact at all—much less, profitably—within this unpredictable and cumbersome legal landscape.²²

But the complexity challenge is about more than just information costs. The particular way this system is constructed turns land tenure on its head: property decisions made by individual landowners dictate (often inadvertently) which sovereign controls where and over which subject areas.²³ The framework for allocating property jurisdiction among reservation sovereigns is both rigidly formalistic and rife with on-the-ground uncertainty. Tribal, state, and federal jurisdiction swirl together in complex and often unpredictable ways, and where they apply, federal rules for trust properties tend to be blunt, deeply bureaucratic, and insensitive to the tremendous diversity among tribal territories and on-the-ground circumstances.²⁴ The current

YALE L.J. 1, 24–42 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*] (emphasizing property law's function of limiting information costs by standardizing packages of legal rights to resources); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1856–57 (2007); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359, 385–88 (2001) [hereinafter Merrill & Smith, *What Happened*]; see also GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012). *But see* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1371–73 (2013) (collecting sources and also critiquing the baseline assumption that property law must be rigid and fixed).

18. See U.S. DEP'T OF THE INTERIOR, INITIAL IMPLEMENTATION PLAN: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 5 (2012), <https://www.iltf.org/sites/default/files/Buy-Back%20Initial-Implementation-Plan.pdf> [<https://perma.cc/5459-57AZ>] [hereinafter BUY-BACK PLAN].

19. U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY ix (2003), <http://www.usccr.gov/pubs/na0703/na0204.pdf> [<https://perma.cc/D7EF-NQG9>] [hereinafter QUIET CRISIS].

20. BUY-BACK PLAN, *supra* note 18, at 5–6.

21. See *infra* Section IV.A.2.

22. See Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 346–50 (2006) (articulating the connection between trust land status and persistent reservation poverty).

23. See *infra* Section I.A.

24. See Gover, *supra* note 22, at 320 (arguing for more individualized, tribe-specific trust property reforms, given “the diverse conditions and capabilities of the Tribes”); Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, but Collectively Deficient, Option*, 55 ARIZ. L. REV. 1031, 1039 & n.40, 1040 (2013) (emphasizing the undesirable results of one-sided federal regulation, because of the “broad diversity of thought and experience related to [each tribe’s] relationship with land and the environment”).

system of pervasive federal control and piecemeal tribal and state jurisdiction tragically limits opportunities for meaningful grassroots experimentation and norm-setting around resource use and stewardship. Meanwhile, more nuanced reform proposals are limited by the complexity of the whole system, which obscures deeper understandings and makes the actual consequences of individual reform proposals hard to predict.

Even property law scholarship, if it addresses Indian land tenure at all, often misses the full picture of the modern Indian land tenure challenge. For example, scholars frequently talk about one issue in isolation—most often fractionation, or sometimes the restrictiveness of the federal trust status.²⁵ Other scholarship is focused on historic inequities in the colonial takings of Indian lands and that history's impact on the modern race-based inequities in property distribution in the United States.²⁶ The complexity of the system's dynamics, however—including the unique property and sovereignty dynamics in particular—compels more holistic attention and, ultimately, reform.

More than a hundred years ago, a group of non-Indian advocates calling themselves the “Friends of the Indians” set this system in motion by championing major property law reform within American Indians' reserved territories based on a fundamental belief in the transformative power of private property.²⁷ Western forms of private ownership of reservation land, they believed, would achieve their (so-conceived) humanitarian goal of assimilating Indian people and eliminating America's “Indian Problem.”²⁸ The resulting federal allotment policy wiped clean existing indigenous property institutions within Indian nations' reserved territories and replaced all of these separately evolving land tenure systems with a single, top-down federal trust

25. E.g., MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 125–29 (2008) (analyzing Indian fractionation as anticommons); Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1059–60 (2008) (addressing “excessive fragmentation of ownership shares” in the Indian context); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 685–87 (1998) [hereinafter Heller, *Anticommons*] (describing fractionation in Indian land as anticommons).

26. This is not to say that these issues are unimportant. Ezra Rosser, for example, has argued forcefully that property theory should focus on the “centrality of race and poverty in American property,” and particularly on the “history of race-related acquisition and distribution of property,” to address ongoing institutionalized ratifications of historic wrongs. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 109 (2013); see also Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIR. 349 (2014) (accepting Rosser's baseline assertion).

27. LEONARD A. CARLSON, *INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING* 80 (1981); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1564–71, 1614 (2001).

28. See 5 PROCEEDINGS OF THE LAKE MOHONK CONFERENCE 1, 9 (1887) [hereinafter LAKE MOHONK PROCEEDINGS]; Bobroff, *supra* note 27, at 1561.

property regime.²⁹ Individual Indians received 40 to 160 acres allotments to be held, at least initially, in a restrictive (and ostensibly protective) federal trust status, and the reservation lands not so allotted were often opened to non-Indian settlement.³⁰ In the end, Indian communities lost close to 90 of their 138 million acres to these new non-Indian settlers, and, perhaps more devastatingly, the Indian land that remained became locked in a top-down system of federal land management and control.³¹ On the Indian lands that remained, this restrictive trust status has been expanded and made permanent.³²

At the time of allotment, the policy's sponsor, Senator Henry Dawes, famously assured his colleagues that these Indian land reforms would operate as "a self-acting machine."³³ If the system were merely permitted to "run it on the track," he promised, it would "work itself all out, and all these difficulties . . . will pass away like snow in the spring time, and we will never know when they go: we will only know they are gone."³⁴ President Theodore Roosevelt at the time also described land tenure, and the allotment policy, as a dynamic machine, though his terms were less gentle. According to Roosevelt, the General Allotment Act would be "a mighty pulverizing engine to break up the tribal mass."³⁵

Modern land tenure does have the air of a "self-acting machine," or even a "mighty pulverizing engine," but not so clearly for the purposes Dawes or Roosevelt perceived. Allotment devastated tribal governance structures and created massive poverty, not prosperity.³⁶ It achieved its goal of breaking up tribal property traditions and reduced the functionality of tribal property systems. It also vested Indian landowners with individual property

29. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 349 (2012)); *see also* Bobroff, *supra* note 27, at 1572–94 (analyzing pre-allotment indigenous property systems).

30. Bobroff, *supra* note 27, at 1564.

31. JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887–1934*, at 120–21 (1991). Lands were lost both through the sale of "surplus" lands to non-Indians and to strategic non-Indian purchases as soon as individual Indian allottees were deemed "competent" and allowed to sell freely in fee status. *Id.*

32. *See* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, sec. 101(5), 114 Stat. 1991, 1991 ("[T]he trust periods for trust allotments have been extended indefinitely . . ."); COHEN'S HANDBOOK, *supra* note 4, § 5.02[4], at 394.

33. LAKE MOHONK PROCEEDINGS, *supra* note 28, at 9.

34. *Id.*; *see also* Shoemaker, *Like Snow*, *supra* note 12, at 729, 739 (taking its title from this reference).

35. *Theodore Roosevelt: First Annual Message*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29542> [<https://perma.cc/2N2V-9FMF>].

36. *See* Ezra Rosser, *Anticipating de Soto: Allotment of Indian Reservations and the Dangers of Land-Titling*, in HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY 61, 73 (D. Benjamin Barros ed., 2010) ("Allotment resulted not in the self-sufficiency and economic development through individually owned agriculture anticipated by Friends of the Indian but rather in continued poverty and dependence on government support, albeit on much diminished reservations.").

rights entitlements, which cannot be easily undone,³⁷ and introduced non-Indian landowners to reservation territories. These non-Indians took this reservation land in a traditional fee simple title and, lacking enfranchisement in tribal governments, brought piecemeal state jurisdiction with them.³⁸

Despite all this, however, many indigenous communities in the United States maintain fundamentally important and diverse relationships with specific physical places. These connections, many have argued, are critical and foundational to Indian identity, culture, and even survival.³⁹ For this reason especially, a more coherent system of property governance in Indian country that allows tribal governments and Indian citizens to fully reflect their social, cultural, and economic values—their fundamental land ethic—through cohesive, locally defined property structures and concepts of ownership is crucial.⁴⁰ Despite a national policy in favor of tribal self-determination for more than forty years, the persistent challenge of this complex reservation property system has remained one of the hardest problems to solve.⁴¹

This Article explores how a more holistic understanding of modern Indian land tenure rules can finally work to create space for meaningful change. Indian land tenure is a uniquely complex legal system. Thinking about it in its entirety as a complex system reveals important new insights, which this Article analyzes in five parts. Part I introduces a taxonomy of complexity in Indian land tenure. It builds on a growing literature exploring

37. See *infra* note 193 and accompanying text; see also Gover, *supra* note 22, at 367 (emphasizing the force of many individual Indians' claims to their property rights as trust allotment owners).

38. See Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 787 (2014) (explaining that changes in reservation land ownership patterns, especially the surplus land sales to non-Indians who were not members of the tribe, "generated a complicated 'checkerboard' pattern of federal, state, and tribal jurisdiction that plagues much of Indian country even today").

39. See, e.g., Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1060–62 (2009); Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 869–71 (2015); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1300–03, 1306–08 (2001).

40. See generally Walter R. Echo-Hawk, Jr., *Under Native American Skies*, GEORGE WRIGHT F., no. 3, 2009, at 58, 58–59 (emphasizing the importance of Indian nations demonstrating a clear land ethic as a "key ingredient to social change," not just for Indian nations themselves, but also for a post-colonial United States to mature into a more just and sustainable nation).

41. See Gover, *supra* note 22, at 319 (identifying federal trust land management as one of the last major areas of federal Indian policy that has not been radically reformed to meet the goal of tribal self-determination). Ironically, the very fact that tribes care so much about these specific spaces may be one of the central reasons this problematic land tenure system has persisted. Current jurisdictional frameworks often require Indian property ownership as a prerequisite for tribal governance, and the federal trust status's primary advantages, if any, are restraints on alienation (i.e., preventing land loss) and a clear rule excluding most state jurisdiction over that property. See discussion *infra* Sections I.A, IV.B. Tribes may accept the cost of pervasive federal oversight in order to preserve not only resource claims, but also some form of land-based sovereignty in particular physical spaces of special significance.

general legal complexity to analyze critical connections within the Indian land tenure system. Part II explores the consequences of this complexity, framing the focus around the interrelated costs of landowner withdrawal, bureaucratic proliferation, and counterproductive or incomplete legislative reforms. Using the particular example of fractionation, this Part suggests a new understanding about the unique cyclical and self-perpetuating nature of complexity effects in this context. It also explores how the system's complexity has created a shadowing effect, which has made it difficult to examine the entire system more clearly, and, therefore, allowed irrationalities to persist.

Part III digs deeper into the system and identifies how even recent reforms purportedly aimed at increasing landowner and tribal autonomy have actually created greater and more problematic complexity by continuing a troubling pattern of top-down prescriptions and micro-categorizations of tiny, interacting property and sovereignty variables. Next, Part IV questions the normative purposes of the entire system. It engages various threads of property theory and Indian-specific land tenure rationales looking for justifications for this particular structure, but concludes that many aspects of the Indian land tenure system are irrational and unnecessarily burdensome. This Part reveals again that the system's complexity seems to perpetuate further complexity, often at the cost of achieving other, more desirable functions of a land tenure system.

Finally, Part V returns to the literature on complexity to sketch out some preliminary thoughts on a new management approach based on the science of adaptation and resilience within complex natural and social systems. The focus is not on additional top-down property reforms, but, rather, on creating the environment for meaningful local flexibility, with room for experimentation and ongoing adaptation at the reservation property level. Efforts to develop tribal capacity and to support future tribal sovereign choices can, over time, create sustainable property regimes within individual reservations. This ultimate reservation-by-reservation property pluralism will paradoxically simplify Indian land tenure and reconcile individual entitlements and community land-use choices with local norms. More importantly, this iterative, bottom-up growth approach creates a framework for building a resilient, sustainable, and ultimately transformational articulation of tribal land values in reservation spaces.

I. A TAXONOMY OF COMPLEXITY IN INDIAN LAND TENURE

Of course, Indian law is complex. Members of the Supreme Court have described federal Indian law as “anomalous,” “complex,” or, even worse, “schizophrenic.”⁴² Professor Philip Frickey described the Supreme Court's

42. See, e.g., *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) (“Federal Indian policy is, to say the least, schizophrenic.”); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 450 (1989) (Blackmun, J., concurring in part and dissenting in part) (articulating how even “anomalous” principles in Indian law “must be read against the rich and extensive background of these cases”); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 167–68 (1980) (Brennan, J.,

tribal jurisdiction cases as a “jurisprudential land of ultimate incoherence,”⁴³ and Professor Matthew Fletcher has noted that decisions limiting tribal autonomy most often describe the field as “complex” or “confusing.”⁴⁴ Professor Allan Erbsen called the entire discipline “a convoluted mess.”⁴⁵ Other analysts approaching Indian law through lenses ranging from energy development to criminal justice to trust fund management have also decried the subject’s overall complexity.⁴⁶ But what does this really mean, especially in the specific scheme of Indian land tenure?

Scientific, legal, and economic literatures have focused increasing attention on complexity science as a subject for stand-alone study.⁴⁷ This emerging work has framed thinking in the legal literature around topics as varied as climate change,⁴⁸ tax policy,⁴⁹ and the structures for legal

concurring in part and dissenting in part) (describing “difficult problems” of tribal sovereignty with results that “flow from an intricate web of sources”); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 n.7 (1979) (lamenting “the complex jurisdictional rules that have developed over the years in cases involving jurisdictional clashes between the States and tribal Indians”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (noting that tribes are, in many ways, “foreign to the institutions of Federal and State governments”); *United States v. Kagama*, 118 U.S. 375, 381 (1886) (describing the U.S. legal relationship with Indian tribes as “always . . . anomalous . . . and of a complex character”).

43. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1, 52 (1999).

44. Matthew L.M. Fletcher, *Commentary on “Confusion” and “Complexity” in Indian Law*, *TURTLE TALK* (May 2, 2011), <https://turtletalk.wordpress.com/2011/05/02/commentary-on-confusion-and-complexity-in-indian-law/> [<https://perma.cc/P5UV-8UMC>]. This blog post from Professor Fletcher also collects many useful references to complexity in federal Indian law, including many cited here.

45. Allan Erbsen, *Constitutional Spaces*, 95 *MINN. L. REV.* 1168, 1253 (2011); see also Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 *U. DAYTON L. REV.* 437 (1998) (collecting seemingly contradictory Supreme Court statements on matters of Indian law); Kelly S. Croman & Johnathan B. Taylor, *Why Beggar Thy Indian Neighbor?* 1 (Joint Occasional Papers on Native Affairs, Paper No. 2016-1, 2016), http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_indian_neighbor.pdf [<https://perma.cc/77JM-9BQQ>] (“The law governing taxation in Indian country is a mess.”).

46. E.g., SHAWN REGAN, *UNLOCKING THE WEALTH OF INDIAN NATIONS: OVERCOMING OBSTACLES TO TRIBAL ENERGY DEVELOPMENT* 11 (2014), <http://www.perc.org/articles/unlocking-wealth-indian-nations-overcoming-obstacles-tribal-energy-development> [<https://perma.cc/SL93-XLSH>]; U.S. DEP’T OF THE INTERIOR, *DOI TRUST REFORM: AS-IS TRUST BUSINESS MODEL REPORT 2-1 to 2-10* (2003), <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/13-2003-03-21-As-Is-Trust-Business-Model.pdf> [<https://perma.cc/K4RL-R3HR>]; Rich Braunstein & William D. Anderson, *A Research Note on American Indian Criminal Justice*, *AM. INDIAN CULTURE & RES. J.*, 2008, at 125.

47. See J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 *IOWA L. REV.* 191, 198 & n.23, 199 & nn.24–32 (2015) (describing complexity science as a new and rapidly emerging as tool for legal analysis).

48. E.g., Mary Jane Angelo, *Embracing Uncertainty, Complexity, and Change: An Eco-Pragmatic Reinvention of a First-Generation Environmental Law*, 33 *ECOLOGY L.Q.* 105 (2006); Daniel A. Farber, *Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty*, 37 *U.C. DAVIS L. REV.* 145 (2003).

49. E.g., Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification*, 34 *HOFSTRA L. REV.* 405 (2005); Deborah L. Paul,

decisionmaking.⁵⁰ Different definitional rubrics have emerged.⁵¹ Social scientists often use complexity in a system-oriented sense to refer to dynamic environments where multiple, interlocking variables create unpredictable outcomes.⁵² Other definitions focus on “the volume of information that must be processed to draw a given conclusion”⁵³ or “the number and difficulty of distinctions the rules make.”⁵⁴ In some sense, these frames reflect two different approaches to complexity: complexity as a fluid *system* of interrelated, non-linear variables with hard-to-predict results, and, more pragmatically, as analogous to *complicated*.⁵⁵

American Indian land tenure epitomizes complexity in both senses. Its internal dynamics include multiple decisionmakers across multiple scales influenced by a range of internal and external forces that are hard to define, recognize, and control. The volume and difficulty of its legal rules and decisionmaking processes are also staggering, and jurisdiction and development outcomes remain uncertain from one property parcel or legal issue to the next. The purpose here is not to resolve ongoing debates about the precise meaning of legal complexity or how complexity theory might relate to legal scholarship generally. My purpose is purely to develop a more comprehensive understanding of Indian land tenure's dynamics.⁵⁶

The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?, 76 N.C. L. REV. 151, 164–69 (1997).

50. E.g., David Frisch, *Commercial Law's Complexity*, 18 GEO. MASON L. REV. 245, 245 (2011) (“We suffer today from a massive increase in the number and complexity of rules that govern social relations.”); Eric Kades, *The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law*, 49 RUTGERS L. REV. 403 (1997); J.B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. U. L. REV. 885, 896–901 (2008).

51. See, e.g., Lance W. Rook, *Laying Down the Law: Canons for Drafting Complex Legislation*, 72 OR. L. REV. 663, 669 (1993) (suggesting “I know it when I read it” as the definition); Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 758 & n.12 (1998) (describing definitional challenges).

52. Scott E. Page, *Uncertainty, Difficulty, and Complexity*, 20 J. THEORETICAL POL. 115, 117 (2008); see also J.B. Ruhl, *Managing Systemic Risk in Legal Systems*, 89 IND. L.J. 559, 565–69 (2014).

53. Meredith M. Render, *Complexity in Property*, 81 TENN. L. REV. 79, 80 n.1 (2013).

54. Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 150 (1995).

55. Compare Page, *supra* note 52, at 117–18, 144 (distinguishing difficulty and complexity), with Ruhl & Katz, *supra* note 47, at 201–02 (discussing differences between focus on “complicatedness” and system behavior).

56. As Ann Althouse has eloquently observed, “[f]inding a scheme of coherence, a framework, really is the process of understanding. To merely observe that the field is chaotic, arcane, or incoherent is to decline the work of understanding.” Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 1001 (1994). The goal here is to more fully understand the modern system of Indian land tenure so that we can better evaluate and respond to its unique challenges.

I also make no claims about the relative complexity of Indian land tenure as compared to other complex challenges. Indeed, some other “massive problems”—like climate change, for example—may be even more messy and hard to address. Cf. J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whitling Away*, 98 CALIF. L. REV. 59 (2010). Nonetheless, thinking about both the mythology

For this particular task, Professor Peter Schuck's four dimensions of legal complexity are helpful guideposts. Schuck discusses legal complexity in terms of institutional differentiation, technicality, density, and indeterminacy.⁵⁷ In Schuck's framework, these four qualities are not necessarily mutually exclusive, but combine together to create a composite measure of legal complexity. A system is institutionally differentiated if there are multiple decision structures with different sources of authority, as in the case of product safety, where statutes, regulations, common law tort principles, and private technical organizations are all at play.⁵⁸ Technicality and density refer mostly to the rules themselves. The Internal Revenue Code, for example, is technical because it requires sophisticated expertise to decipher.⁵⁹ Similarly, pension administration is dense because the relevant rules are numerous and attempt to cover a wide range of conduct.⁶⁰ Indeterminacy refers to legal regimes with difficult-to-predict outcomes, such as the multi-factored and relatively fluid "reasonableness" standard in torts, or the almost-inverse scenario, where a web of highly rigid rules overlap in difficult-to-decipher (and therefore uncertain) ways.⁶¹ All of these systems, so construed, are complex. The task is not to characterize a legal field as either absolutely simple or absolutely complex, but, rather, to situate it on a continuum of more to less complex. These four dimensions provide a qualitative structure for assessing the complexity of the system as a whole.⁶²

Indian land tenure incorporates all four qualities of legal complexity, and the remainder of this section uses this four-part frame to begin a more complete analysis of how this system operates.

A. *Institutional Differentiation: Checkerboards and Worse*

Complex legal systems are the product of multiple decisions made by multiple authorities across multiple scales. In any legal regime, differentiated

and typology of complexity in Indian land tenure has proven particularly helpful, especially for beginning to chart better management approaches into the future.

57. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 3 (1992). More technical properties of complex systems—including, for example, non-linearity, the aggregation of emergent collective behavior, heterogeneity, and the presence of feedback loops—are also useful, but may be less accessible for this purpose. Schuck's four qualities of complexity, though arguably somewhat loose, were also adopted as descriptive tools in Richard Epstein's notable work on the role of law in increasingly complex societies. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 23–29 (1995).

58. Schuck, *supra* note 57, at 4 ("A legal system is *institutionally differentiated* insofar as it contains a number of decision structures that draw upon different sources of legitimacy, possess different kinds of organizational intelligence, and employ different decision processes for creating, elaborating, and applying the rules.").

59. *Id.* at 4.

60. *Id.* at 3–4.

61. *Id.* at 4.

62. See *id.* at 3–5. But see Ruhl & Katz, *supra* note 47 (arguing that future work should focus on establishing more concrete quantitative metrics for measuring and monitoring legal complexity changes over time).

statutory, regulatory, and adjudicatory authorities and overlapping private and public ordering at multiple governance levels can create complex challenges. It is difficult to direct outcomes—or to identify a problem and solve it—if the system is actually an aggregate of multiple interlocking, but independent (or at least nonlinear and uncoordinated), variables. In Indian land tenure, these challenges are particularly acute. Not two but three separate sovereigns—tribal, state, and federal—converge in reservation spaces, and they create three related, but fundamentally distinct, interlocking legal systems in which a multitude of individual landowners unpredictably operate.⁶³

Today, there is no such thing as a single “reservation property” form—rather, there are three jurisdictionally discrete land tenure statuses: individual Indian trust, tribal trust, and fee properties.⁶⁴ Each tenure status incorporates a different set of rights and responsibilities for owners, and these rules are set by a mix of federal, state, and tribal jurisdictions.⁶⁵

Trust property can only be owned by Indians.⁶⁶ Trust properties are governed largely by the federal government, with some tribal role.⁶⁷ There are often different rules depending on whether the land is in “tribal trust” or “individual trust.”⁶⁸ Importantly, Indian trust land passes out of trust and

63. Erbsen, *supra* note 45, at 1253–58 (describing “vexing” challenges of concurrent jurisdictions in reservation territories).

64. See COHEN’S HANDBOOK, *supra* note 4, § 15.03, at 995–99, § 15.04[5], at 1015, § 16.03, at 1070–71.

65. For more detail on these jurisdictional allocations, also see Shoemaker, *Emulsified Property*, *supra* note 8.

66. *Bailess v. Paukune*, 344 U.S. 171, 173 (1952); COHEN’S HANDBOOK, *supra* note 4, § 15.03, at 995–99. Recently, however, Congress did add a new limited category of “eligible heirs” who can hold some rights in trust without being technically Indian. See *infra* Section III.B.

67. For example, most transactions involving trust lands require compliance with federal procedures and secretarial approval before being executed. See *generally* 25 C.F.R. §§ 150–227 (2016) (containing extensive regulations on “Lands and Water” and “Energy and Minerals”). In specific cases, however, the federal government may refer to tribal law in making those determinations or carve out boxes for areas of more tribal control. See, e.g., *infra* note 129 and accompanying text. For instance, the federal government might have authority to decide whether and how a particular lease will be approved on trust property, but the governing tribe might impose a building code that controls what types of structures can be built on that property by the lessee. See Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,446–48 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) (articulating the Department of the Interior’s policy of deference to tribal law in leasing and recognizing that “tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land”); see also 25 C.F.R. §162.016 (2016) (“Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.”).

68. E.g., Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, Pub. L. No. 112-151, §2(h), 126 Stat. 1150, 1151 (codified at 25 U.S.C. § 415 (2012)) (authorizing special tribal law leasing procedures, but only for tribal trust lands, not individual allotments).

into fee status whenever it passes to a non-Indian owner.⁶⁹ There are limits on when land can pass to non-Indians in this way,⁷⁰ but when it does, the trust-to-fee conversion is automatic.⁷¹

Fee status property within the reservation is, as a general matter, categorically outside of the bureaucratic federal land-management system for trust properties. This has advantages for landowner autonomy and flexibility, but fee properties are also subject to state property taxation, while trust properties are not. Fee properties are also subject to a more unpredictable mix of state and tribal jurisdictions.⁷² Fee properties within reservation boundaries can be owned by either Indians or non-Indians. Indian-owned fee properties are typically governed by the tribe, but are also often subject to state taxation and an uncertain mix of other state and local controls, depending on the exact identity of the owner⁷³ and where the property is located (including the character of the surrounding reservation area).⁷⁴ Non-Indians cannot own reservation land in trust status but do own fee lands within reservations.⁷⁵ These non-Indian fee landowners are not citizens of tribal governments, which has complicated tribal assertions of jurisdiction

69. See, e.g., 25 C.F.R. § 152.6 (providing for automatic fee patent issuance to non-Indian owners of formerly trust properties). *But see supra* note 66 (noting one limited exception to this rule for narrowly defined “eligible heirs”).

70. See, e.g., *infra* notes 101, 248 and accompanying text.

71. See *Bailess*, 344 U.S. at 173 (holding that a devise of trust interest to a non-Indian results in an automatic transfer to unrestricted fee title status); *Estate of Dana A. Knight*, 88 Interior Dec. 987, 988–90 (IBIA 1981) (confirming that “allotted Indian lands take on a different status when they are held by a non-Indian” and that the Department of the Interior’s trust responsibilities terminate upon the transfer to a non-Indian, even if the Secretary of the Interior has not yet completed the “ministerial act” of issuing a fee patent (quoting *Bailess*, 344 U.S. at 173)).

72. Indian interests sometimes worry that losing trust status in this way makes Indian ownership of land insecure, as it can be alienated or foreclosed, and it also creates potential for other state jurisdiction in Indian country, as discussed below. See also *infra* Section IV.B.

73. For example, states may have stronger claims to assert jurisdiction over Indian individuals who are not citizens of the governing tribe, but who are instead enrolled in another, geographically distant tribal government. E.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160–61 (1980) (holding that the state could not tax tribal member cigarette purchases from a tribal smoke shop on tribal lands, but allowing a state tax for the same cigarette purchases of Indians who were not enrolled in the governing tribe).

74. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428–33 (1989) (opinion of White, J.) (making allocation of state and tribal zoning authorities in reservation dependent on the Indian character of a given area, including whether there would be an impact on a tribe’s “political integrity, economic security, or health and welfare”); see also *Judith V. Royster, The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 56–57 (1995) (discussing the significance of this “Indian character” jurisdictional analysis).

75. E.g., *Estate of Eugene R. Trust*, 11 IBIA 203, 206–208 (May 27, 1983) (articulating the general rule that the Department of the Interior “has no authority to hold land in Indian trust status for non-Indians” and suggesting that debt and other issues remaining after fee title has been transferred “are properly the subject of state court adjudication”).

over them. Therefore, non-Indian fee lands may be subject to state or local authorities, and, only to a lesser degree, tribal control.⁷⁶

A central challenge of Indian law is that non-Indian reservation landowners are not politically enfranchised in tribal governments. Tribal governments possess their own inherent sovereignty that predates contact with European settlers,⁷⁷ but, today, they are subject to a federal plenary sovereignty.⁷⁸ Originally, government-to-government treaties between Indian nations and the new U.S. government promised federal protection for indigenous nations' exclusive rights to use, control, and govern all lands within their reserved territories.⁷⁹ The federal allotment policy's pursuit of individual Indians' assimilation through private landownership, however, also transferred significant Indian lands to non-Indians in fee status. The original purpose of introducing non-Indian fee lands in this way was to facilitate the termination of tribes as tribes, and, today—as a matter of federal law—individuals who are not biologically “Indian” (and, therefore, do not inherit the attendant political rights) generally cannot be recognized as citizens of the tribal government.⁸⁰

Modern concern about tribal authority over non-Indians, even when they elect to enter tribal territories, is rooted in this democratic-deficit problem.⁸¹ The Supreme Court has expressed significant skepticism about subjecting non-Indians to tribal laws that are foreign to them.⁸² The Court has also emphasized that Indian nations are “outside the basic structure of the

76. See generally Shoemaker, *Emulsified Property*, *supra* note 8, at 964–66 (explaining the complicated nature of the definition and regulation of fee property in reservations).

77. See *United States v. Lara*, 541 U.S. 193, 197–99 (2004); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *United States v. Winans*, 198 U.S. 371, 381–82 (1905).

78. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–68 (1903).

79. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (describing the treaty view of Indian nations “as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States”); Judith V. Royster, *Revisiting Montana: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, 57 ARIZ. L. REV. 889, 918–19 (2015) (analyzing typical Indian treaty rights to use and occupation of reservation territories).

80. *United States v. Rogers*, 45 U.S. (4 How.) 567, 572–73 (1846). Most tribes had an adult “adoption” or naturalization process prior to federal intervention. See, e.g., John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEB. L. REV. 171, 194–96 (2001).

81. Fletcher, *supra* note 38, at 823.

82. E.g., *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) (expressing concern about difficulty of outsiders being able “to sort out” the law applicable to tribal court, which may include unwritten “values, mores, and norms of a tribe” (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130 (1995))); see also Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1054 (2005); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 634–35 (2008) (arguing in favor of tribal court civil jurisdiction over non-Indians).

Constitution.⁸³ Tribal law may, and often does, treat non-Indians fairly,⁸⁴ but there is no federal cause of action or waiver of tribal sovereign immunity that guarantees non-Indians rights comparable to the constitutional ones protected by a U.S. court.⁸⁵

The resulting owner-based (rather than territory-based) system of property sovereignty makes land tenure more complex in Indian country.⁸⁶ Trust and fee land owners are often subject to different jurisdictions and have vastly different property rights depending on their tenure status, even if their lands are immediately adjacent within one reservation.

This system turns the typical relationship between property and sovereignty on its head. Generally, sovereignty encompasses dominion over territory, and part of a sovereign's right and responsibility is to define, and then protect, the institution of private property ownership for all persons and land within that territorial domain.⁸⁷ In Indian country, who governs where often turns not on the territorial location of the property, but, rather, on the identity of the owners, creating a property-by-property (or interest-by-interest) jurisdictional mix-and-match that is disjointed, difficult, and costly to operate.⁸⁸ Individual landowner decisions—whether to transfer to an Indian or a non-Indian, for example, or whether to hold in fee or in trust—change jurisdictional dynamics at the individual parcel level. In addition, whole neighborhood demographics and characteristics—whether an area is predominantly Indian or not—can also shape wider regulatory authority issues, such as which sovereign asserts zoning authority where.⁸⁹

Moreover, the jurisdictional differentiation is even more complicated than this construct of a property-by-property jurisdictional checkerboard

83. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (quoting *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment)). The Court also stated that, because “nonmembers have no part in tribal government[,] . . . those [tribal] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.” *Id.*

84. *See also* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–03 (2012) (mandating that tribal governments protect a list of individual rights, including most of the rights guaranteed in the Bill of Rights).

85. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978).

86. For a helpful general summary of the difference between territorial and consent-based sovereignty, see Fletcher, *supra* note 38.

87. *See* Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 8–11 (1927); Richard A. Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising out of Early Supreme Court Opinions and the General Allotment Act*, 25 *N.M. L. REV.* 35, 35 (1995); Royster, *supra* note 74, at 2–7.

88. *See, e.g., supra* notes 73–76 and accompanying text.

89. *E.g., Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 428–33 (1989) (opinion of White, J.) (authorizing tribal zoning over an area with strong Indian character regardless of the individual parcel's tenure status, but allowing a state to zone all properties, including Indian trust properties, within a mostly open or non-Indian area of reservation).

suggests.⁹⁰ Co-ownership, or fractionation, is pervasive on Indian trust lands.⁹¹ Many of these fractionated trust lands have “tens or hundreds of different owners, all with varying levels of interests.”⁹² Co-owners each possess small, but undivided, shares of the whole parcel.⁹³ Today, many of these jointly owned tracts are actually in a mixed tenure or “emulsified” state, with some of the undivided interests held in fee, and other undivided interests in the same property in individual and tribal trust statuses.⁹⁴ These mixed-tenure, emulsified properties exacerbate jurisdictional issues immensely as governance is differentiated in even more finely grained and difficult-to-distinguish ways. These undivided-property co-owners often have completely incongruent property rights to the same resource. In terms of overall complexity, in many scenarios jurisdiction is not only differentiated parcel by parcel, but co-owner by co-owner (or subject matter by subject matter, or right by right) within single tracts.⁹⁵

B. *Technicality: Indian Law's Idiosyncrasies*

Technicality is “a function of the fineness of the distinctions a rule makes, the specialized terminology it employs, and the refined substantive judgments it requires.”⁹⁶ In this sense, technicality is relative to the audience expected to interpret and implement the rule.⁹⁷ In Indian land tenure, landowners, their advocates, and the government itself bear the cost of a highly technical legal framework. Indian law is always postured as the exception to “regular” rules.⁹⁸ It incorporates a long and vast, specialized legal history

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

91. See *supra* notes 12–15 and accompanying text. In 2012, the Department of the Interior reported that it held nearly 3 million fractional ownership interests in trust for individual Indians—with more than 2.2 million of those small, undivided interests amounting to a 2-percent, or smaller, ownership stake in the relevant tract. *BUY-BACK PLAN*, *supra* note 18, at 5. For further context, in 2012, the Department of the Interior also reported that 46 percent of the total trust tracts it held—including even tribally owned trust lands—were fractionated to some degree. *Id.* at 5, 33 app.B-1. In an assessment of fractionation of twelve sample reservations between 1992 and 2010, economists Jacob Russ and Thomas Stratmann also found only 15,819 complete ownership interests in allotments (where a single Indian owned the entire tract), compared to 1,312,065 fractionated co-ownership interests. Russ & Stratmann, *supra* note 15, at 18.

92. *BUY-BACK PLAN*, *supra* note 18, at 18.

93. *Hodel v. Irving*, 481 U.S. 704, 707–09 (1987).

94. “Emulsified” is my term for mixed tenure properties that are jointly owned by co-owners whose theoretically undivided co-ownership interests are held in a mix of both fee and trust statuses. Shoemaker, *Emulsified Property*, *supra* note 8, at 949.

95. See *id.* at 949–50; see also *infra* Part III.

96. Schuck, *supra* note 57, at 4.

97. See *id.* at 45 (describing the “audience principle”).

98. Cf. Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 310 (2015) (explaining that Indian law cases “occupy an obscure backwater in the Supreme Court docket”).

that is not easily accessible to a spontaneous observer. In land tenure specifically, many property law terms have unique meanings that depart from conventional understandings, which further complicates engagement by both landowners and legal advocates.

To start, many law students complete an entire juris doctor degree with little or no mention of the tribal sovereign or federal Indian law. Even the most basic operative terms in Indian law—defining Indian versus non-Indian, understanding the difference between trust tenure status and fee status—are loaded with histories and multifaceted meanings that are not readily accessible. For example, the definition of “Indian” varies according to the subject area, law, and purpose for which it is being deployed. Indian status is defined with reference to both federal and tribal law, and it incorporates a range of nuanced, individual-specific factors.⁹⁹ On top of this are a series of other critical, but highly specialized relevant legal questions, including whether and how Public Law 280 affects state and federal jurisdiction in some, but not all, Indian reservations;¹⁰⁰ how the Indian Reorganization Act may or may not uniquely affect alienation of some lands within a given tribe’s territory;¹⁰¹ and the relevance of a tribe’s particular treaty history.¹⁰² There is also the challenge of simply being able to decipher what an Indian landowner owns, which requires translation of a federal inventory of an individual’s trust assets—a cryptic, mostly numerical record of ownership.¹⁰³ A non-specialist is unlikely to know enough to begin to ask these questions, and even a specialist will find these distinctions and judgments difficult to make.

In addition, Indian land tenure introduces a whole series of unique property law twists that apply only in this field. As just one example, Congress relatively recently passed the highly technical American Indian Probate

99. See generally Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011) (exploring Indian status as defined through the political classification doctrine).

100. Public Law 280 transferred the federal government’s criminal jurisdiction in Indian country, and some authority over civil adjudications, to certain state governments. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2012); 25 U.S.C. §§ 1321–26 (2012); 28 U.S.C. § 1360 (2012)). Public Law 280 was amended over time to change the rules for when and how states could opt in or out of this jurisdictional transfer, and whether, and when, tribal consent was required. See CONFERENCE OF W. ATT’YS GEN., AMERICAN INDIAN LAW DESKBOOK § 6:12, at 435–44 (7th ed. 2016).

101. The Indian Reorganization Act of 1934 (“IRA”) was intended to stop the allotment and assimilation efforts of the federal government in favor of a recognition of tribal sovereign rights to self-determination. See Act of June 18, 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–94 (2012)). For tribes electing to adopt the IRA, it also included a limit on the ability of Indian landowners to transfer property to non-Indians via intestacy or devise. See 25 U.S.C. § 464 (2012).

102. See Royster, *supra* note 79.

103. See *Individual Trust Interest Report*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/individual-trust-interest-report> [<https://perma.cc/BY5J-TS9J>].

Reform Act of 2004 (AIPRA).¹⁰⁴ AIPRA governs disposition of Indian trust property upon an Indian landowner's death, whether through intestate succession or testate devise.¹⁰⁵ But the rules are difficult to understand and apply. For example, a special primogeniture, or "single heir," rule applies to prevent intestate distribution to multiple heirs, but only when the fractional co-ownership interest to be distributed amounts to less than 5 percent of the total ownership in the tract.¹⁰⁶ In addition, intestacy distribution is limited to those who satisfy a detailed rubric of who qualifies as an "eligible heir" and who does not.¹⁰⁷ Eligible heirs have to be Indian (also specially defined for the purposes of this statute),¹⁰⁸ "lineal descendents [sic] within 2 degrees of consanguinity of an Indian[,]” or a co-owner of a trust interest in the same property.¹⁰⁹ AIPRA also uniquely creates a presumption that certain language in a will creates a joint tenancy with a right of survivorship,¹¹⁰ instead of the typical tenancy-in-common default that applies in other contexts. Other detailed rules exist—with multiple layers of processes for each—for things like tribal-purchase options and landowner-consolidation agreements at probate.¹¹¹ Tribes are also authorized, subject to federal approval, to adopt their own tribal probate codes supplanting AIPRA's provisions¹¹²—requiring Indian probate practitioners to assess what, if anything, the tribal law provides, and to which interests it applies, including where an individual Indian's estate may include trust assets located in different reservations.¹¹³

104. American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773 (codified in scattered sections of 25 U.S.C.); see 152 CONG. REC. 5777 (2006) (statement of Sen. McCain) (describing the AIPRA as "a very complex piece of legislation"); Diane K. Lutt, *The American Indian Probate Reform Act: A Five-Year Review*, 51 WASHBURN L.J. 105, 121 (2011) ("AIPRA's complex technical provisions pose barriers to tribal members in need of estate planning services as well as attorneys and other professionals positioned to provide such services.").

105. American Indian Probate Reform Act § 3.

106. 25 U.S.C. § 2206(a)(2)(D)(i), (iii).

107. *E.g.*, *id.* §§ 2206(a)(2)(A)–(B), (D)(iii); see also *id.* § 2201(9) (defining "eligible heirs"). There are also similar, but in some ways more complex, limits on who may receive an Indian trust asset through a testamentary devise. *Cf. id.* at §§ 2206(b)(1)–(3).

108. *Id.* §§ 2201(2)(A)–(C), (9)(A).

109. *Id.* §§ 2201(9)(B)–(C).

110. *Id.* § 2206(c)(1).

111. Lutt, *supra* note 104, at 118–20.

112. 25 U.S.C. § 2205.

113. See *id.* §§ 2206(a)(1), (b)(1)(A). Generally, tribal probate codes must be approved by the Secretary of the Interior, with such approval to be given only if the tribal probate code is consistent with the policies of the 2000 Amendments to the Indian Land Consolidation Act. *Id.* § 2205(b)(2)(C). This means, generally, that tribal probate codes must "prevent further fractionation of trust allotments[;]" "consolidate fractional interests . . . into usable parcels;" in a way that "enhances tribal sovereignty;" and otherwise reverse allotment's negative effects on Indian tribes. Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, sec. 102, 114 Stat. 1991, 1992.

The partition rules under AIPRA provide another example. Outside of the Indian land tenure context, partition refers to the absolute right of every co-owner of real property to exit the co-ownership, either by forcing a physical division of the property or a partition sale with pro rata distribution of sale proceeds.¹¹⁴ AIPRA did authorize a new partition sale option—but here, partition means a totally unique process of executing a particular kind of forced sale only available on qualifying “highly fractionated Indian lands” after a detailed application process, consent from at least 50 percent of co-ownership interests in the land, and a mandatory appraisal review.¹¹⁵ The ultimate sale must take place at an auction with limits on who qualifies to bid, and with the caveat that the final price at auction must at least match a previously determined, formal appraised value.¹¹⁶ The process takes a master technician to accomplish.¹¹⁷

C. Density: Reams and Reams of Regulation

As highlighted by the AIPRA discussion above, administrative regimes are, by definition, “almost inevitably more complex than legislation,” in large part because of the proliferation of numerous and encompassing regulations.¹¹⁸ Indian trust properties are regulated primarily by the Bureau of Indian Affairs (BIA) and also, in some cases, by tribal administrative agencies, who can contract with the federal government to perform the BIA’s role, albeit still subject to federal rules and authority.¹¹⁹ These authorities

114. *E.g.*, Patricia Reyhan, *Partition*, in 4 THOMPSON ON REAL PROPERTY § 38.03(a)(1), at 521–22 (David A. Thomas ed., 2016).

115. 25 U.S.C. § 2204(c).

116. *Id.* Interestingly, although the Department of the Interior theoretically does have some other in-kind partition authority, it is outdated and also rarely used. *See* COHEN’S HANDBOOK, *supra* note 4, § 16.03[4][e], at 1085–86; *see also* 25 U.S.C. §§ 372, 378, 483; Walker, 57 IBIA 167, 169, 174–77 (2013) (discussing federal partitioning authority for an allotment interest that had been contested for nearly twenty years); S. REP. NO. 106-361, at 2 (2000) (“Even when partition [in kind] is a legal option, it is rarely a practical alternative.”); 25 C.F.R. §152.33 (2016) (discussing different partition procedures for “competent” versus “incompetent” co-owners).

117. In 2011, approximately seven years after AIPRA’s passage, the National Congress of American Indians told Congress that it still had “not heard of a single instance” where AIPRA’s partition sale option for highly fractionated lands had been used, and it suggested the process needed revision because the system “is too cumbersome.” *The American Indian Probate Reform Act: Empowering Indian Land Owners: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 11, 13 (2011) (statement of David Gipp, Vice President, Great Plains Region, National Congress of American Indians).

118. *See* Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 233 n.37 (2010) (“Complexity is not necessarily congruent with incoherence, but the two characteristics are at least closely correlated.”); Schuck, *supra* note 57, at 3–4, 10.

119. *See* Tribal Self-Governance Act of 1994, Pub. L. 103-413, tit. II, 108 Stat. 4250, 4270; Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (providing authority for tribes to operate, via federal contract, federal programs, including BIA realty functions, but still subject to final approval authority by the Department of

cover nearly every aspect of Indian trust property, including not only distribution of assets after death, but also most inter vivos property rights, including all kinds of real property transfers, and even an owner's ability to possess her own land.

For example, federal law includes a near-absolute restraint on alienation on Indian lands that limits any transfer, including inter-family gifts, credit-securing collateral agreements, and, of course, any kind of for-value transfers.¹²⁰ Under traditional property law canons, free transferability is fundamental to a functioning property system.¹²¹ In Indian trust land, however, the federal government individually approves or disapproves every lease, mortgage, and transfer—often requiring a full appraisal and a bureaucratic assessment of whether the transaction is in the Indian landowner's best interests before deciding whether to approve a request.¹²² These alienation restraints may also apply to a less certain degree to Indian-owned non-trust property.¹²³

Use and possession of Indian land is also comprehensively regulated, largely by the federal government. Outside of the Indian law context, any co-owner of jointly owned land has a direct right to use and possess her own land, subject only to the parallel rights of any other co-owners and generally applicable land-use regulations.¹²⁴ In the Indian lands context, however, the federal government now oversees even a co-owner's own use of her trust land.¹²⁵ Under existing federal rules, Indian co-owners have no direct right to possess trust properties absent a federally approved lease or co-owner permission, and Indian owners must pay fair-market-value rent for their own possession, at least to the other Indian co-owners, and regardless of

the Interior); see also *The Success and Shortfall of Self-Governance Under the Indian Self-Determination and Education Assistance Act After Twenty Years: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 42 (2008) (statement of James Cason, Associate Deputy Secretary, U.S. Department of the Interior) (describing how these programs “allow[] tribal governments to . . . set their own priorities consistent with Federal law and regulations” (emphasis added)); COHEN'S HANDBOOK, *supra* note 4, § 1.07, at 99.

120. See 25 U.S.C. § 177; COHEN'S HANDBOOK, *supra* note 4, § 15.06[1], at 1027, § 15.06[2], at 1031–32.

121. See *infra* Section IV.A.2.

122. Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 *BYU J. PUB. L.* 1, 62–75 (2004) (cataloging the BIA's land-management regime).

123. See COHEN'S HANDBOOK, *supra* note 4, § 15.06[4], at 1034 (articulating lingering uncertainty in the law about the scope of anti-alienation rules as applied outside trust land tenure status).

124. Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 *U. KAN. L. REV.* 383, 389–94 (2014) [hereinafter Shoemaker, *No Sticks*]. See generally 7 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* §§ 50.01[1], 50.03[1][a] (Michael Allan Wolf ed., 2014); W.W. Allen, Annotation, *Accountability of Cotenants for Rents and Profits or Use and Occupation*, 51 *A.L.R.2d* 388, § 9 (1957).

125. E.g., 25 C.F.R. § 162.005 (2016) (requiring a lease before Indian co-owners of trust land may possess their co-owned property). See generally Shoemaker, *No Sticks*, *supra* note 124 (discussing the evolution of the Department of the Interior's regulation of Indian co-owner possession rights).

whether these other co-owners have actually asserted any interest in making use of the land themselves.¹²⁶ In reality, all of an Indian co-owner's property rights are mediated and defined through encompassing federal regulatory structures.¹²⁷

Non-owners who seek to use Indian lands also must navigate each proposed use through the regulatory process for acquiring consent from Indian owners (or co-owners) as well as the BIA. Title 25 of the Code of Federal Regulations is thick with Indian-specific land regulations to direct this multi-actor process. For example, a proposed user of Indian trust property would have to consult (and follow) Part 167 for grazing permits, Part 169 for rights-of-ways over Indian lands, Parts 211 for tribal mineral development and 212 for individual mineral development, or any of the many respective subparts in Part 162 for various types of Indian leases, with special sub-rules for agricultural leases, homesite leases, business leases, energy leases, and other nonspecific, nonagricultural leases.¹²⁸

In some cases, federal law allows tribal law to supplant federal rules, but often only after a federal vetting and approval process for the tribal enactment.¹²⁹ These tribal regulations would then apply, but typically only to the extent they do not conflict with other federal law or a more amorphous sense of the federal trust responsibility.¹³⁰

126. 25 C.F.R. § 162.005; *see, e.g.*, Goodwin, 60 IBIA 46 (2015) (holding an Indian co-owner in trespass for possession of her own allotment where she failed to receive permission from co-owners or the BIA and failed to pay rent for that possession of her own property).

127. *See* Shoemaker, *No Sticks*, *supra* note 124.

128. 25 C.F.R. pts. 162, 167, 169, 211–12.

129. For example, there has been some trend to increase tribal autonomy on tribal trust property, eliminating some secretarial approval requirements over tribal leases of tribal lands. *See* Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, Pub. L. No. 112-151, §2(h), 126 Stat. 1150, 1151 (codified at 25 U.S.C. § 415(d), (h) (2012)). Even this tribal autonomy, however, is regulated through a framework that provides some continued federal oversight and control. *See id.* (permitting some tribal leasing of tribal trust lands without federal approval, provided tribal leasing regulations are preapproved by the Department of the Interior); *see also* 25 U.S.C. § 3711(b) (2012) (requiring federal preapproval of tribal agricultural resource management plans); *supra* note 113 (discussing tribal probate code procedures). As of this writing, Congress has passed, and the president has just signed, the Indian Trust Asset Reform Act, which may expand the scope of HEARTH-like tribal management options over both surface leasing and forestry management for selected demonstration project tribes. *See* Indian Trust Asset Reform Act, Pub. L. No. 114-178, 130 Stat. 432 (2016) (codified at 25 U.S.C. §§ 5601–02, 5611–14, 5631–36).

130. *E.g.*, 25 U.S.C. § 415(h)(3)(B)(i) (authorizing the Secretary of the Interior to approve HEARTH Act tribal land leasing authorities only if tribal regulations “are consistent with” federal leasing regulations); *see also* 25 C.F.R. § 162.014(a)–(b) (providing that tribal law shall apply to BIA-approved surface leases of Indian lands “except to the extent that those tribal laws are inconsistent with these regulations or other applicable Federal law”; also allowing tribal law to supersede or modify the Department of the Interior’s leasing regulations, but only with respect to tribal lands, and only if, among other caveats, there is no conflict with the Department of the Interior’s “general trust responsibility under Federal law”).

On top of all this, whether the tribe or state exercises zoning or other land-use authority (from environmental regulations to building-permit procedures) is a separate and difficult jurisdictional question. This shifting land-use authority can add additional layers of dense (and hard-to-read) regulation over reservation land uses.¹³¹

D. *Indeterminacy: The Exquisite Bind of Both Rigidity and Uncertainty*

Finally, all of these factors work together to produce an extreme degree of uncertainty about otherwise basic property law questions in Indian country. Uncertain or indeterminate laws make outcomes hard to predict.¹³² This kind of uncertainty—whether it comes from ambiguous rules or from the proliferation of too many, highly specific rules—vastly increases the cost of any bargain, transaction, use, or investment by increasing the transaction costs and the number of alternative scenarios that must be assessed before taking any action.¹³³ As the jurisdictional discussion above suggests, despite the number of dense and technical rules imposed on top of the various tenure statuses in Indian country, tremendous uncertainty abounds about who has which property rights, what those rights mean, and how one enforces those rights among the three separate sovereign authorities and their many varied institutional arrangements. The importance of this uncertainty cannot be underestimated.

Within the basic parameters that trust property is mostly federal (with some tribal influence) and that fee property is a mix of state and tribal rules (depending on a host of factors),¹³⁴ there is tremendous uncertainty. Because of the ad hoc way jurisdictional conflicts are decided in Indian country, tribal, state, and local governments all operate in a bit of a vacuum with vast, unknown legal questions—and, therefore, ongoing conflicts—about who governs where. Huge, unsettled questions remain about things that should otherwise seem basic within a land tenure system: Does a tribe have property tax authority in Indian country? Over which properties? Who can exercise eminent domain? How? Who regulates what property uses on which

131. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428–32 (1989) (opinion of White, J.); see also Rebecca M. Webster, *This Land Can Sustain Us: Cooperative Land Use Planning on the Oneida Reservation*, 17 *PLAN. THEORY & PRACT.* 9, 10 (2016) (analyzing challenges and opportunities for cooperative land-use planning across state and tribal authorities).

132. Schuck, *supra* note 57, at 4.

133. See Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 *MICH. L. REV.* 1285, 1288 (2008) (acknowledging significant information costs as parties seek to translate even clear, but abstract, property rules to concrete applications and determinations of the actual scope of rights on the ground); see also Schuck, *supra* note 57, at 4 (“Ironically, rules and institutions that are designed to reduce the law’s indeterminacy may actually *increase* it, due to the cumulative effect of their density, [technicality], and differentiation. Indeterminacy then, may be a consequence, as well as a defining feature, of complexity.” (footnote omitted)).

134. See *supra* Section I.A.

lands? Who defines the property rights? How and where are disputes between owners of different tenure types adjudicated?

Tribes have broad, and often exclusive, jurisdiction over their own citizens, especially in their reserved territories.¹³⁵ Tribal jurisdiction is more constrained with respect to trust property where the federal government acts as a gatekeeper overseeing individual exercises of tribal sovereignty.¹³⁶ Tribes have even less jurisdiction over non-Indians.¹³⁷ For example, the Supreme Court recently held that tribes categorically cannot restrict the alienation of non-Indian fee lands within reservation boundaries.¹³⁸ However, the “tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same.”¹³⁹ In the vast gray area between these benchmarks, jurisdictional disputes are left to federal common law to be decided on a case-by-case basis, sometimes with exhaustion in tribal courts first.¹⁴⁰ Different tests apply for when, where, and how the state or federal government can assert jurisdiction.¹⁴¹

Relatedly, in many contexts questions even linger about where exactly reservation boundaries are drawn. The creation of “checkerboard” jurisdictions, and the permanent residence of non-Indians within Indian territories, have informed the Supreme Court’s unique reservation diminishment or disestablishment cases.¹⁴² The presence of fee interests does not necessarily mean that reservation boundaries should be redrawn in a diminished way to exclude swaths of fee ownership.¹⁴³ Instead, the Supreme Court considers

135. See *United States v. Wheeler*, 435 U.S. 313, 322 & n.18 (1978) (affirming a tribe’s inherent sovereign rights to “regulat[e] their internal and social relations,” including “the right to prescribe laws applicable to tribe members” (first quoting *United States v. Kagama*, 118 U.S. 375, 182 (1886))); *Williams v. Lee*, 358 U.S. 217, 220–22 (1959) (holding that tribes have the right “to make their own laws and be ruled by them”).

136. See *supra* Section I.A.

137. See *Montana v. United States*, 450 U.S. 544, 557–67 (1981) (establishing a presumption of no tribal civil jurisdiction over non-Indians on non-Indian fee lands, with exceptions); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (creating a categorical rule of no tribal criminal jurisdiction over non-Indians). *But see infra* note 344 and accompanying text (discussing recent statutory reform recognizing tribal jurisdiction over some non-Indians in certain domestic-violence-related prosecutions).

138. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327–28, 340 (2008).

139. *Id.* at 336.

140. *E.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 450, 453 (1997) (articulating a prudential rule of tribal court exhaustion based on comity and “in deference to the capacity of tribal courts ‘to explain to the parties the precise basis for accepting [or rejecting] jurisdiction’ ” (quoting *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985))).

141. Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 540 (1997).

142. *E.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356–57 (1998); *Solem v. Bartlett*, 465 U.S. 463, 471–72 & n.12 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586–92, 605 (1977); *DeCoteau v. Dist. Cty. Court*, 420 U.S. 425, 444–45 (1975).

143. See S. REP. NO. 106-361, at 3 & n.10 (2000) (discussing Supreme Court precedent to this effect).

multiple factors to assess whether Congress intended to diminish reservation boundaries—sometimes, but not always, by the alienation of tribal lands to non-Indians.¹⁴⁴

Finally, in the land tenure context, obscurity also exacerbates complexity, despite a significant federal regulatory presence.¹⁴⁵ Even if there were clarity about which government or institution regulates or governs a specific property question in Indian law, the task of actually locating the applicable rule is another matter.¹⁴⁶ Locating the applicable real property rule in Indian country is difficult because of uncertainty about which sovereign has authority over which property issues, the density of the relevant rules and regulations, and the inaccessibility of some source materials.¹⁴⁷ This occurs at the federal level because, in practice, there is often significant variance between BIA offices, especially at the reservation-agency level, as to how specific real estate issues are addressed.¹⁴⁸ Unwritten and uncertain rules are difficult to act around, even if the other direct transaction costs of the federal trust status were not inhibiting.¹⁴⁹ And tribal laws can be difficult to locate and, in some cases, difficult to research and find.¹⁵⁰ Historically, the

144. Recently, the Supreme Court reinforced the primacy of congressional intent at the time of the surplus land sales in this reservation-diminishment analysis, making clear that legislative history and current demographics are used, at most, to reinforce the Court's determination of what the historic Congress intended. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1078–80 (2016).

145. *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2429 n.93 (1995) (describing how the relative obscurity of certain legal rules can relate to Schuck's four dimensions of legal complexity). Writing in the specific context of federal environmental law, Professor Lazarus points to both the "peculiar manner in which environmental rules are written and the practical difficulty of locating environmental rules[]" as sources of this kind of obscurity. *Id.*

146. *See id.* at 2436 ("'Obscurity' refers to the difficulty, in the first instance, of even locating the law.").

147. *Cf. id.* at 2428–30, 2429 n.93, 2436–39.

148. *E.g.*, U.S. GEN. ACCOUNTING OFFICE, INDIAN TRUST FUNDS: IMPROVEMENTS MADE IN ACQUISITION OF NEW ASSET AND ACCOUNTING SYSTEM BUT SIGNIFICANT RISKS REMAIN 18 & n.9 (2000), www.gao.gov/assets/230/229536.pdf [<https://perma.cc/QC8F-RM9J>].

149. Although this is something the Department of the Interior has been actively seeking to contain, it persists. *Id.* at 18–19.

150. *E.g.*, Bonnie Shucha, "Whatever Tribal Precedent There May Be": *The (Un)availability of Tribal Law*, 106 L. LIBR. J. 199, 199 (2014). Many tribes are also actively working to remedy this issue. *Id.* at 204. This concern about "unwritten tribal traditions" being used to resolve disputes was part of one non-Indian corporation's recent argument to the Supreme Court that it should not be subject to tribal court jurisdiction, despite significant contacts within reservation boundaries. *E.g.*, Brief for the Petitioners at 6–7, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496). *But see* Brief for the United States as Amicus Curiae Supporting Respondents at 28, 31–32, *Dollar Gen.*, 136 S. Ct. 2159 (No. 12-1496) (asserting that tribal courts are "effective institutions for administering justice" that exercise predictable authority over nonmembers).

BIA has also struggled even to account for who actually owns what in reservation territories. This was the major basis of the *Cobell* class action lawsuit,¹⁵¹ which the federal government is now paying \$3.4 billion to settle.¹⁵²

All of these variables get swirled together. Indian land tenure is a fundamentally complex legal system,¹⁵³ and this complexity bears down on every property decision within reservation spaces, as well as the quality and success of efforts to improve the system more broadly. It is complicated. It is dynamic. And it has costs.

II. THE CYCLICAL COSTS OF COMPLEXITY

Greater simplicity has undoubtable appeal.¹⁵⁴ Some complexity, however, is unavoidable.¹⁵⁵ It reflects and responds to the realities of the complex world in which the law operates, and, when appropriately constructed, can preserve both useful flexibility and attendant benefits to the overall system's resiliency.¹⁵⁶ The core problem in Indian land tenure is not just that the system is complex; it is that this specific, complex legal structure has been constructed in a way that negatively impacts real outcomes.¹⁵⁷ This Part provides an initial discussion of the particular costs of Indian land tenure's uniquely complex system architecture.

151. See *Cobell v. Norton*, 392 F.3d 461, 463–64 (D.C. Cir. 2004) (discussing congressional findings of the Department of the Interior's "hopelessly inept management" of some Indian trust assets).

152. See *infra* notes 203–204 and accompanying text.

153. Cf. *supra* note 56 (articulating the scope of the complexity claim in this piece).

154. See, e.g., EPSTEIN, *supra* note 57, at 14–15, 23–24; CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 1–14 (2013); Daniel Martin Katz & M.J. Bommarito II, *Measuring the Complexity of the Law: The United States Code*, 22 ARTIFICIAL INTELLIGENCE & L. 337, 338 (2014) (suggesting that the goal should be to make everything as simple as possible, but no simpler).

155. Page, *supra* note 52, at 142 (“[C]omplexity is often irreducible. Lowering complexity in one domain of interaction often causes it to reappear someplace else.”); see also Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 4–5 (2011) (“Even the clearest and simplest rule has fuzziness at the margin . . .”).

156. See, e.g., Kaplow, *supra* note 54, at 161 (“[M]uch complexity . . . arises because of the benefits from rules that are more precisely tailored to particular behavior.”); Lazarus, *supra* note 145, at 2429 (“[E]nvironmental laws reflect the complexities of the ecosystem itself. Lawmakers cannot avoid these complexities . . .”); Page, *supra* note 52, at 143 (“[T]he fundamental premise—that complexity is bad—is often wrong. Complexity often correlates with robustness and innovativeness.”); Paul, *supra* note 49, at 164–69 (explaining that commitment to equity necessarily complicates taxation); Eric W. Orts, *Simple Rules and the Perils of Reductionist Legal Thought*, 75 B.U. L. REV. 1441, 1443 (1995) (book review) (identifying “a serious error in presuming simple rules are more desirable than complex ones”).

157. Complexity matters only to the extent that it influences the performance of a legal system. Ruhl & Katz, *supra* note 47, at 238.

A. Categories of Harm

There are at least three particular costs arising from Indian land tenure's overall complexity: (1) landowner withdrawal; (2) bureaucratic proliferation; and (3) the prevalence of counterproductive, or at least incomplete, legislative reforms.

1. Landowner Withdrawal

Too much complexity can drive out desirable activity as participants elect to disengage from the field.¹⁵⁸ This withdrawal is rational, though socially undesirable, when complexity becomes too costly for individuals to bear.

Property law in particular requires stability and clarity so that owners know their rights and responsibilities and can invest in accordance with those internalized expectations.¹⁵⁹ Reservation landowners have no such clarity. The jurisdictional complexity adds costs to any desirable land use. Simply determining who governs what is often fraught with peril.¹⁶⁰ On top of this, Indian landowners bear the assembly challenges of fractionated ownership and the burdensome—but intermittent—restrictions of the federal land-management regime. This complexity limits access to capital, directly impedes flexible land use, and encourages disengagement as the costs of active participation exceed the likely benefits.¹⁶¹

At the same time, communities often benefit most from local landowners making local uses of their lands.¹⁶² This is missing in many Indian communities. The large majority of fractionated Indian lands are idle, not generating any income, or, if they are in use, being leased to non-Indians.¹⁶³ Data on other tenure forms in Indian country are harder to collect, but

158. Schuck, *supra* note 57, at 40–42.

159. See 1 JEREMY BENTHAM, *Principles of the Civil Code*, in *THE WORKS OF JEREMY BENTHAM* 297, 307–08, 325 (John Bowring ed., Edinburgh, William Tait 1843) (describing property as “only a foundation of expectation” and explaining that, in order to regulate expectations, property laws must be readily understood); Bell & Parchomovsky, *supra* note 25, at 1022 (“There cannot be ownership in land without some clear idea of who owns the land, what land is owned, and what rights accrue to the owner as a result of her status.”); *supra* note 17 and accompanying text.

160. Michael Heller has also identified how overlapping jurisdictional assignments can create anticommons-like waste. Michael A. Heller, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163, 1186–87, 1187 n.122 (1999) (describing inefficiencies of “ongoing jurisdictional spat” in one sample coastal regulation dispute (quoting Greg Mitchell, *Supreme Court Airs Takings, DNA Admissibility*, *RECORDER*, Feb. 11, 1998, at 1)).

161. See *infra* Section IV.A.2.

162. See, e.g., David A. Fleming & Stephan J. Goetz, *Does Local Firm Ownership Matter?*, 25 *ECON. DEV. Q.* 277, 277 (2011); Linda Lobao & Curtis W. Sofferahn, *The Community Effects of Industrialized Farming: Social Science Research and Challenges to Corporate Farming Laws*, 25 *AGRIC. & HUM. VALUES* 219, 221 (2008); Rick Welsh, *Farm and Market Structure, Industrial Regulation and Rural Community Welfare: Conceptual and Methodological Issues*, 26 *AGRIC. & HUM. VALUES* 21, 21 (2009).

163. *BUY-BACK PLAN*, *supra* note 18, at 5–6.

terrible poverty, homelessness, and unemployment persists throughout many reservations, despite widespread land ownership.¹⁶⁴ Landowners' withdrawal may be rational at the individual level, but it has pressing social costs at the wider community level.

2. Bureaucratic Growth

Too much complexity also increases governance costs.¹⁶⁵ Having three separate sovereigns to regulate the same underlying subject matter wastefully duplicates government efforts. Governance costs also increase when these three sovereigns have to make predictions about, and negotiate around, uncertain jurisdictional boundaries. Even more specifically, the complexity of Indian land tenure seems to exacerbate bureaucratic costs, and, in many instances, the persistence of undesirable levels of federal interference and control in tribal territories.

Structural elements of Indian land tenure favor an ever-growing role for federal oversight and administrative functions. As Indian landowners rationally withdraw from active use and engagement of their own land, the BIA's ongoing and increasing role as replacement land-manager, record-keeper, and monitor becomes more justified. If landowners are not actively engaged, federal land oversight becomes more important to keep the system propped up and operating, and therefore the federal agency's role only grows as the "need" for oversight increases.

Any general political-economy analysis would suggest that bureaucratic agencies tend to benefit from bureaucratic proliferation and increasing control.¹⁶⁶ In some sense, complexity continues to employ people; it does keep the BIA very much in business.¹⁶⁷ In addition, increasing regulatory complexity also makes agencies less susceptible to public monitoring and control.¹⁶⁸ This played out, for example, even during the Termination Era of federal Indian policy, when the BIA "kept talking about working itself out of a job and turning over responsibility to the Indians," but the actual effect was that "congressional appropriations to Indian tribes decreased by approximately 80%, while appropriations to [the BIA] (chiefly for salaries) increased by approximately 53,000.% [sic]."¹⁶⁹ Today, similar incongruities

164. QUIET CRISIS, *supra* note 19, at 8–9, 63.

165. Schuck, *supra* note 57, at 20.

166. *See id.* at 30–31.

167. *See id.* at 26 (identifying this "internal rationality" in maintaining complexity); *see also, e.g.*, Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1650–51 (1995) (discussing how rational agency employees acting in their own self-interest might have incentives to maintain the perverse system that employs them).

168. *See* Schuck, *supra* note 57, at 30–31.

169. Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 388 (1953); *see also* TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS? 14–15 (1995) (arguing that allotment provided opportunities for "bureaucrats to expand their domains").

emerge. Economists Jacob Russ and Thomas Stratmann estimated that, despite decades of legislative efforts to streamline BIA procedures and reduce overall land-management costs, the BIA's costs are steadily increasing—as much as \$7 million more per year on just twelve reservations surveyed.¹⁷⁰ This represents a “fivefold increase” in BIA recordkeeping costs at these twelve sample reservations alone.¹⁷¹ Russ and Stratmann estimate BIA's total recordkeeping costs at \$575 million annually,¹⁷² with probate and other costs on top of this.¹⁷³

To be fair, much of this modern spending does get passed on to tribal governments, who have the option to contract with the federal government to perform line-level agency work on behalf of the BIA.¹⁷⁴ These tribal agencies operating under federal contracts to perform these regulatory functions are still, however, subject to federal authority and control of the process.¹⁷⁵ Although the BIA's own staff numbers have declined in recent years due to the tribal contracting process, the bureaucracy's total administrative reach has continued to expand (as have its costs, both in terms of transaction costs to landowners and total costs to taxpayers).¹⁷⁶ At the same time, other pressing needs in Indian country go unmet, and overall federal funding in Indian country is “disproportionately low when compared to overall funding levels for Americans.”¹⁷⁷

This bureaucratic persistence and expansion is problematic on many levels. Most directly, in the case of many individual Indian estates, the costs of the BIA's land maintenance and management role exceed the value of the underlying asset.¹⁷⁸ This is strikingly irrational. But, more subtly, we have to acknowledge two related harms: In the role of land-use decisionmaker, as opposed to trustee (in which its true function is to advise and support tribal sovereignty), the BIA has different incentives than the tribe or individual

170. Russ & Stratmann, *supra* note 15, at 24.

171. *Id.* at 3.

172. *Id.* at 24.

173. In 1998 dollar amounts, the Department of the Interior estimated that it cost the BIA an additional \$1,500 to \$2,000 per estate to complete a probate, regardless of the estate's value. In many cases, an individual estate is worth much less than this. *Id.*

174. See Gover, *supra* note 22, at 348.

175. See *supra* note 119 and accompanying text.

176. Gover, *supra* note 22, at 346–50.

177. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 37 (Joint Occasional Papers on Native Affairs No. 2004-03, 2004).

178. See Swimmer Statement, *supra* note 16, at 8; see also Jacob W. Russ & Thomas Stratmann, *Missing Sticks: Property Institutions and Income Dissipation in Indian Country 2* (George Mason Univ. Dep't of Econ. Research Paper Series, Working Paper in Econ. No. 15-22, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536597 [https://perma.cc/3SCT-8RDP] (noting that fractionation and overly restricted property rights result in bad economic outcomes for Indians).

landowner might have directly.¹⁷⁹ The BIA is risk averse and will make decisions to avoid potential liability for breaches of its trust responsibility.¹⁸⁰ More broadly, neither Congress nor the BIA is in any position to make local decisions that reflect nuanced, tribe-specific values and policy choices.¹⁸¹ Instead, the proliferation of the BIA's land-management regime—even when contracted wholesale to tribal agencies—critically reinforces and exacerbates the problem of landowner withdrawal. More bureaucracy increases landowners' costs and, ultimately, further discourages landowner engagement.¹⁸²

3. Democratic Inertia

Finally, because complexity makes it difficult to read and understand the full land tenure challenge, it limits the ability of even sincere reformers to tackle large-scale change.¹⁸³ Legal rules that are too complex can suffer from a lack of informed dialogue.¹⁸⁴ It is challenging to have effective democratic engagement around rules we cannot understand. A system's participants often have important information, which lawmakers need, about the actual effects of policy choices, but when rules are too complex, these interactions are not easily observed or communicated, impeding public input and participation.¹⁸⁵

179. See Ezra Rosser, *The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 310–14 (2005) (discussing one example of conflict between the BIA and tribal objectives).

180. See Warner, *supra* note 24, at 1046–47. This seems likely to be particularly true after the federal government's recent \$3.4 billion settlement payment following the *Cobell* lawsuit's allegations that the BIA had breached its historic trust accounting obligations. See *infra* notes 203–204 and accompanying text.

181. See, e.g., Stephen Cornell, “Wolves Have a Constitution:” *Continuities in Indigenous Self-Government*, INT'L INDIGENOUS POL'Y J., Jan. 2015, at 9 (discussing an example of potential differences in Indian and Western expectations); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 729–40 (2006) (discussing analogous tensions in the context of federal prosecutorial roles in tribal territories); see also *infra* Section IV.A.3.

182. This happens very concretely in the Indian land tenure context, as the BIA's land-use rules seem, in many instances, to prioritize absentee owners over local active owner-users. See *infra* Section II.B.2. To be clear, however, this discussion is in no way intended as a personal critique of the many hardworking public servants actively engaged in trying to make things work from inside the BIA. To the contrary, one purpose of this Article is to illuminate how difficult more wholesale reform has become because of these cyclical complexity costs.

183. Schuck, *supra* note 57, at 20–21 (“Even fervent reformers hesitate to alter a landscape that is so hard to read; they know that in a more polycentric legal world, any change will have ripple effects, ramifying widely, swiftly, and unpredictably throughout the system's web. When the risks of error are magnified, rulemakers are more likely to adhere to even an unsatisfactory status quo.” (footnotes omitted)).

184. See Kelly Casey Mullally, *Legal (Un)Certainty, Legal Process, and Patent Law*, 43 LOY. L.A. L. REV. 1109, 1112 (2010) (“[A] lack of certainty can cause the public to abandon legal institutions.”); Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1169 (arguing when “the citizenry knows very little of the law, it undermines democratic values and representative governance” because “[l]egislators have less accountability to voters”).

185. Professor Sunstein has said that one of the most critical things he learned as administrator of the White House Office of Information and Regulatory Affairs is the importance and

This lack of dialogue, in turn, provides excellent cover for the persistence of maladapted property rules (and cost ineffective bureaucracy).¹⁸⁶ Even well-intentioned reformers may fail to account for all of the possible system-wide effects downwind, leading to counterproductive results. Complexity, then, gives rise to a special kind of paralysis. It is hard to know how best to respond, given a likely cascade of additional, but relatively unknowable, consequences in an interlocking and difficult system of complex variables. Faced with such a risk of failure, we can end up with a persistent, even if unsatisfactory, status quo, or—perhaps worse—with tinkering around the edges that does more harm than good. This occurs often in Indian law, as in the examples that follow.

B. Fractionation as a Specific Example

Real reforms require a deep understanding of the relevant tenure framework and its limits, and this takes work. Too much complexity adds to the challenge. Thus, Indian land reforms have historically failed to adequately account for all of the interconnected challenges of the system. This Section explores the fractionation problem, which is often discussed in isolation, and which has been the subject of myriad (failed) federal reforms. First, it emphasizes the cyclical nature of complexity's costs—specifically, the way in which these effects snowball over time and reinforce ever-growing complexity. Second, it explains why a more nuanced approach—one accounting for Indian land tenure's system-wide interactions—is essential to the future of Indian communities.

1. Self-Perpetuating Cycles of Complexity

One insight of an analysis of complexity's costs in the specific context of Indian land tenure is how interrelated these effects are. We can clearly recognize how one cost (landowner withdrawal) feeds into and supports the proliferation of the second cost (bureaucratic growth). This, in turn, isolates the field from broader public engagement and leads to ineffective, or insufficient, reform, which causes the third cost—democratic inertia.¹⁸⁷ This all loops back to reinforce the first effect: more of the status quo means more landowner withdrawal, which requires more bureaucracy to sustain, which exacerbates complexity and inertia. Complexity begets more complexity. We get stuck.

To follow the specific example of Indian land fractionation, consider this: As co-ownership numbers become more extreme, the federal bureaucracy becomes more important to maintain these interests and perform a

value of stakeholder input. SUNSTEIN, *supra* note 154, at 216; *see also* Stevenson, *supra* note 184, at 1168–70 (explaining how the law becomes paradoxically more inaccessible as it proliferates).

186. *See* Render, *supra* note 53, at 81 (“Complexity provides excellent camouflage, and its destructive capacity is frequently underestimated.” (footnote omitted)).

187. *See supra* Section II.A.

managerial role. The federal trust land-management regime proliferates, and, by providing this backstop, it implicitly encourages and permits more landowner passivity without any internalized cost to landowners. Landowners have no direct incentive to limit further fractionation of interests; in many cases, passive ownership will exacerbate fractionation through additional intestate distributions to multiple heirs and a failure to undertake costly efforts to consolidate small interests during life.¹⁸⁸ That further fractionation, in turn, continues to perpetuate the perceived need for an ongoing federal record-keeping and management role. The increasingly complex bureaucracy then shields the field from greater legislative oversight and action.¹⁸⁹ This creates more democratic paralysis, or, at best, incomplete and myopic reforms;¹⁹⁰ which perpetuates the whole “as-is” system; makes more landowners withdraw; and feeds an ever-growing cycle of complexity.

2. Need for System-Wide Approaches

Recognizing the costs of Indian land tenure as the consequences of a rigid, yet complex regulatory system helps explain how numerous fractionation-specific reform efforts have been doomed to fail from the beginning. These limited reforms neglected to account for the whole interacting set of system variables. For decades, Congress has expressed concern about the increasing fractionation of Indian lands, both because of the challenges for Indian users of Indian lands and because of the growing administrative burden associated with maintaining so many tiny fractional co-ownership interests.¹⁹¹ Reform attempts, however, have feebly patched one tiny element of the problem after another, while a comprehensive solution to the systemic and complex land tenure challenges across reservation territories has remained elusive. Meanwhile, fractionation continues to grow exponentially worse despite these reforms.¹⁹²

Initially, Congress tried probate changes to reduce or slow the number of new small interests created in future intestate distributions (by decreasing the default number of heirs, for example), but these reforms failed to address the challenge of *existing* fractionation. When Congress further tried to eliminate trust landowners’ “rights to devise” even the smallest fractional interests in individual trust lands and instead attempted to force escheat of those interests to the governing tribe, the Supreme Court deemed it an

188. See *supra* Section II.A.1, II.A.2; see also Schuck, *supra* note 57, at 40–42.

189. See Render, *supra* note 53, at 81 (“In complex situations, the important facts—the very facts that we need to know to avoid catastrophe—may be quite effectively hidden in plain sight.” (footnote omitted)).

190. See, e.g., Mullally, *supra* note 184, at 1114; Stevenson, *supra* note 184, at 1166.

191. Gover, *supra* note 22, at 346–50.

192. See *supra* notes 14–15 and accompanying text.

unconstitutional taking of individual landowners' private property rights, however small.¹⁹³

Congress also tried authorizing land exchanges, allowing individual owners to trade in small interests in multiple parcels for a single, consolidated tract of tribally owned lands.¹⁹⁴ These efforts failed, however, to account for the overall gridlock of the system. Executing such an exchange took up to six years on some reservations, including multiple steps of bureaucratic review, fact-checking, and formal appraisals; in most cases, the incentive of owning even 100 percent of a still too-restricted trust property was not desirable enough to undertake such an effort.¹⁹⁵

These efforts all focused only on consolidation for the sake of consolidation, overlooking the more fundamental requirement that ownership—whether consolidated or not—must actually work for landowners and reservation communities. It is always “easier to divide property than to recombine it,” so the value of the extra effort to recombine fragmented interests must be worthwhile to the consolidator.¹⁹⁶ Right now, assembly is often not worth its costs. For example, consider the Department of the Interior's current limits on a co-owner's right to use her own jointly owned land. Under recent rules, a co-owner must get a BIA-approved lease from her other co-owners and pay them all fair-market-value rent before using her own land.¹⁹⁷ These co-ownership limits mean that only absolute consolidation to sole ownership truly frees an owner to use her own land directly, without interference from the Department of the Interior. And even then, it is still in the restrictive trust status that limits access to capital and credit. This kind of consolidation takes significant effort and is not worthwhile—or even possible—in many cases.

Meanwhile, there are a host of perverse incentives that actually encourage landowner passivity and absenteeism (and, therefore, fractionation). While active use and consolidation are expensive, passive ownership is free, and, in some cases, more economically beneficial than making any effort. In well-functioning property regimes, boundary principles exist to keep

193. *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997); *Hodel v. Irving*, 481 U.S. 704, 717–18 (1987); see also Guzman, *supra* note 14, at 635; Michael A. Heller & James E. Krier, Commentary, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1007 (1999). Even if it had been constitutional, this escheat reform also failed to address other land tenure challenges, including checkerboard jurisdiction and functioning co-ownership rules within existing, more modestly fractionated properties.

194. E.g., Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2517 (1983) (codified as amended at 25 U.S.C. §§ 465, 478, 2201–10 (2012)); Act of Oct. 30, 1984, Pub. L. No. 98-608, 98 Stat. 3171 (codified as amended at 25 U.S.C. §§ 2203–06, 2211 (2012)).

195. See, e.g., Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231, 251 n.165, 256–57 (1997).

196. Heller, *supra* note 160, at 1165–66, 1169 (“Like Humpty Dumpty, resources prove easier to break up than to put back together.” (footnote omitted)); see also Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595, 596 (2002) (“[R]eunifying fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original deal.”).

197. See *supra* notes 125–126 and accompanying text.

property scaled to avoid the risks of overuse in a commons or underuse in an anticommons.¹⁹⁸ In Indian trust tenure, these boundaries are missing. For example, there are no limiting carrying costs, such as tax or registration fees for maintenance. The absence of these carrying costs allows interests to get progressively smaller without ever reaching a breaking point at which an individual co-owner would need to move to consolidate.¹⁹⁹ And even if one wanted to sell or exit a co-ownership, there is no efficient exit mechanism like partitions or markets for transfers, at least not without following cumbersome federal procedures.²⁰⁰

Moreover, the whole structure of the current system makes it predictably more profitable for individual landowners to disengage from any land-use activity whatsoever. Active owners have to navigate the federal bureaucracy to use land themselves or to lease it to others; if an owner refuses to participate or is otherwise absent from the process, the BIA will step in and ensure absentee co-owners get the highest available market rate—with no effort required and no cost to the non-participating owners.²⁰¹ Oftentimes, co-owners who refuse to cooperate end up better off.²⁰²

As fractionation continued to grow uncontrollably, the whole system became so unwieldy that it rendered the BIA unable to confidently account for the trust interests it was responsible to manage and record. In 1996, a class of Indian landowners sued the U.S. government in what came to be called the *Cobell* litigation, alleging that the federal government, despite its record-keeping obligations for Indian trust assets, was so overwhelmed by the fractionation problem that, in many cases, the BIA could not accurately tell Indian landowners which interests they owned.²⁰³ The case ultimately

198. Heller, *supra* note 160, at 1166–68. Heller uses the term “boundary principle” to refer to legal doctrines that are used to keep resource claims “well-scaled for productive use.” *Id.* at 1166. For example, Heller suggests that modern land-use controls, such as minimum lot size or square footage requirements in zoning and subdivision rules, “prevent people from spatially fragmenting resources too much.” *Id.* at 1173 (footnote omitted).

199. See *id.* at 1173–74 (describing taxes and registration fees as examples of powerful means of preventing excessive fragmentation). These tax and registration fees, of course, do not exist in Indian trust properties. See *supra* Sections I.A, I.B.

200. See *supra* notes 115–117 and accompanying text; cf. Heller, *supra* note 160, at 1167 n.13, 1196 n.169 (discussing the value of partition rights in preventing fractionation outside the Indian context).

201. See, e.g., 25 C.F.R. § 162.013(c), .209 (2016).

202. For further discussion related to this theme, see Shoemaker, *No Sticks*, *supra* note 124, at 439–41 (discussing structural incentives for absentee landownership).

203. *Cobell v. Norton*, 392 F.3d 461, 463–64 (D.C. Cir. 2004) (describing the Department of the Interior’s financial management as “hopelessly inept”). In 1992, Congress found a “dismal history of inaction and incompetence” on the part of the Department of the Interior in its financial management of Indian trust assets. H.R. REP. NO. 102-399, pt. 1, at 5 (1992). In response, Congress passed the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended at 25 U.S.C. §§ 162a et seq., 4001–61 (2012)), to require, among other things, certain accountings by the Department of the Interior of all funds held in trust for individual Indians. The *Cobell* class action objected to the sufficiency of the Department of the Interior’s accounting efforts, and the federal courts generally agreed (over the protracted litigation) that the government had breached its trust

settled for \$3.4 billion,²⁰⁴ reflecting the magnitude of the system's failure.

From these settlement funds, \$1.9 billion is now allocated to a federal buy-back project to purchase tiny fractional ownership interests from willing sellers and transfer them to tribal ownership.²⁰⁵ The goal is to reduce the number of co-owners in trust lands, and thereby reduce both the severity of co-owner coordination challenges and the Department of the Interior's ongoing accounting obligations.²⁰⁶ Often, this buy-back effort is casually assumed to constitute the final answer to all of the failed fractionation reforms to date. Unfortunately, it is not.

Although it is certainly a valuable step, this substantial buy-back effort will not eliminate fractionation.²⁰⁷ There is not enough money to buy all interests, and it only applies to willing sellers.²⁰⁸ Many individual Indian landowners remain unwilling to sell.²⁰⁹ Moreover, even if the number of co-owners is dramatically reduced, this "solution" also fails to account for the whole system-wide Indian land tenure challenges that remain. The system continues to be set up for further fractionation to occur because the buy-back effort fails to adequately reform the institutions of land ownership in Indian country—the whole complicated, messy system that invites landowner withdrawal, rather than engagement.²¹⁰

The trust status itself remains overly rigid and technical for landowners. The jurisdictional uncertainty between tribal and federal control, even within trust properties alone, is limiting. Even worse, the entire buy-back endeavor itself fails to account for the problem that many of these co-owned lands are actually emulsified—containing mixes of fee and trust co-ownership interests—and the buy-back plan does not include these undivided fee interests in some emulsified properties.²¹¹ At best, these buy-back efforts result in a new co-ownership between fee owners and a trust on behalf of

responsibility and had not adequately performed the required accounting. *See, e.g.,* *Cobell v. Salazar*, 573 F.3d 808, 809–10 (D.C. Cir. 2009). *See generally* Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 *GONZ. L. REV.* 609 (2011) (detailing the history of the *Cobell* litigation and its ultimate settlement).

204. *See* Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066–70; *see also* *Cobell v. Salazar*, 679 F.3d 909, 913–16 (D.C. Cir. 2012) (upholding the settlement).

205. BUY-BACK PLAN, *supra* note 18, at 1, 7–24 (describing buy-back plan).

206. *Id.* at 1.

207. *See id.* at 8 (“[D]espite the size of the Fund, the Fund may not supply sufficient capital to purchase all fractional interests across Indian country.”). Costs of appraisals and other administrative costs could also consume a significant portion of the funds, and there is a ten-year time limit on purchases. *Id.* at 8, 18.

208. *Id.* at 8.

209. *E.g.,* Jerilyn Decoteau, *Why I Opted Out of the Cobell Settlement*, INDIAN COUNTRY TODAY (June 4, 2011), <http://indiancountrytodaymedianetwork.com/2011/06/04/why-i-opted-out-cobell-settlement> [https://perma.cc/93AP-SWFE].

210. *See supra* Section II.A.I.

211. *See* BUY-BACK PLAN, *supra* note 18, at 6 app. B; *see also* Shoemaker, *Emulsified Property*, *supra* note 8, at 996 n.250.

the tribe itself. But very few, if any, consolidation efforts in heavily fractionated trust lands will be complete, suggesting the more likely result is an even more complicated mix of co-ownership among a new three-way mix of individual trust, tribal trust, and fee co-owners in something akin to a “super-emulsified” property.²¹² Because each of these different tenure statuses is defined and regulated in different, and often incongruent, ways by different jurisdictional authorities, these property institutions may be more difficult to use than even all-trust fractionated lands—meaning the buy-back effort may backfire and create more complex and novel land-use problems than originally perceived.²¹³

This discussion highlights the importance of more wholesale property reform. We have to shift the focus from patching holes to building something radically new, and to do that, we first have to understand the system in a more nuanced way.

III. ANOTHER VIEW INSIDE THE SYSTEM: HYPERCATEGORIZED PROPERTY AND SOVEREIGNTY

Consideration of the entire Indian land tenure system in complexity terms also sheds new light on other recent land tenure reforms that, although pitched as beneficial, are likely to have more adverse consequences. Again and again, on-the-ground experiences tell us that the most effective solution to reservation needs is, in virtually every case, true tribal sovereignty and self-governance.²¹⁴ For more than forty years, the formal federal policy in Indian Affairs has been Indian self-determination—“to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”²¹⁵ Likewise, the Department of the Interior, in promulgating recent leasing regulations, acknowledged that:

212. In a recent status report on its progress under this buy-back program, the Department of the Interior acknowledged that it had purchased interests in 26,400 trust tracts, but that only approximately 1,060 of those tracts (or about 4 percent) had achieved complete consolidation in sole tribal ownership. U.S. DEP’T OF THE INTERIOR, 2015 STATUS REPORT: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 18 (2015), <https://www.iltf.org/sites/default/files/Buy-Back%20Initial-Implementation-Plan.pdf> [<https://perma.cc/9KBQ-XY7>]. To the contrary, approximately 96 percent of the affected tracts post-buyback had at least some form of mixed-tenure ownership, with some tribally owned interests added to the mix by virtue of the purchase program. *See id.* This status report also acknowledges that consolidated tribal interests are only large enough to put 16 percent of fractionated tracts “in Tribal Control.” *Id.* at 10.

213. *See* Shoemaker, *Emulsified Property*, *supra* note 8, at 994–97.

214. *See* Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 3, 30 (Miriam Jorgensen ed., 2007); Cornell, *supra* note 181, at 13.

215. *See* Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564, 565 (statement by President Richard M. Nixon).

[E]conomically and culturally, sovereignty is a key lever that provides American Indian communities with institutions and practices that can protect and promote their citizens [sic] interests and well-being [and] [w]ithout that lever, the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable over the long run.”²¹⁶

And yet, even as recent reforms are pitched as promoting landowner re-engagement and Indian self-determination, they perversely exacerbate the problematic aspects of the system's complexity and all of its attendant costs. This Part identifies three recent reforms that all create increasingly granular jurisdictional differentiation within single physical properties. This is symptomatic, in part, of the complex reliance on property-based, rather than territory-based, sovereignty definitions in Indian country. By treating Indian property and Indian sovereignty in difficult and complex ways, impossible jurisdictional distinctions, even within single physical parcels, prevail. These three reforms all create new gradations between federal, tribal, and even state sovereignty depending on how a given property right “stick” within a larger bundle of trust property ownership is (rigidly, technically, and often uncertainly) categorized. Complexity literature predicts that these top-down property controls, which rely on ever-increasing micro-categorizations of property and sovereignty, will never work to produce meaningful self-determination at the reservation level.²¹⁷

A. *Fee vs. Trust*

Fee and trust tenure statuses are threshold categorizations in Indian land tenure. Fee lands have one set of rules; trust lands have another set.²¹⁸ This difference is visible only by searching the deeds of the relevant tracts—and even then, by searching across different possible recording offices, since trust properties are recorded by the federal government (which might contract the task to a tribal office), and fee properties may be recorded by either state or tribal systems.²¹⁹

Although, outside of Indian country, permanent improvements are classically considered part of the real property itself, in Indian land tenure,

216. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) (alterations in original) (quoting Kalt & Singer, *supra* note 177, at 4).

217. See *infra* Part V (discussing need to foster complexity-responsive reform alternatives); see also *supra* Section II.A.2, II.A.3 (discussing pitfalls of top-down controls).

218. See *supra* Section I.A.

219. See Shoemaker, *Emulsified Property*, *supra* note 8, at 977–78. The Supreme Court has itself gotten these reservation property classifications wrong, even in an important case involving jurisdictional differences by property type. See Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1217 n.175 (2010).

permanent improvements have been harder to classify as either real or personal, or whether held in fee or trust.²²⁰ After a significant period of uncertainty, the Department of the Interior recently moved to clarify that permanent improvements (e.g., houses, barns, and other structures) constructed on Indian trust lands are not also held in trust status, but, rather, are separately owned as personal property in fee.²²¹

Having a house in fee status on land that is in trust status creates enormous potential for conflict between building and land rights.²²² For example, in *Olson*, the Interior Board of Indian Appeals (IBIA) considered a house on a lakeside allotment.²²³ The land was in trust and co-owned by 39 Indian owners, but the house had been built and leased by only one of those co-owners, Ms. Caye.²²⁴ In Ms. Caye's case, the BIA "did not know if the house was trust real property, trust personal property, or non-trust (i.e., fee) property."²²⁵ The IBIA did, however, acknowledge that, if the house were in fee and the land in trust (the framework the Department of the Interior now categorically applies to permanent improvements), serious use conflicts would emerge. The fee-property house, according to the IBIA, can be used or leased by its owner directly without BIA involvement (pursuant to state or tribal law, as applicable); however, the house's resident also needs a separate lease to the underlying land that is approved by the BIA and the trust land's co-owners before occupying the house—or, really, before the house can even legally occupy the pad on which it rests.²²⁶

The different tenure statuses also matter significantly for probate purposes. The BIA only takes jurisdiction over trust assets in a decedent's estate; fee property (now including permanent improvements on trust lands) is typically probated separately through state or tribal processes. In another example of this complexity, Congress recently tried to address the probate problem by passing "technical" amendments to AIPRA, providing that any

220. *E.g.*, Thompson, 54 IBIA 125, 132 (2011) (requiring a remand to the BIA to determine whether a house on trust land was held in fee or trust status).

221. Indian Trust Management Reform—Implementation of Statutory Changes, 76 Fed. Reg. 7500, 7501 (Feb. 10, 2011) (codified at 25 C.F.R. pt. 15) (describing permanent improvements on trust land as personal property in fee).

222. *See, e.g.*, Smartlowit, 50 IBIA 98, 99 (2009) (reflecting agency confusion about whether rent is even owed for a house on trust property and, if so, who should administer that rent).

223. 31 IBIA 44, 45 (1997).

224. *Id.*

225. *Id.* at 51.

226. *See id.* at 51–52. The IBIA noted this difficulty to some degree when observing:

The Board sincerely doubts that the intention in leasing the house was that the lessee would have access to the leased premises only by helicopter landing on the house's roof, would not be able to step outside without trespassing on Allotment 2020, and in fact would be in trespass at all times because the house was sitting on Allotment 2020.

Id. at 52.

improvements on trust lands should pass along with the trust's real property, whether through descent or devise, even where such permanent improvements are "not held in trust" and "without altering or otherwise affecting the non-trust status of such a covered permanent improvement."²²⁷

The Department of the Interior, however, read this statutory change very narrowly. After clarifying that improvements will typically be in fee, the Department of the Interior then refused to actually exercise any probate jurisdiction over these fee improvements, presumably reasoning that the statute itself had not expressly given the federal administrative judges conducting the Indian probates actual jurisdiction over fee interests in trust properties, leaving their jurisdiction limited exclusively to trust assets.²²⁸ Current Department of the Interior regulations continue to provide that the Secretary of the Interior will probate only trust assets and not any fee property.²²⁹ According to the Department of the Interior, because improvements are still not trust property, it does not keep an inventory of them and is not responsible for maintaining them. However, for probates after December 2, 2008, Department of the Interior probate decisionmakers "will include in probate orders a general statement of the substantive law of descent or devise of permanent improvements," but will leave "courts of competent jurisdiction . . . (i.e., Tribal and State courts)" to apply these rules in a separate probate for non-trust property.²³⁰

Thus, we now have a new class of property interests—permanent improvements in fee on trust lands—that are subject to still more novel jurisdictional rules. Substantive trust-property probate rules determine who inherits the improvement, but this final probate transfer must separately be executed through state or tribal probate court procedures (mechanically, with no new law to apply, creating one more hoop for landowners to jump through).²³¹ And, perhaps most troubling, all of the potential use, possession, and other jurisdictional conflicts between trust lands and fee-property improvements on those lands remain.

227. Act of Dec. 2, 2008, Pub. L. No. 110-453, tit. II, § 207(c)(2), 122 Stat. 5027, 5029, 5031 (codified at 25 U.S.C. §§ 2206(a)(2), (h)(1)(B)–(C) (2012)) (using the titles "[i]ntestate descent of permanent improvements," "[p]ermanent improvements," and "[a]pplication and effect").

228. Compare *id.* with Indian Trust Management Reform—Implementation of Statutory Changes, 76 Fed. Reg. 7500, 7501 (Feb. 10, 2011) (codified at 25 C.F.R. pt. 15).

229. 43 C.F.R. § 30.102 (2016).

230. Indian Trust Management Reform—Implementation of Statutory Changes, 76 Fed. Reg. at 7501.

231. The Department of the Interior did, however, attempt to clarify that these improvements—though in fee—are also of a special category of fee property, because they should not, according to the Department of the Interior, be subject to state tax. See Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,448 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162).

B. *Indian vs. Non-Indian*

Another threshold categorization distinguishes Indians from non-Indians for land tenure purposes. This difference also has tremendous property and sovereignty consequences.²³² As discussed above, tribes have greater jurisdiction over Indians, while states assert more power over non-Indians. And, generally, only Indians can own land in the federal trust status. If an Indian landowner validly passes property to a non-Indian, by law, that land automatically passes out of trust and into fee—and into an entirely different jurisdictional category.

Primarily motivated by the potential loss of tribal jurisdiction with trust-to-fee conversions, some reformers have sought to eliminate some of the mechanisms by which land can pass out of trust and into fee.²³³ For example, amendments to the Indian Land Consolidation Act (“ILCA”) passed in 2000 would have made it more difficult—and, in some contexts, outright impossible—to make certain transfers to non-Indian devisees or heirs upon an Indian landowner’s death.²³⁴ These changes were controversial in Indian country, however, because they also introduced a new, and arguably more limited, definition of who qualified as “Indian” for this purpose.²³⁵ Many trust landowners feared these changes would force them to disinherit relatives whom they had previously understood to qualify for trust land ownership.²³⁶ This concern had the perverse consequence of causing many trust beneficiaries to rush to take land out of trust status during their lifetimes to avoid these strict after-death limitations (that were ironically, at least on their face, presented as intending to *preserve* the land’s trust status).²³⁷

Many of ILCA’s amendments in 2000 were never certified by the Secretary of the Interior, however, and, therefore, were never made effective.²³⁸

232. See *supra* Section I.A.

233. See, e.g., Gover, *supra* note 22, at 342–45 (cataloging advantages of trust status); *infra* Section IV.B.1.

234. Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, sec. 103, § 207(a)(1)–(2), 114 Stat. 1991, 1995–96 (permitting full devises to Indians only and limiting non-Indian devisees to life estates); *id.* sec. 103, § 207(b)(1)–(2), 114 Stat. at 1996–97 (limiting intestate distribution to only limited classes of non-Indians, and, even then, permitting only life estates to transfer).

235. *Id.* sec. 103, § 202(2), 114 Stat. at 1992 (limiting the Indian definition to any person who is a member, or is eligible to become a member, in an Indian tribe, or to “any person who has been found to meet the definition of ‘Indian’ under a provision of Federal law if the Secretary determines that using such law’s definition of Indian is consistent with the purposes of this Act[]”).

236. See John C. Sledd, Events Leading to the American Indian Probate Reform Act of 2004 (AIPRA) 9–10 (May 2005) (unpublished manuscript), <https://www.iltf.org/sites/default/files/Events%20Leading%20to%20AIPRA%20%28Sledd%29.pdf> [<https://perma.cc/R3LJ-C3UA>]; see also Shoemaker, *Emulsified Property*, *supra* note 8, at 973–74.

237. Shoemaker, *Emulsified Property*, *supra* note 8, at 973–74.

238. See sec. 103, §§ 207(g)(4)–(5), 114 Stat. at 1999.

Instead, in response to this turmoil, Congress passed AIPRA.²³⁹ AIPRA defines Indian more broadly for trust purposes²⁴⁰ and creates a new, novel class of individuals who are not deemed Indian per se, but who are nonetheless “eligible heirs.”²⁴¹ These eligible heirs may take land in “the same trust or restricted status as such interest was held immediate prior to the decedent’s death.”²⁴² Non-Indians can still qualify as eligible heirs for this purpose, as long as they are “lineal descendants within two degrees of consanguinity of an Indian.”²⁴³ This potential for eligible close relatives to take property in trust status, regardless of whether they are technically Indian under the Act, reduced the concern for some Indian landowners about limits on distributions of trust property to family members. This new distinction between Indians, non-Indians, and eligible heirs does, however, add a new category of distinctions for land tenure purposes. It also pushes off a future problem—only individuals within two degrees of consanguinity of a qualifying Indian can take property under this category. At some future point, eligible heirs may be prohibited from passing this trust property to their own further-removed family members in the same status.

Perhaps more challenging, AIPRA also adds another fine-grain distinction within Indian land tenure by creating a novel hybrid property interest within trust properties. In particular, surviving spouses, including non-Indian spouses, are now entitled to a special “life estate without regard to waste” in some intestate distributions.²⁴⁴ The status of these life estates without regard to waste, especially for non-Indian life tenants, is not clearly in either trust or fee but, instead, appears to be something like a unique “quasi-trust” for spouses of Indian decedents,²⁴⁵ an odd new jurisdictional hybrid. The federal government continues some management of the life tenant’s

239. American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773 (codified in scattered sections of 25 U.S.C.); COHEN’S HANDBOOK, *supra* note 4, §16.05[2][c], at 1095–98.

240. *See* 25 U.S.C. § 2201(2) (2012).

241. *Id.* § 2201(9).

242. *Id.* §§ 2206(a)(2), (5); *see also id.* §§ 2206(b)(1) (also providing for similar trust-status preservation, absent contrary decedent intent, to qualifying beneficiaries of a testamentary devise).

243. *Id.* § 2201(9)(b).

244. *Id.* § 2206(a)(2)(A) (providing for descent of life estate without regard to waste to certain surviving spouses). *But see id.* § 2206(a)(2)(D)(ii) (prohibiting intestate distribution of life estates in fractional trust interests amounting to less than 5 percent of the entire parcel, unless a surviving spouse is residing on the property). In some cases, non-Indians may also take life estates in trust property by testamentary devise, but in another odd technicality of the statute, these devised life estates are not similarly designated expressly as “without regard to waste.” *See id.* § 2206(b)(2)(A)(i).

245. *See id.* § 2206(a)(5) (excluding a spouse’s inherited life estate without regard to waste from general rule that inherited interests under AIPRA will pass in the same trust status that the decedent held the property in). *But see* Estate of Raymond P. Sausser, 59 IBIA. 29, 32 n.3 (2014) (noting in footnote that a “devise of a life estate in trust property to a non-Indian . . . does not, by itself, remove trust property from trust status”).

interests for the sake of the future Indian remainder holders, but exactly how these jurisdictional issues will shake out is still to be determined.²⁴⁶

When an Indian decedent writes a will, there are still other possibilities for what may be a different category of non-Indian life estates.²⁴⁷ To start, there is tremendous difficulty in determining even when this special non-Indian life estate by devise will be deployed. It depends, for example, on whether the relevant tribe adopted the Indian Reorganization Act (“IRA”) in the 1930s and, if they did, whether they elect to change the IRA’s alienation restraints under new authority also recently created.²⁴⁸ If a non-Indian life estate is created by devise, however, there is nothing in the statutory language of AIPRA that specifies the estate is “without waste,” although life estates created by descent in the same statute are “without waste.”²⁴⁹ Again, this creates still more dimensions of complex jurisdictional confusion and difficulty, especially within already-fractionated Indian trust properties.

These new categories of eligible heirs and different types of non-Indian life estates, although well intentioned, create even more complexity in Indian land use and administration. For example, creating these life estates does little to streamline management or reduce the administrative costs of maintaining federal trust records²⁵⁰—in fact, it does the opposite. The possessory interests in the allotment are further fractionated, not only concurrently, but also across time, with additional levels of different types of consecutive sub-interests created within single parcels.

246. “Without regard to waste” is defined as entitling the life tenant “to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen.” 25 U.S.C. § 2201(10); *see also* 25 C.F.R. § 179.202 (2016) (allowing the “lawful depletion” of resources by the holder of a life estate without waste). At least one challenge to the constitutionality of this provision has been brought by legal remainder holders, who assert that a life tenant’s right to all income from the trust property during her life could substantially diminish their future interest in the same property. *See Fredericks v. United States*, 125 Fed. Cl. 404, 415 (2016). The court concluded that the remainder holders had stated a cognizable Fifth Amendment takings claim in this new no-waste rule, and it remanded the case for further proceedings on the merits. *Id.* at 421.

247. *See* 25 U.S.C. §§ 2206(b)(1)(a)–(b), (2)(A) (outlining potential devises, including devises to non-Indians in life estates, or, in some cases, in fee status, where that non-Indian does not qualify as a lineal descendant of the testator or is not otherwise a co-owner of a trust interest in the same property).

248. *See id.* § 2206(b)(2)(B) (cross-referencing to the IRA’s land transfer restriction); *see also* Act of Dec. 2, 2008, Pub. L. No. 110-453, tit. II, § 207(c), 122 Stat. 5027, 5030 (codified at 25 U.S.C. § 2206(b)(2)(B)(ii)) (adding the IRA opt-out mechanism).

249. *See supra* note 244 and accompanying text.

250. One tribal representative, in advocating for these kinds of life estate options, acknowledged, “[w]e recognize that this system of devise could potentially lead to greater fractionalization of possessory interests in Indian lands, but at least the underlying ownership would not be further fragmented.” *Indian Land Consolidation Act: Hearing on S. 1340 Before the S. Comm. on Indian Affairs*, 107th Cong. 51 (2002) [hereinafter Congressional ILCA Hearing] (statement of Hon. Maurice Lyons, Chairman of the Morongo Band of Mission Indians).

C. *Property Right vs. Property Right*

Finally, recent efforts to subdivide property and sovereignty have surpassed even the “big boxes” of fee versus trust or Indian versus non-Indian. Now, while the Department of the Interior asserts that it is trying to give landowners more autonomy in management of their own land, it is actually creating more granular distinctions of types of property interests that are subject to federal jurisdiction and those that are not.

The best example of this is the Department of the Interior's recent decision to distinguish “permits” from “leases” of trust land. Under new leasing regulations, for the first time, the Department of the Interior categorically exempts “permits” for short-term, non-possessory, revocable rights for some limited uses of Indian land from BIA approval, administration, and enforcement authority.²⁵¹ By removing some “permits” on Indian allotments from BIA oversight and control, this new rule is a creative and even somewhat laudable effort to affirm more local control of temporary uses of Indian land, including potentially uses by Indian owners themselves. But it is difficult in practice to distinguish “use” from “possession,” especially where entire regulatory regimes turn on the difference. If it is use, it is tribal; if it is possession, it is federal. Adding even more difficulty to the new regime, the BIA has also implemented a new rule that requires the landowner or permittee to submit to a threshold check by the agency itself of the propriety of the use's designation as a “permit” (as opposed to a “lease,” for which federal approval and other bureaucratic administration would be required)—thereby cementing the BIA's role in even this effort to increase landowner autonomy and tribal control.²⁵²

The new rule also defines these more flexible “permits” narrowly, such that they are not considered an interest in land, and grazing and other specified types of common “permits” are still treated separately and remain subject to extensive BIA oversight and control.²⁵³ A permit, for this purpose, is any “written, non-assignable agreement . . . whereby the permittee is granted a temporary, revocable privilege to use Indian land or Government land, for a specified purpose.”²⁵⁴ This means that, under the new BIA policy, Indian landowners “will be responsible for collecting permit payments,

251. 25 C.F.R. § 162.007 (2016) (differentiating between “permits” and “leases”); Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,445–46 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) (expressing the intent to define a “permit” as different from a “lease”).

252. 25 C.F.R. § 162.007(a)(2); see also *infra* note 375 and accompanying text.

253. See Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. at 72,444–45, 72,470; see also 25 C.F.R. §§ 163.1–.83, 166.1–.1001 (separate regulatory sections for timber and grazing permits).

254. 25 C.F.R. § 162.003 (defining “Permit”). A lease, by contrast, conveys “a right to possess Indian land, for a specified purpose and duration.” *Id.* (defining “Lease”).

rather than BIA,” and the BIA will not otherwise administer or enforce permits.²⁵⁵ In reality, however, the BIA is not going out of a job, and landowners are not enjoying much true flexibility. Instead, there is simply more jurisdictional complexity, even within singular properties.

Another example of micro-categorizing property and sovereignty variables within property right “bundles” is manifested in the rule that tribes have the right to assign, without federal oversight and control, certain use or possession rights to their own tribal lands (both in trust and in fee) to individual members. This is formulated as an “assignment” of tribal lands—a property right subject to specific terms, such as a ninety-nine-year assignment of a homesite on tribal land where a member’s house may be built.²⁵⁶ In general, however, when the tribe grants an assignment of tribal land, the Department of the Interior “will not recognize a tribal land assignment as an individual trust interest that may be conveyed or that operates as an encumbrance on tribal trust land although the tribe may treat the assignment as a temporary possessory interest or owner use privilege.”²⁵⁷ The assignee’s rights are otherwise defined by the tribe alone.²⁵⁸

Recently, however, the Ninth Circuit held that the Trade and Intercourse Act still applies such that a tribe is prohibited from executing, without federal approval, any kind of land assignment to tribal members where the assignment too closely resembles a fee simple conveyance.²⁵⁹ Thus, where a federal court determined that a given transfer caused a tribe to lose possession rights and permitted descent and alienation of the assigned interest, the transfer was invalidated for being executed without federal approval—even where the tribe’s title was not extinguished.²⁶⁰ Thus, the new jurisdictional categorization is this: a tribe can “assign,” but only if it does not look too much like “alienation,” which is still a right in the domain of federal control. Totally different jurisdictional results follow based on whether a given conveyance looks more like a transfer (requiring federal approval) or a “mere assignment.”

255. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. at 72,445.

256. See, e.g., 25 C.F.R. § 162.207(a) (discussing tribal land assignments as distinguished from leases of tribal lands, which require consent of holders of any prior tribal assignments, as well as the tribe itself). Some tribes, such as the Navajo, also continue to recognize other forms of individual customary use rights on tribal lands. See, e.g., Ezra Rosser, *This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 257, 263 (2005).

257. BUREAU OF INDIAN AFFAIRS, INDIAN AFFAIRS MANUAL pt. 52, ch. 10, § 1.1 (2008); see also 25 C.F.R. § 84.004(d) (explaining that secretarial approval is not required for “[c]ontracts or agreements that convey to tribal members any rights for temporary use of tribal lands, assigned by Indian tribes in accordance with tribal rights or custom”).

258. *Id.*

259. See *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 906 (9th Cir. 2014).

260. *Id.* at 906–10.

While arguably intended to add regulatory certainty and support tribal sovereignty, these recent reforms just increase the burden of the system's overall complexity. The result has neither sufficient flexibility nor certainty. Strikingly, we continue to make finer and finer land tenure distinctions in a rigid and inflexible way, but without any certainty as to how those categories should be applied, and with dramatic consequences. This problem of hyper-categorization seems to be increasing over time in a way that makes Indian property more complex, more difficult to use, and more subject to gridlock and waste.

IV. FINDING PURPOSE

This whole American Indian land tenure system, with its roots in the allotment policy itself, was founded on a fundamental belief in the importance of property law—the belief that land tenure reforms could transform Indian people and Indian communities socially, culturally, and economically.²⁶¹ Indeed, entire stretches of historic federal Indian policy periods, from allotment to removal to termination, have used land reform to reengineer Indian nations' physical and metaphysical place in the world.²⁶² Those policies were morally repugnant, but this comparison begs the question: What purpose is this current, complex tenure system serving? This Part asks what functions this property system really serves, exploring both general accounts of private ownership from property theory and the more specialized, Indian-specific justifications that are sometimes proffered. It concludes that the current framework fails to serve any of these purposes well. Instead, this Part offers more insidious, largely unspoken, reasons for the persistent complexity, but, more importantly, it paves the way for a more intentional, purpose-based restructuring over time.

A. *Theorizing American Indian Property*

Comprehensive accounts of property (at least, Westernized accounts)²⁶³ tend to focus on one of three justifications for private property institutions: (1) preserving fundamental liberty rights of owners (property rights as a

261. See *supra* note 27 and accompanying text.

262. See, e.g., 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 660–65 (1984).

263. Certainly, there is tension in even the idea of using the academy's own (largely anglophile) theories of what private property should be to test the legitimacy or success of American Indian property. American Indian property does not have to follow Western, Anglo-American notions of what property and land use (or a land ethic) should be. Cf. Guzman, *supra* note 14, at 657–61 (articulating the importance of both individual and tribal, as well as traditional and modern, property perspectives). At the same time, however, we have to avoid the stereotyping of “what Indians want,” or freezing Indian culture and Indian property at some mythical idea of Indians as they appear in storybooks—communist, anti-property, and naïve. See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 270–71 (1996) (emphasizing the importance of avoiding stereotypes or assumptions regarding Indian land values and ethics). At least by evaluating Indian land tenure using existing metrics, it shows that the current

bulwark against government interference); (2) utilitarianism (property rights as an efficient market tool); and (3) human flourishing (property rights as organizing social relationships around resources to achieve a range of human values for all). Under each property framework, Indian land tenure's current, complex system fails.

1. Individual Rights

Rights theories of ownership conceptualize private property as a reflection of, and protection for, individual rights.²⁶⁴ These theories, most typically associated with Locke, but also typified in many other philosophers' works, are not premised on any instrumentalist or consequentialist function of property for the collective good. Rather, they are based primarily on pre-political or natural law sources and reflect notions of moral desert.²⁶⁵ In this frame, property rights exist because they protect individual liberty and autonomy.²⁶⁶ If anything, private property rights serve as a buffer between the autonomous individual and the influence and control of the state.

Indian landowners, of course, enjoy no such buffer. Rights-driven accounts of property emphasize an owner's freedom to possess, manage, use, and receive income from the object of the property; to consume or destroy the asset; and to sell, transfer, and exclude others from it.²⁶⁷ The right to possess one's own property—and simultaneously exclude others from that possession—is centrally important to this account.²⁶⁸ Alienability is also particularly important, and rules of inalienability are generally highly suspect in these property frameworks.²⁶⁹ Indian landowners can neither alienate their interests nor possess any jointly owned lands without the express, case-by-case approval of the federal government.²⁷⁰ In addition, nearly every other

(largely federally imposed) institutions are not even working under Western property theory's existing benchmarks.

264. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 172, 176 (1978); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 38–39, 62 (1988).

265. ALEXANDER & PEÑALVER, *supra* note 17, at 36–37; JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY* 95 (2002) (concluding that Locke's treatise “adds up to a natural law argument”); see also STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 254–255 (1990).

266. See WALDRON, *supra* note 264, at 38–39.

267. A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 113, 116 (A.G. Guest ed., 1961); see also Stephen R. Munzer, *The Commons and the Anticommons in the Law and Theory of Property*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 148, 149 (Martin P. Golding & William A. Edmundson eds., 2005); J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 *UCLA L. REV.* 711, 755–759 (1996).

268. E.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 *NEB. L. REV.* 730, 730–31 (1998); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (emphasizing property law's role in protecting an “owner's expectation that he will be relatively undisturbed at least in the possession of his property”).

269. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1111–14 (1972); Lee Anne Fennell, *Adjusting Alienability*, 122 *HARV. L. REV.* 1403 (2009).

270. See *supra* notes 120–125 and accompanying text.

individual land-use decision is similarly managed by government oversight and control. This is the opposite of individual liberty and autonomous expression.²⁷¹

2. Utilitarianism and Information Costs

Utilitarian theories of property focus on the role of private property in maximizing aggregate social welfare, often using economic efficiency as the central metric of success.²⁷² For example, clear, certain property rights are generally assumed to increase economic efficiency by encouraging secure investment, thereby encouraging productive activity.²⁷³ By internalizing certain externalities, private property is also thought to encourage efficient use of resources.²⁷⁴

As a factual matter, the land tenure system in Indian country has neither created wealth nor encouraged reasonable resource development. Allotment itself reduced economic outputs in Indian country.²⁷⁵ Today, the restrictive administrative regime and patchwork jurisdictional framework take the blame for some of the worst and most persistent poverty in the United States in Indian reservations.²⁷⁶ Economists have repeatedly shown that the trust regime and jurisdictional patchwork cause reduced investment in Indian lands, as compared to neighboring fee properties.²⁷⁷ And more than half of

271. The stark lack of owner autonomy in Indian trust ownership may make some question whether Indian trust property constitutes private property at all. The U.S. Supreme Court has twice held, however, that individual Indians' interests in trust lands are constitutionally protected private property rights. See *supra* note 193 and accompanying text.

272. See JOSEPH WILLIAM SINGER ET AL., *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* xliii (6th ed. 2014). Social utility and welfare are not necessarily the same as economic efficiency, but they often overlap. See, e.g., ALEXANDER & PEÑALVER, *supra* note 17, at 11–34; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3–17 (9th ed. 2014).

273. Related to certainty is the importance of security. For example, Thomas Merrill and Henry Smith have explained that advanced economic issues of concern “exist at the apex of a pyramid, the base of which consists of the security of property rights.” See Merrill & Smith, *What Happened*, *supra* note 17, at 398 (footnote omitted).

274. See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 356 (1967).

275. See *supra* note 36 and accompanying text.

276. See Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 *OR. L. REV.* 757, 851–52 (2001) (blaming “[t]he cumbersome and inefficient federal bureaucracy” and trust status for hindering reservation economic development).

277. See Randall Akee, *Checkerboards and Coase: The Effect of Property Institutions on Efficiency in Housing Markets*, 52 *J.L. & ECON.* 395, 397–99 (2009); Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 *J.L. & ECON.* 427 (1992) (finding that land tenure systems contribute to a decrease in agricultural productivity on Indian lands); see also Dwight Newman, *The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study*, 95 *NEB. L. REV.* (forthcoming 2016) (manuscript at 2–4) (collecting sources and discussing the economic characteristics of indigenous property rights generally).

co-owned Indian trust properties are currently idle or generating no income.²⁷⁸ Not surprisingly, Indian people continue to suffer from extreme poverty, with low rates of home ownership and a high degree of unemployment, despite widespread land ownership on paper.²⁷⁹

Utilitarian property scholarship also provides insights into the reasons for these inefficiencies and negative outcomes. At least three threads of this literature point to contributing causes: transaction costs generally, information costs specifically, and property-scale issues. First, the addition of a federal administrative layer over every land-use decision and action adds unique transaction costs to any land use in Indian country.²⁸⁰ Even where Indian property rights are relatively secure, the federal management role can impede development.²⁸¹ The restrictiveness of the federal trust title, especially as it relates to alienation, limits investment and access to capital in Indian country, because Indian lands are not designed to be used as directly and efficiently as non-Indian fee lands.²⁸² This impediment encourages waste of resources.²⁸³ Trust land is extremely difficult to use as collateral to secure credit, and investors may be wary of the significant additional administrative delays and other transaction costs involved in any land transaction requiring federal agency involvement.

Relatedly, but more specifically, the information costs are enormous for owners and users of Indian land. Professors Thomas Merrill and Henry Smith have argued that, first and foremost, property institutions standardize the rights of owners to most efficiently facilitate transactions with uniform packets of information.²⁸⁴ There is a significant information cost in Indian lands, given the uncertainty of how these rights are defined and who governs what. This uncertainty includes not only jurisdictional doubts, but also the fact that the BIA has historically been roundly critiqued for terrible mismanagement and a raging backlog of accounting duties.²⁸⁵ In addition, to the extent that tribally defined rights are novel, and current systems require

278. BUY-BACK PLAN, *supra* note 18, at 6.

279. See Shoemaker, *No Sticks*, *supra* note 124, at 395–99 (summarizing recent data on reservation resource bases compared to communities' pressing economic, and other, needs).

280. See Miller, *supra* note 276, at 851–52.

281. See, e.g., Rosser, *supra* note 36, at 65 & n.19.

282. See Miller, *supra* note 276, at 841–42, 852 (discussing the lack of credit and capital access because of alienation restraints on the primary asset in land); see also Gavin Clarkson & Alisha Murphy, *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability*, 12 J.L. ECON & POL'Y 177 (2016) (discussing how U.S. policies have produced negative economic conditions in Indian country).

283. See Heller, *supra* note 160, at 1199 n.174.

284. E.g., Merrill & Smith, *Optimal Standardization*, *supra* note 17, at 9–12; Merrill & Smith, *What Happened*, *supra* note 17, at 385–88.

285. E.g., David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 213 (2004) (describing a more-than-100-year staff backlog and the “glacial pace of BIA title searches” as a limit on tribal economic development activities).

them to be translated within state-sanctioned systems, this difference creates a new communication cost.²⁸⁶

Finally, private property rights should be ideally scaled to achieve the productive use of resources,²⁸⁷ and property institutions should be designed to maintain private property at this usable scale—drifting neither into too-weak regimes, where tragedy-of-the-commons issues emerge,²⁸⁸ nor into anticommons tragedies, with the proliferation of too many discrete property rights.²⁸⁹ The fractionated status of Indian lands is often cited as an example of an anticommons problem,²⁹⁰ and data confirm predictably worsening household incomes, the declines in which are attributed to fractionation.²⁹¹

3. Human Flourishing

Progressive property theories—perhaps the most difficult metric by which to assess the success of the Indian land tenure system—focus primarily on property's multi-purposed role in organizing social relationships around the control of resources. Instead of viewing private property exclusively as a bounded area of individual autonomy, or as a social instrument with the singular goal of productive efficiency, progressive theorists focus on property as regulating a complex web of interactions and social relationships.²⁹² This approach considers, for example, the relative interconnectedness of neighbors and the impact on the excluded caused by the state's delegation to a single owner of a private property right to exclude.²⁹³ This relates to a broader, more pluralistic view of property law's functions that seeks to achieve not only economically measured "utility," but also a more encompassing ideal of overall "human flourishing."²⁹⁴

The central animating idea is that property law organizes individuals' relationships with each other and with the physical environment and that

286. See Abraham Bell & Gideon Parchomovsky, *Property Lost in Translation*, 80 U. CHI. L. REV. 515, 553 (2013).

287. See *supra* note 198 and accompanying text.

288. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

289. Heller, *Anticommons*, *supra* note 25, at 668–69.

290. See, e.g., *id.* at 685–87. This may not be a perfect descriptor for the challenge, however, particularly to the extent that individual Indian co-owners' rights are so limited by a centralized management role of the federal government. See Shoemaker, *No Sticks*, *supra* note 124, at 387.

291. Russ & Stratmann, *supra* note 178, at 2–3.

292. See, e.g., Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009) (describing property's social values).

293. *Id.*; see also JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 13–15 (2000); Mulvaney, *supra* note 26, at 349–52; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 657 (1988).

294. Alexander et al., *supra* note 292, at 743 ("Property implicates plural and incommensurable values."); see also Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1018 & n.3 (2011); Eric T. Freyfogle, *Private Ownership and Human Flourishing: An Exploratory Overview*, 24 STELLENBOSCH L. REV. 430, 441–43 (2013).

the ends to be balanced in designing these systems are multifaceted, conflicting, and pluralistic.²⁹⁵ Through this broad notion of property law's function, we recognize and enforce who has access to what resources; who is "in" and who is "out" in defined physical spaces; and how we collectively understand our relationships to the world.²⁹⁶ Our choices within this complex system of property, then, are "extremely fundamental to the structure of human societies as going concerns."²⁹⁷ Professor Joseph Singer, in particular, has argued that property is a political institution, and that it must be situated as such to facilitate robust and egalitarian democratic engagement in the political process—or, to paraphrase Professor Singer, to create a world where all human beings are treated with equal dignity and respect.²⁹⁸

One of the most striking things about U.S. Indian policy is its shaping of indigenous communities in a top-down, decidedly undemocratic way. Allotment, for example, replaced the traditional tribal role of defining these legal and social relationships through indigenous property understandings with a single, top-down federal form of land tenure.²⁹⁹

The predominantly top-down federal land tenure regime that persists today continues to impact not only Indian landowners, but also tribal sovereignty in many of the same inflexible ways. Just as indigenous nations historically had their own diverse land tenure systems and property institutions, many Native scholars continue to emphasize the unique modern relationship with the land that persists in many American Indian communities today.³⁰⁰ Before European contact, indigenous nations had many various land tenure systems.³⁰¹ The nomadic tribes where systems were based on shifting hunting territories typically had temporary use rights.³⁰² Farming tribes that

295. Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1600 n.8 (2008).

296. See A. Irving Hallowell, *The Nature and Function of Property as a Social Institution*, 1 J. LEGAL & POL. SOC. 115, 120 (1943) (discussing how property rights not only benefit owners, but also directly impact the non-owners, and concluding that "[p]roperty is a social institution because, like other institutions, it structuralizes human relations in order that certain ends may be achieved").

297. *Id.* at 133 ("Consequently, property rights are not only an integral part of economic organization of any society; they are likewise a coordinating factor in the functioning of the social order as a whole."); see also PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY 3 (2014) ("A society is known by its property system because a society's property system expresses society's values about the distribution and use of its resources.").

298. Joseph William Singer, Essay, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1051–52 (2009). Given its pluralistic foundations, it is unsurprising that this progressive property school has not settled on a clear definition of what those values include, how to measure them, or even how to talk about them. See generally Rosser, *supra* note 26, at 115–26 (describing varying theories that fit under progressive property).

299. See *supra* notes 29–32 and accompanying text.

300. See *supra* note 39 and accompanying text.

301. See generally Bobroff, *supra* note 27, at 1571–94 (presenting an overview of the "myriad different property systems, varying widely by culture, resources, geography, and historical period" of indigenous tribes).

302. *Id.* at 1592.

were more settled often had more established guarantees of individual possession.³⁰³ In many indigenous cultures, however, land has a fully different concept.³⁰⁴ Thus, how we define legal rights to land is critically important—economically, but also socially and culturally.³⁰⁵ Our systems of land tenure shape many other dimensions of human life: distributions of economic entitlements, access to shelter and spaces for sustenance, and inclusion or exclusion from community life.³⁰⁶ In indigenous communities, land and place are often particularly intertwined with religion and culture and even identity as a “people.”³⁰⁷ How we understand “the land”—our land ethic—also shapes many other decisions. Are we stewards of a sacred place? Is the land our responsibility to develop? Are resources fungible commodities we should use before we lose?³⁰⁸ In this way, property law communicates social values.

Under this account of Indian land tenure, the central problem is the completely dysfunctional governance systems that created this property regime. Tribes do not truly communicate their land ethics or organize social relations through the mess of jurisdictional checkerboards, emulsions, and property-versus-sovereignty stratifications.³⁰⁹ Instead, the system perpetuates a high degree of federal control and, in areas of uncertainty, sovereign-to-sovereign animosity and land-use-related jurisdictional conflict.³¹⁰

303. *Id.* at 1593–94.

304. *E.g.*, Winona LaDuke, *2012 Dodge Lecture: Food Sovereignty, Biopiracy, and the Future*, YouTube (Apr. 26, 2012), <https://www.youtube.com/watch?v=Un1hx-n5Pcc> [<https://perma.cc/9T8G-BUW6>] (finding significance in the different world views of Ojibwe citizens, whose calendar is marked by seasonal changes to the land, and non-Indian U.S. citizens, whose calendar is marked by months named after Roman emperors bent on acquisition and colonialism).

305. As just one example, Professor Underkuffler has noted how we are much more willing to assert redistributed claims to money than we are to land. LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 121 (2003); *see also* Rosser, *supra* note 26, at 151 n.283 (discussing the same).

306. *See* Joseph William Singer, *Titles of Nobility: Poverty, Immigration, and Property in a Free and Democratic Society*, 1 J. L. PROP. & SOC'Y 1, 1 (2014) (emphasizing the relationship between one person's right to exclude and another person's right to find a place to sleep).

307. *E.g.*, Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 348–55 (2008) (describing the connection between sacred spaces and Indian peoplehood). Professor Carpenter sums this concept up succinctly in the epigraph to her article: “When this place is destroyed, the Cherokee people cease to exist as a people.” *Id.* at 315 (quoting BRIAN EDWARD BROWN, *RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND* 15 (1999)); *see also* Tsosie, *supra* note 39.

308. For a broad overview of ethics and land use, *see* TIMOTHY BEATLEY, *ETHICAL LAND USE* (1994).

309. *See* Riley & Carpenter, *supra* note 39, at 880 (quoting Principal Chief Wilma Mankiller of the Cherokee Nation's statement that federal Indian land policies, including allotment, “profoundly altered our sense of community and our social structure” (quoting Mishuana Goeman, *Land as Life: Unsettling the Logics of Containment*, in *NATIVE STUDIES KEYWORDS* 71, 79 (Stephanie Nohelani Teves et al. eds., 2015))).

310. *See* Webster, *supra* note 131, at 10, 16 (reflecting on the pattern of inter-governmental land-use conflict, but still expressing optimism for a more cooperative future).

One of the founding figures of the progressive property school, Morris Cohen, argued that modern property rights are delegations of state sovereign authority to private individuals, who receive rights good against the world.³¹¹ As such, allocations, distributions, and definitions of individual property rights must be justified by the same sense of morality and public good that any direct state action would require.³¹² It is striking how much of Indian land tenure is divorced from this central tenet. Indian property rights are not allocated to reflect sovereign values. Rather, Indian property rights are somehow used to allocate jurisdictional rights *between* sovereigns. This topsy-turvy reversal of how property and sovereignty typically work does not achieve broad-based flourishing, reflective of indigenous social values, in Indian communities. Even more troubling, Indian people, who are uniquely subject to this perverse system, are certainly not treated as human beings entitled to the equal dignity and respect they deserve.³¹³

B. *Stated Reasons for Persistence*

Although Indian land tenure rather clearly fails to achieve the goals of any of the prevailing justifications for property law, the reality is that many tribes and Indian landowners still seek to preserve various aspects of the current system. Indeed, even apart from the presence or persuasiveness of any of its supporters, the system persists. This Section begins to explore why, identifying four specialized justifications often offered to justify at least portions of the modern tenure framework. It closes with my own analysis of additional, less-touted reasons for the system's persistence.

1. Tribal Jurisdiction

Because all of the existing jurisdictional frameworks within Indian country draw such a firm jurisdictional divide between trust and fee properties, the trust status is at least seen as a critical buffer for preserving tribal jurisdiction. The trust status clearly excludes state authority over most aspects of trust land management.³¹⁴ States generally have no authority to define property rights to Indian trust lands.³¹⁵ States also have no rights to

311. See Cohen, *supra* note 87, at 9–11.

312. See *id.* at 21–23.

313. For a compelling discussion of the relationship between property institutions and the values of human dignity, equality, and respect, see, for example, Singer, *supra* note 298, at 1053–55, 1061–62.

314. See *supra* notes 67–72 and accompanying text.

315. *E.g.*, Estate of Ducheneaux v. Ducheneaux, 861 N.W.2d 519, 526–27 (S.D. 2015) (finding that state courts lack jurisdiction to “adjudicate the right to possession of Indian trust land”); see also COHEN’S HANDBOOK, *supra* note 4, § 6.01[1], at 489–90, § 6.03[1][a], at 511–12. *But see* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 423–25, 428–32 (1989) (opinion of White, J.) (recognizing some state zoning rights over Indian trust lands located in largely open, predominantly non-Indian area of reservation). Until recently, the Department of the Interior also applied state intestacy laws when probating Indian trust property. 25 U.S.C. § 348 (2000). The AIPRA, *supra* note 104, changes that.

tax trust property³¹⁶ or, under current Department of the Interior regulations, to tax any improvements or activities authorized on Indian lands by a federally approved lease instrument, even if the lessee is non-Indian.³¹⁷ This protection from state incursions is one of few relatively clear jurisdictional rules in Indian country.

Thus, when threats to the trust status are perceived, Indian representatives often protest and express a collective desire to preserve the trust status, primarily because of the categorical protection it provides from most state jurisdiction.³¹⁸ Indeed, tribes often seek to have more land taken into trust.³¹⁹ In addition, when the Indian Law Resource Center (“ILRC”), with the support of the Indian Land Tenure Foundation, set out its proposals for what Indian land tenure *ought* to look like, the ILRC did not propose changing Native allottees’ property rights, arguing that Native lands should remain “untaxable” and “inalienable,” and generally providing that “Native land would continue to be held in trust so long as the Native owner wished it to be in trust.”³²⁰

But it is circular and unsatisfying to say that one part of the entire complex tenure framework (i.e., trust status) is supported because the rest of the complex framework requires it (i.e., defining jurisdiction by property ownership). In addition, given the extent of federal control over trust properties, the degree to which tribes are actually able to assert sovereignty—at least as to land-related issues and property law itself—is often limited. In narrow cases, like Indian gaming, land generally must be in trust for tribes to operate certain gaming enterprises on it.³²¹ But beyond these narrow examples and benefits, ironically, trust status preserves some protection from state jurisdiction, yet leaves very little actual tribal jurisdiction over the property itself.³²²

316. *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998).

317. 25 C.F.R. § 162.017 (2016); *see also supra* note 231 and accompanying text.

318. *See, e.g.*, Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, sec. 101(14), 114 Stat. 1991, 1992; Congressional ILCA Hearing, *supra* note 250, at 30 (statement of Hon. Maurice Lyons, Chairman of the Morongo Band of Mission Indians).

319. *See, e.g.*, *Alaska Tribes Win Trust Land Appeal Before D.C. Circuit Court*, NATIVE AMERICAN RIGHTS FUND (July 1, 2016), <http://www.narf.org/2016/07/alaska-tribes-win-trust-lands-appeal-d-c-circuit-court/> [<https://perma.cc/T2JM-AJMX>]; Press Release, U.S. Dep’t of the Interior, Obama Administration Exceeds Ambitious Goal to Restore 500,000 Acres of Tribal Homelands (Oct. 12, 2016), <https://www.doi.gov/pressreleases/obama-administration-exceeds-ambitious-goal-restore-500000-acres-tribal-homelands> [<https://perma.cc/GX7X-ETHS>]. *See generally* BUREAU OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK) (2016) (describing the procedures for transferring land into trust or restricted status).

320. INDIAN LAW RES. CTR., NATIVE LAND LAW § 1.1, at 7 (2016) [hereinafter NATIVE LAND LAW].

321. *See* Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 4(4), 102 Stat. 2467, 2468 (1988).

322. *See, e.g., supra* notes 129–130 and accompanying text.

To be fair, the ILRC does argue for “far greater freedom, with far less federal interference, with greater certainty about their ownership and control over their lands and resources.”³²³ This would include clear “governmental authority over allotted lands owned by Indian or Native persons within the reservation or subject to the jurisdiction of the Native government.”³²⁴ In addition, several scholars and Indian advocates have argued for other changes to the trust regime that would increase tribal autonomy over Indian lands, with necessary protections to ensure tribal jurisdiction and tribal taxing power over the land.³²⁵ Some legislation to this effect has been proposed, but never passed.³²⁶ There have also been many general calls for a return to the original territorial definitions of Indian tribal sovereignty.³²⁷

Nonetheless, when threats to the trust status are perceived, Indian representatives at present often protest and express a collective desire to preserve at least the status quo.³²⁸ In the face of several bad alternatives in the current, complex federal–state–tribal jurisdictional morass, trust status at least provides some “not state” certainty, which Indian interests often prefer.

2. Land Preservation

Another related benefit of the trust status is the importance of the anti-alienation rules for land preservation. Given the centrality of Indian ownership for preserving any tribal jurisdiction under existing frameworks, and the history of dramatic land loss that occurred upon past removal of the trust restrictions on original allottees’ titles, many advocates sanction the anti-alienation rules of the trust status because of the land preservation benefits. In fact, one important theme in the adverse reaction to the ILCA amendments enacted in 2000 was a tribal consensus of a collective “desire to preserve the trust status of existing allotments on Indian lands” and to avoid more land loss out of the trust land base.³²⁹

Recent empirical work confirms, however, that the current tenure patterns do not work for this purpose. In many cases, more land goes out of, rather than into, trust status in the current system on an ongoing basis by virtue of the general rule that non-Indians may not hold land in trust.³³⁰ To

323. NATIVE LAND LAW, *supra* note 320, § 1.1, at 8.

324. *Id.* § 1.2, at 12.

325. *See, e.g.*, Miller, *supra* note 276, at 852–53.

326. *E.g.*, Indian Trust Asset Reform Act, S. 165, 113th Cong. (2013).

327. *E.g.*, Katherine J. Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 600–01 (2010).

328. *See, e.g.*, Congressional ILCA Hearing, *supra* note 250 (collecting protests to proposed ILCA changes perceived to threaten the availability and persistence of the trust status of allotments).

329. *See id.* at 30 (statement of Hon. Maurice Lyons, Chairman of the Morongo Band of Mission Indians).

330. *See* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 539 (2013) (reviewing data in five sample states showing approximately 64,600 acres of Indian land passed out of trust and into fee from 2000 to 2012, while only

remove land from trust, the property merely needs to pass to a non-Indian owner. When an Indian purchases fee property within reservation boundaries, it remains in fee status until that owner formally requests that the Department of the Interior take the land into trust, and the Department of the Interior acts positively on that application.³³¹ To acquire new land into trust, an Indian owner must undertake an extensive federal review process and meet specific, complicated, and discretionary federal requirements.³³²

Even if the purpose of land preservation were more effective and grounded in empirical reality, it could not account for all of the complexities inherent in the system. If anything, this function is tied to rules governing alienation to non-Indians, or perhaps non-member Indians (and the potential ensuing jurisdictional shifts), alone.

3. Federal Trust Responsibility

A third justification for the current framework is fairness and the responsibilities associated with the federal government's role as "trustee" over Indian trust lands. On one level, there is the practical reality that the federal trust status provides important record-keeping and administrative support, as well as clear state tax exemption, which is especially important for owners of tiny interests in fractionated allotments.³³³ There is an extensive literature establishing that federal land policies, from allotment to today, have caused and exacerbated the fractionation of Indian trust lands.³³⁴ In fact, the federal government has acknowledged this fact.³³⁵ It would be vastly unfair—and impractical—to immediately impose all of these expenses directly on individual landowners or the tribes themselves, especially without tribal consent and substantial federal financial, and other, support for such a transition. As a practical matter, some federal administrative support will remain essential for the immediate future.

More difficult, however, is defining exactly what other obligations flow from the fact that the federal government holds Indian lands "in trust" for Indian landowners. Through recent Supreme Court decisions, the federal government has increasingly narrowed what, specifically, its "trust responsibility" requires it to provide Indian citizens and nations.³³⁶ There is a history in some early cases, however, of a high level of care being required in the

approximately 8,000 acres of fee lands were transferred into trust status in those same states during the same time period).

331. *E.g.*, Estate of Dana A. Knight, 88 Interior Dec. 987, 989–90 (IBIA 1981).

332. 25 C.F.R. pt. 151 (named "Land Acquisitions").

333. *See supra* Sections II.A.1–2, IV.B.1.

334. *E.g.*, Shoemaker, *Like Snow*, *supra* note 12, at 730–31.

335. Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, sec. 101(6), (13), 114 Stat. 1991, 1991–92 ("[T]he problem of the fractionation of Indian lands described in this section is the result of a policy of the Federal Government, cannot be solved by Indian tribes, and requires a solution under Federal Law.").

336. *See, e.g.*, United States v. Navajo Nation, 537 U.S. 488, 508 (2003); Warner, *supra* note 24, at 1060–65 (discussing the evolution of trust responsibilities).

management of Indian trust assets.³³⁷ Indeed, the BIA's own rationale for recent regulatory action limiting Indian landowners' own use and possession rights, and increasing its federal regulatory role in mandating fair-market-value rental payments even from active co-owners for the benefit of passive and absentee landowners, seems largely rooted in a sense of its trust obligation to all landowners.³³⁸ Even in the face of tribal objections about the feasibility and desirability of this strict fair-market-value requirement for all Indian land uses; even with the burden of an additional formal appraisal process; and even in light of pressing on-the-ground Indian housing needs, the Department of the Interior was unmoved.³³⁹

Certainly, there is significant debate in Indian country about what the federal government's trust obligations are and should be. There is at least a healthy dose of skepticism, however, among some about using the trust responsibility to perpetuate what is seen as a paternalistic federal trust structure, and an associated implication of Indian incompetence, rather than using the federal trust relationship as a true platform for indigenous self-governance and self-determination.³⁴⁰

4. Protecting Non-Indian Landowners

Finally, the rationale for the disparate jurisdictional treatment of non-Indian fee land and Indian-owned properties is also couched in the concern about the extra-constitutionality of Indian tribes and the "foreignness" of tribal law as applied to non-Indians in particular. Concern over subjecting non-Indian landowners to tribal jurisdiction always limits calls for greater

337. *E.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (suggesting that trust responsibility imposes "moral obligations of the highest responsibility and trust" that should "be judged by the most exacting fiduciary standards").

338. *E.g.*, Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,456 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) (explaining the Department of the Interior's position that "all non-consenting landowners are entitled to fair market value, as our trust responsibility is to all landowners, not just those who have consented").

339. *Id.* at 72,451 (explaining again that "all Indian landowners are entitled to just compensation for use of their land (and a valuation is required to determine what just compensation is), not just consenting landowners").

340. *See, e.g.*, REID PEYTON CHAMBERS, COMPATIBILITY OF THE FEDERAL TRUST RESPONSIBILITY WITH SELF-DETERMINATION OF INDIAN TRIBES 7–9 (2005); Gover, *supra* note 22, at 373 (critiquing the paternalistic foundations of trust policy with respect to Indian lands and arguing that the current land-management role, in light of the larger goal of tribal self-determination, "is stirringly dumb"); *see also* Alex T. Skibine, *Using the New Equal Protection to Challenge Federal Control over Tribal Lands*, 36 PUB. LAND & RESOURCES L. REV. 3, 5 (2015) (collecting scholars' opinions that the "trust doctrine is not only the by-product of paternalistic and racist attitudes towards Indians, but is also a major impediment to efficient economic development on Indian lands" and proposing legal arguments to retract federal trustee role); Clarkson & Murphy, *supra* note 282, at 180–82 (describing paternalistic roots of "disastrous policy of tribal trust land" and also identifying "trust land as a primary impediment" to economic development in Indian country).

tribal jurisdiction within tribal territories.³⁴¹ Ironically, of course, this same concern holds little weight when tribal law routinely applies to non-member Indians who are often similarly disenfranchised from the resident tribal government.³⁴²

This general concern has already been discussed, but it is also worth noting that possible middle grounds could exist. For example, historically many tribes had traditions of adult adoption or naturalization for biologically non-Indian citizens who became a part of the Indian community; it is federal law that is understood to prohibit a similar citizenship path today.³⁴³ Other ideas have focused on creating a form of political, but not necessarily cultural or spiritual, enfranchisement in tribes as political institutions for non-Indians (or non-member Indians, for that matter). For example, a recent reauthorization of the Violence Against Women Act extended tribal jurisdiction over non-Indian defendants for certain domestic violence charges, but only if certain protections—including, notably, the right for resident non-Indians to serve on juries—were in place in tribal criminal courts.³⁴⁴ Some tribes understandably respond to these citizenship-criteria reform ideas with worry about diluting or changing tribal identity.³⁴⁵

Likewise, Congress might respond to these concerns by instead ensuring greater federal protections for non-Indian landowners subject to tribal jurisdiction, including, for example, creating a cause of action for federal review of any civil rights claims against tribal governments arising out of property regulation. Certainly, though, this kind of abrogation of tribal sovereign immunity and addition to the federal courts' caseload is also not without peril and would warrant further analysis.

C. *Undercurrents: Complexity, Justice, Racism, and Doubt*

Perhaps most troubling about this entire account is the novelty of the discussion. In literature on legal complexity, one of the greatest risks often cited of too much complexity is a concern for a system-wide loss of democratic legitimacy.³⁴⁶ What does it tell us about Indian land tenure if we have

341. *E.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008).

342. *United States v. Lara*, 541 U.S. 193, 199 (2004) (affirming congressional recognition of inherent tribal sovereignty over reservation crimes committed by both member and non-member Indians, but not non-Indians); *see also* Bryan Newland, *Dollar General and the Racist Foundation of the Supreme Court's Tribal Jurisdiction Cases*, *TURTLE TALK* (Sept. 8, 2015), <https://turtletalk.wordpress.com/2015/09/08/dollar-general-and-the-racist-foundation-of-the-supreme-courts-tribal-jurisdiction-cases/> [<https://perma.cc/MN98-VK4L>] (discussing related race-based jurisdictional issues).

343. *See supra* note 80 and accompanying text.

344. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(d)(3)(A), 127 Stat. 54, 122.

345. *See supra* note 80 and accompanying text.

346. Schuck, *supra* note 57, at 19–20 (emphasizing “delegitimation costs” of legal complexity).

not, to date, fully questioned the risk of future illegitimacy in a system that cannot be fully accounted for by any property or Indian law rationale?

Complexity has an obscuring, shadowing effect. Indian land tenure is so complex that it has been difficult to see all the intricacies happening on the inside. We also have a tendency to want to brush off the nuances as acceptable idiosyncrasies of Indian law: “That’s just Indian law. It’s different.”

But we must also explore whether it is more than this. We cannot escape that much of the current land tenure framework is a direct product of the history of the trust status itself being imposed based on the federally determined needs of the then-deemed “incompetent” Indian allottees. This is part of a long history of racism and paternalism in federal Indian law. Many argue that, just as racism drove colonial assumptions of power over indigenous people in this country, the same racist ideas pervade many aspects of modern Indian law.³⁴⁷

This happens at a meta-level: Indian landowners do not receive the same rights and protections as non-Indians, and tribal governments are presumed more suspect than states.³⁴⁸ Indeed, who even qualifies as Indian under federal law requires, by virtue of federal law, a blood-based determination of Indian-ness.³⁴⁹ The baseline presumption of individual Indian landowners’ incompetency to manage their own affairs, and tribal governments’ incapacity to fairly and equitably govern, persists and quietly informs much of Indian land tenure today. These biases are implicit and entrenched, separate from the explicit justification for the current tenure system. Indeed, much of the system is propagated by forces seemingly beyond any single decisionmaker’s control—the same way the cycle of complexity seems to perpetuate itself.³⁵⁰

However, to the extent that racism—or colonialism, or other suspect forms of unspoken doubt—exacerbates the shadowing effects of complexity in this particular field, and the pervasive invisibility of these fundamental concerns, it provides yet another reason to pay more urgent attention to revisiting the system’s design for the future.

V. MANAGING FOR THE FUTURE

In many retellings, the most difficult part of European colonization was the overall inflexibility of choices left for American Indian people, including within this federally imposed land tenure system.³⁵¹ Professor Joseph Singer

347. See, e.g., ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON* (2005); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990).

348. E.g., Singer, *supra* note 1, at 42–43.

349. See Rosser, *supra* note 36, at 67–68 (citing Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 808 (2008)).

350. See *supra* Part II.

351. E.g., Bobroff, *supra* note 27, at 1563; Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 255–56 (1989) (describing allotment as a top-down land reform policy insensitive to tribal cultural understandings); Rosser, *supra* note 36, at 72 (“The inflexibility was intentional and harsh.”).

has argued that, if we accept today that initial colonization of this continent at the expense of indigenous peoples and Indian nations was a moral wrong, then the very least we can do is stop perpetuating the colonization process now.³⁵² Yet this careful study of the modern institutions of Indian land tenure reveals that we have not truly stopped this top-down limitation of indigenous choices. To the contrary, the current federally imposed land tenure system does much of this same colonizing (choice-limiting) work but more discretely, now shadowed in the overarching complexity of an infrastructure that promotes invisibility and ignorance. Indian people still suffer from very little true flexibility of choice.

Assessing the complex property and sovereignty interactions in Indian country goes a long way toward a deeper understanding of the land tenure challenge and, ultimately, better solutions. Both landowners and tribal governments need a unified governance structure within reservation territories that achieves a fairly and democratically derived set of property purposes—be it individual autonomy, efficient use of resources, respect for Indian sacred spaces and cultural values, or other ideals of a pluralistic civil society. This kind of coherent, localized (and tribally controlled) property system fundamentally comports with current national policy that seeks to promote tribal self-determination.³⁵³ Empirical evidence also indicates that supporting tribal sovereignty is the best way to achieve improved social welfare outcomes in Indian communities.³⁵⁴ But perhaps most interestingly for this purpose, the work of complexity theorists also supports an understanding of the fundamental importance of creating space for reservation-level flexibility, innovation, and space-by-space adaptation—in other words, the importance of choice.

Creating more robust, tribally defined reservation property systems is a challenge. Property systems, in general, need stability.³⁵⁵ In addition, tribal governments cannot simply reinvent, much less implement, a whole new property system overnight. And many of the forces that add to Indian land tenure's complexity—including, predominantly, the on-reservation presence of non-Indian landowners who are not citizens of tribal governments and the pervasive co-ownership patterns in many trust allotments—remain in place. This Part sketches out initial thoughts on responses to these challenges. The first Section explores how the science of complex, adaptive systems confirms that effective change in these types of systems happens best by facilitating a gradual cascade of bottom-up transformative steps. This, in theory, confirms the need for more local, tribal control. The second Section shares early thoughts on how to create this flexible space for iterative, adaptive experimentation and change at the reservation level. Ultimately, the core problem of micro-categorizing tiny, unpredictably interacting property and sovereignty interests in Indian country does not require more top-down

352. Singer, *supra* note 1, at 42–45.

353. See *supra* note 215 and accompanying text.

354. See *supra* note 214 and accompanying text.

355. See *supra* note 159 and accompanying text.

tinkering by the federal government—instead, it requires a complete resetting of system dynamics. More work on specific strategies is still necessary, but this Part lays the critical foundations.

A. *Science of Reform and Revolt*

Scientists who study adaptive change in complex systems—particularly ecological and social systems—agree that perfect prediction of future outcomes in complex systems is impossible. In complexity theory, the key is not to try to eliminate complexity or to control it; rather, the focus is on better *management* to achieve more desired normative purposes from the interactions within the system itself.³⁵⁶ Professor Scott Page, for example, has argued that, because complexity is irreducible in some sense, the task is really to “channel complexity to domains where it can be handled effectively.”³⁵⁷ In Indian land tenure, especially, this means more democratic and flexible reservation-by-reservation land tenure experimentation and choice.

Additional work by Professors C. S. Holling and Lance H. Gunderson, both ecologists, helps illustrate how this channeling task might occur, and why it matters. Holling, Gunderson, and their colleagues have posited a “panarchy” vision of adaptive change that informs how we can better manage to reach a normatively desirable transformation in an otherwise unpredictable environment.³⁵⁸ According to Holling, complex systems operate not as one monolithic “thing,” but, rather, as a series of nested subsystems that influence each other in unpredictable and cascading ways.³⁵⁹ In a well-adapted system, whether naturally occurring or socially constructed, resilience is built into the structures of how one choice or action interacts across this larger series of nested systems and on multiple scales. At the “small, fast,” local level, there is greater flexibility for experimentation—or “revolt”—with various quickly deployed responses to external changes and a relatively low cost of failure. These local actions are tempered to some degree, however, by the stability, or “memory,” of “large, slow,” higher-level institutions that change more gradually and ensure overall system

356. *E.g.*, Page, *supra* note 52, at 117 (“Complex environments cannot be solved in any sense. At best, the complexity can be harnessed.”).

357. *Id.* at 142. Page also clearly articulates how lowering complexity at one level of interaction—for example, reducing traffic complexity by requiring all travelers to carpool—simply moves complexity to another level—for example, by increasing the challenges of people who must coordinate to carpool with others. *Id.* at 142–43. Page is the Leonid Hurwicz Collegiate Professor of Complex Systems, Political Science, and Economics at the University of Michigan. He also directed the Center for the Study of Complex Systems.

358. *See* C.S. Holling et al., *In Quest of a Theory of Adaptive Change*, in PANARCHY: UNDERSTANDING TRANSFORMATIONS IN HUMAN AND NATURAL SYSTEMS 3, 21–22 (Lance H. Gunderson & C.S. Holling eds., 2002); C.S. Holling & Lance H. Gunderson, *Resilience and Adaptive Cycles*, in PANARCHY: UNDERSTANDING TRANSFORMATIONS IN HUMAN AND NATURAL SYSTEMS, *supra*, at 25, 33–40, 47–52.

359. *E.g.*, C.S. Holling, *From Complex Regions to Complex Worlds*, 7 MINN. J.L. SCI. & TECH. 1, 2–3 (2005).

stability.³⁶⁰ Over time, as more local “small, fast” changes cascade up to inform higher-level institutions, more permanent, “large, slow” institutional change occurs.³⁶¹

In property terms, this describes, for example, how more localized customs and social norms, like informal arrangements among close-knit, cooperating stakeholders, can react quickly to change and experiment with various adaptive responses. If successful, these experiments may cascade to inform higher-level property law changes—be it in the common law, or through statutory, or even constitutional, reforms—over time. These local-level experiments in actual resource uses are simultaneously stabilized by these higher-level, more permanent institutions, like constitutional property protections. Existing legal and economic observations about how property institutions and regimes have actually changed over time also emphasize the value of this kind of bottom-up method of initial experimentation and organization, combined with more gradual and stabilizing, formal legal change.³⁶²

In some instances, however, complex systems become maladapted, or get stuck in ways that prevent the kind of essential, bottom-up cascade of iterative adaptation and flexible change.³⁶³ Human-designed systems are at least equally, if not more, likely to fall into one of these traps. For example, many views of regulatory and administrative legal regimes reveal a pattern of some initial policy success followed by increasing agency rigidity, which stifles adaptation and can lead to crisis.³⁶⁴ Legal theorists, including Professor J.B. Ruhl, have picked up on these signals and related themes and explored options for law and regulation to take a more flexible and adaptive approach to management.³⁶⁵ This kind of flexible regulation—with ongoing monitoring and decisionmaking adjustments to respond to unpredicted

360. See C.S. Holling et al., *Sustainability and Panarchies*, in PANARCHY: UNDERSTANDING TRANSFORMATIONS IN HUMAN AND NATURAL SYSTEMS, *supra* note 358, at 63, 75 & Fig. 3-10, 76–77.

361. See *id.* at 76. For a further, accessible introduction to this topic, see C.S. Holling, *Understanding the Complexity of Economic, Ecological, and Social Systems*, 4 ECOSYSTEMS 390 (2001).

362. E.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991); ELINOR OSTROM, *GOVERNING THE COMMONS* (1990); EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS* (2010); see also James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009).

363. See Holling et al., *supra* note 358, at 10–14; see also Holling, *supra* note 361, at 400 (discussing poverty traps and rigidity traps).

364. See Holling & Gunderson, *supra* note 358, at 53, 55–60.

365. See, e.g., J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 39–40 (1999). This includes what ecologist C.S. Holling calls “adaptive management.” See C.S. HOLLING ET AL., *ADAPTIVE ENVIRONMENTAL ASSESSMENT AND MANAGEMENT* 20 (C.S. Holling ed., 1978); see also Lance H. Gunderson et al., *Escaping a Rigidity Trap: Governance and Adaptive Capacity to Climate Change in the Everglades Social Ecological System*, 51 IDAHO L. REV. 127, 149 (2014) (“Adaptive governance incorporates formal organizations, informal groups, and individuals at multiples scales and requires collaboration, communication, and adaptation in response to social and ecological monitoring.” (citations omitted)); J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the*

ripple effects in system-level change—is ill-fitted to most existing legal structures, which prefer, for example, reductionist and prescriptive rulemaking.³⁶⁶ The law is much better at announcing blunt, forward-looking prescriptions.³⁶⁷ These top-down prescriptive efforts to rigidly control complex systems routinely fail, however, precisely because of the unpredictability of all system interactions.³⁶⁸ Making the law more functionally adaptive requires, in some cases, making it less rigid and more messy in ways that contradict most legal reformers' initial reactions.³⁶⁹

Holling in particular has made clear that discussions about panarchy and complex system adaptation may be best viewed metaphorically in many cases, and my intent here is not to take any analogy or scientific comparison too far.³⁷⁰ But with respect to Indian land tenure, many of these themes simply make sense. Many recent federal Indian land reforms have followed a rigid, highly prescriptive, top-down approach, even when articulating a desire to promote tribal sovereignty. The hypercategorization of property and sovereignty interests in recent reforms is a fine example.³⁷¹ In addition, recent special statutes have sought to acknowledge tribal rights to implement binding agricultural resource-management plans on Indian trust lands, to pass tribal probate codes that dictate disposition of trust assets after an Indian landowner's death, and to more flexibly lease tribal trust lands without case-by-case secretarial approval.³⁷² These rights, however, are all limited by the Department of the Interior's threshold approval process and the risk of federal preemption.³⁷³

Courts, 95 MINN. L. REV. 424 (2010) (collecting and evaluating literature on adaptive legal strategies).

366. See J.B. Ruhl, *Regulation by Adaptive Management—Is It Possible?*, 7 MINN. J.L. SCI. & TECH. 21, 28–29 (2005).

367. See *id.* at 25–28.

368. E.g., Jan G. Laitos & Lauren Joseph Wolongevicz, *Why Environmental Laws Fail*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 1, 17–20 (2014).

369. See, e.g., Ruhl & Salzman, *supra* note 56 (characterizing environmental law itself as a complex adaptive system and arguing that reforms must allow the field to become less rigid for it to be more adaptive and flexible to change); see also J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 917–18 (1996) (critiquing regulatory reductionism as a first-order legal response and arguing for more common law, rights-based approaches, where feasible).

370. E.g., Holling & Gunderson, *supra* note 358, at 33.

371. See *supra* Part III.

372. See, e.g., *supra* notes 113, 129–130 and accompanying text.

373. For example, tribal probate codes will be implemented and approved only if they are first deemed consistent with federal land consolidation policies. See *supra* note 113 and accompanying text. Likewise, the new tribal leasing flexibility under the new HEARTH Act is permitted only where the tribe first passes its own tribal leasing regulations that the Department of the Interior accepts as consistent with federal leasing regulations. See *supra* notes 129–130 and accompanying text; see also Warner, *supra* note 24 (addressing other critiques of the HEARTH Act, including its accompanying waiver of federal liability and the imposition of potentially difficult environmental review requirements on tribal governments).

Even more problematic, these and other similar efforts—though likely well intentioned as iterative endeavors to increase tribal capacity—also require prescriptive rulemaking by the tribe in order to participate (so that the Department of the Interior has regulations to preapprove).³⁷⁴ But this limits the actual iterative and adaptive work of experimentation, impeding a more natural evolution of tribal law. There remains little room for ongoing flexibility on the ground, insufficient space for iterative experimentation and norm development, and over-restriction in the range of choices deemed acceptable.³⁷⁵

Complexity theory confirms that rigid, top-down reforms in this context will not achieve the desired flexibility of locally adaptive change—more seismic reorientation is required.

B. *Iterative Adaptation and Change*

Instead, complexity theory compels us to think about how Indian land tenure can be rebalanced to permit the kind of “small, fast,” local-level experimentation that will grow local property norms, rebuild tribal capacity in willing tribal governments, and ultimately support rational change in the “large, slow” institutions of land tenure and jurisdiction in Indian country. The process of making Indian property law more adaptive—more in the spirit of tribal sovereignty, in line with self-determination goals, and consistent with an indigenous land ethic—must itself be implemented in an iterative (and adaptive) way. This requires participatory local processes to define the problem, set tribal community objectives, assess the land tenure baseline, and formulate models of reform that are iteratively tested as they are deployed.³⁷⁶

Although this must be a ground-up process, the federal government has to support the effort—both structurally and practically. There is intense tension here. The federal government’s job should be to find and support space for actual landowner flexibility and genuine tribal control, not to prescribe substantively what that exercise of authority in those spaces should look like.

374. Cf. Monette, *supra* note 87, at 58–59 (discussing proposed legislative language that would have recognized broader tribal authority to manage trust lands).

375. As another example, consider the BIA’s recent attempt to allow Indian landowners to transfer use rights to trust lands without a formal federal lease. See *supra* Section III.C. Although a more flexible system of local permits, as opposed to federally approved leases, may create space for some on-the-ground experimentation and adaptation with respect to qualifying short-term land uses, in practice, the BIA requires even these purportedly unregulated permits to be presented for inspection before any actual use, and the BIA must conduct a threshold check of whether the underlying right in fact qualifies for this treatment as a permit, and not a lease. See 25 C.F.R. § 162.007(a)(2) (2016). This must now happen in every case, regardless of how de minimis the use, and regardless of whether anyone is actually objecting to any perceived impact. Instead of actual flexibility, in many cases, this just creates another administrative step and another hypercategorization of Indian property interests.

376. Cf. Ruhl, *supra* note 365 (making a similar observation for reforming the administrative state more broadly).

The central goal of system redesign should be to identify, and then support, the best “small, fast,” local spaces for experimentation, where the costs of informal efforts are low, and failure is relatively inexpensive. Wholesale land tenure system reform will require an iterative process of increasing tribal control in evolutionary stages. For example, tribal control and autonomy within trust and Indian-owned fee properties, where it is already strongest, should come first. Then, with confidence and more capacity, tribes might assert greater authority over undivided fee interests within emulsified properties or other closely related non-Indian fee owners. A territorial solution through federal recognition of tribal sovereignty over all reservation property interests, regardless of owner status—just like real property jurisdiction outside Indian country—would be the final step.³⁷⁷ In the short term, however, the priority should be taking the initial, experimental steps that, as part of this complex system, will cascade up. These steps can ultimately inform the rational evolution of a new property system that reflects current reservation communities’ needs, while eliminating many of the current system’s unfortunate complexity costs.

There may be many possible places where this kind of “small, fast” adaptation may be best promoted. This Article collects three sample suggestions to start.³⁷⁸

Functional Co-Ownership. Instead of focusing so intently on consolidation for its own sake, a tribal property system may desire more attention to the core functionality of land ownership, even in a shared status.³⁷⁹ For example, recognizing tribal authority to define and regulate Indian co-owners’ use and possession rights to their own properties could inject critical informality and flexibility into reservation land use. Tribal rules could incentivize owners’ active engagement with their lands and free these lands—currently, mostly idle—from the federal bureaucracy that often requires formal leasing, possibly at the expense of other higher community ideals. This co-owner flexibility would provide one ideal platform for more “small, fast” experimentation with reservation land use.³⁸⁰

377. See *supra* note 3 and accompanying text. For this purpose, it is important to note that non-Indian landowners will be protected, at least in part, by a tribe’s intrinsic desire to evolve its property norms in a way that supports reservation property values, but other protections can be negotiated and institutionalized.

378. Of course, these three recommendations are not intended to supplant or minimize in any way the tremendous efforts already being made by several tribes to innovate locally, even within this highly rigid modern system. There is much more work to be done, both in terms of assessing current strategies and charting additional potential paths forward. I intend to focus more on this process of property system change in future work.

379. This also relates to consolidation, of course, as discussed *supra* Section II.B.2. As the value and benefit of being a landowner increases in a more sensible structure, so do the natural incentives for consolidation. Right now, we emphasize consolidation for its own sake, but, in the current micromanaged system, the carrot at the end of that stick is hardly appealing enough to warrant the assembly work.

380. For further discussion of this theme, see generally Shoemaker, *No Sticks*, *supra* note 124.

Active Leasing Programs. Relatedly, even if the Department of the Interior persists in reading its trust responsibility to require robust BIA protection of absentee owners by its formal leasing program, there is room for reform. For example, simply modifying the co-owner consent requirements in the BIA's leasing program to require a majority of the active, participating landowners who actually engage in the leasing process—as opposed to the BIA simply voting for the monetary bottom line in place of the absentee, inactive landowners—would adjust incentives in favor of active owner use. These actual landowner decisions, in turn, can inform further change up the chain.³⁸¹

Liberalized Trust Transfers Among Tribal Citizens. Finally, tribes might also consider advocating for freer, Indian-to-Indian trust land transactions. Removing or reducing the Department of the Interior's oversight of Indian-to-Indian trust transfers could go a long way toward creating at least an internal market for Indian land—with no negative impact on the Department of the Interior's larger objectives of preserving the trust corpus, preventing Indian land loss, and ultimately encouraging tribal self-determination. Freer Indian-to-Indian land transfers could also help expand tribal property laws to govern the course of these transactions, including prohibitions on any fraudulent or otherwise undesirable transfers. This approach would leave the Secretary of the Interior's administrative duties for these lands—from record-keeping to lease-income distribution—firmly in place, reducing the overall cost of such a change on tribal governments.³⁸²

CONCLUSION

Indian land tenure is the inverse of what a property system should be. Complex systems naturally and effectively adapt through cycles of local-level experimentation and reform stabilized by the security of higher-level, more-constant institutions. The system of Indian land tenure, however, is characterized by a pattern of top-down federal reforms that trap individual landowners in a rigid, yet paradoxically uncertain and expensive, world of perverse incentives and bureaucratic control. Property means more than this. Property law should reflect our highest values, including human dignity, liberty, and meaningful political, economic, and social engagement. In many cases, Indian land tenure has rendered Indian trust property merely a paper asset, removing Indian landowners from a relationship with real land

381. See also *id.*

382. See also Shoemaker, *Like Snow*, *supra* note 12, at 781. The Coalition of Large Tribes ("COLT") has also argued that the Department of the Interior should liberalize the restrictions on trust transfers between any "member or non-member Indian." COLT argues this best fosters true tribal self-determination and that "allowing Indian landowners the ability of private fee landowners to negotiate sales and exchanges would recognize land owner rights and facilitate active land ownership." *The American Indian Probate Reform Act: Empowering Indian Land Owners: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 29 (2011) (statement of Majel M. Russell, Attorney at Law, on behalf of the Coalition of Large Tribes).

in a more meaningful way. Relaxing the federal grip and reorienting reforms toward genuine flexibility of local choice could, finally, make Indian property law transformative in a positive way.