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# PROGRESSING BACK: A TRIBAL SOLUTION FOR A FEDERAL MORASS

*James T. Hamilton\**

## *Introduction*

Indisputably, the history of exercise of federal power over American Indians and their tribal governments has been arbitrary, inconsistent, and most often pernicious. This poor record has left the political/legal landscape of Indian affairs littered with ticking time bombs for the federal government. For each action aimed at the destruction of the American Indian, including war, removal, allotment, and termination, an almost karmic, costly legal reaction awaits the federal government in time.

One of the time bombs exploded in 1995 with the filing of the *Cobell v. Babbitt*<sup>1</sup> case. *Cobell* claims breach of the federal trust responsibility for failing to properly manage billions of dollars collected by the federal government from assets held for the benefit of individual Indians and tribal governments. The case resulted in findings that the U.S. Departments of the Interior and Treasury are in breach of trust, and Contempt of Court citations against two Secretaries of the Interior and a Secretary of the Treasury.<sup>2</sup> The costs to the federal government to litigate, justify accounts, and distribute funds is already in the hundreds of millions of dollars, and, ironically, may in the end prove more costly than the total value of the corpus of the trust.

The Department of the Interior (DOI) has struggled mightily to fix the underlying issues. In large measure, the DOI has done so by attempting to revamp and reinvent its American Indian trust bureaucracy.<sup>3</sup> These attempts

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1. 37 F. Supp. 2d 6 (D.D.C. 1999).

2. See *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999) (ordering contempt of court citations); *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) (finding Secretaries Babbitt and Rubin, and Assistant Secretary Gover in Contempt). All orders of the Court and Special Master in the *Cobell* case available at <http://www.indiantrust.com/rulings>.

3. The several attempts to address the issue through the trust bureaucracy include the Office of American Indian Trust located within the BIA; the Office of the Special Trustee, which was created under the Clinton Administration, inside the Department of the Interior but outside the BIA, and most recently a sweeping proposal from Interior to consolidate all trust

only address the mismanagement symptoms of the crisis and, by all accounts, are failing miserably. John Miller, the deputy in charge of policy at the Office of the Special Trustee at the DOI recently described the situation:

[T]he data base is plagued by missing records, unreliable information, severe security deficiencies and unverifiable audit trails. The major problem is . . . we do not have a system that can fulfill the fiduciary responsibility now or in the future much less account for the past. . . . [T]here is no system in place to accurately maintain the records. . . . In other words, the “bleeding” would continue.<sup>4</sup>

The real problem — the problem that the DOI just does not seem to get — is that the prescribed bureaucratic solutions deal only with the symptoms of the disease infecting Indian Trust assets. Likewise, the solution does not lie in the Courts. Judge Lamberth made that point in the *Cobell* case. While fully recognizing the egregious nature of the breach of trust at issue, the court nevertheless notes that “plaintiffs must remember that this is a lawsuit. They cannot treat the court as a grievance committee for the United States’ mishandling of the trust. Whether plaintiffs like it or not, only Congress can play that type of role.”<sup>5</sup> To even have a hope of effectively solving the problem, the federal government must deal with the root causes of the mess — the pernicious and discredited federal laws of allotment.<sup>6</sup>

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asset management responsibility in the Office of the Special Trustee. That proposal, originally floated without Tribal input, met with universal and vituperative rejection in Indian Country. A consultation process was put in place and that process is ongoing.

4. Memorandum from Deputy Special Trustee for Policy to Special Trustee for American Indians 1-2 (Apr. 19, 2002), at <http://www.indianz.com/docs/ost/miller2002.pdf>; see also *Official: Interior can't stop the 'bleeding'* Apr. 22, 2002, at <http://www.indianz.com/news/show.asp?ID=pol02/04222002-1>.

5. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7 (D.D.C. 1999). Judge Lamberth’s Opinion provides a superb recitation of the shameful history of the federal government’s relations with American Indians, and the outright thievery of Indian resources. This article assumes the case is made for the historical extreme, even criminal mistreatment of both individual Indians and Tribes. The record in the *Cobell* case, and such works as FELIX S. COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* (Rennard Strickland et al. eds., 1982) [hereinafter COHEN], or PROF. CHARLES WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* (1987), lay out the legal and historical tenets of Indian policy that any attempt at serious description would be superfluous and, most certainly, inferior.

6. The process of allotment was achieved through a number of different, yet similar, acts of Congress dealing with various tribes in various regions of the United States. The most notable was the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-383 (2000)). For a general history of allotment, see COHEN, *supra*

This article examines first the fundamental legal and social origins of the system of trust accounts that has been so tragically mishandled by the federal trustee. It next examines Congress' attempts to stanch the bleeding of Indian assets, and the Supreme Court's rejections of such strategies on constitutional grounds. This article next examines the issues under the rubric of reserved rights of tribal self government and proposes using this tool as at least a first step towards a solution to the current, seemingly inextricable morass of trust fund mismanagement. Finally, it examines the "justice" of such a solution by examining the relative interests of the affected parties — Tribes and their member allottees.

### *I. Nature of the Breach*

In the latter years of the nineteenth century, the United States was in the process of achieving its Manifest Destiny at a frenzied, manic pace. Chief among the obstacles to fulfilling this goal were the lands' indigenous people and their governments, i.e. American Indian tribes. This article does not, and can not, endeavor to detail the many, very brutally creative methods our government employed to "solve" the Indian problem. This article focuses on only one such strategy — allotment and allocation.<sup>7</sup> This gambit for Indian lands ultimately engendered the most costly and possibly the most extensive litigation ever initiated against the United States Government.

Most Pre-Columbian American Indian tribes were semi-nomadic. The tribes' traditional territorial lands spread over many thousands of miles. The tribes were removed from much of their original territory to make way for the European settlers, merchants, and farmers that made "productive" use of the rich Indian lands. Those Indians not killed by wars or European disease, especially smallpox and alcoholism, were sent to tracts of land (which may or may not have been their traditional territorial lands) "reserved" for their use. Called reservations, government to government treaties with the United States guaranteed most of these lands.<sup>8</sup>

It was soon apparent to the mercantile interests of the United States that many of these reservations were extraordinarily valuable tracts of land.

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note 5, at 127-42.

7. Allotment was a tremendous "success," at least insofar as it was intended to be a massive land grab. Between 1881 and 1934, the effective years of the policy and law, Indian held land declined from 156 million acres to 48 million acres. See COHEN, *supra* note 5, at 138. As will be explained in the text, the bleeding of Indian lands continues as a result of the system of descent engendered by the policy.

8. See *id.* at 47-206 (discussing, definitively, the general history of Indian policy).

Timber, mining, railroad, and agricultural opportunities abounded in Indian Country, but for the continuing nuisance of the Indians. A seemingly ideal solution was presented whereby the Indian lands could be put to productive use, and the individual Indian could be civilized and made a "man of property."

The basic operation of the Allotment Acts was fairly simple. Reservations under communal tribal government control were to be allotted to individual Indians in some multiple of forty acre parcels. Title to these lands was to be held by the federal government in trust for the individual Indian, until such time as the statute provided, upon which a fee patent was issued in the name of the Indian or his heirs and assigns. The statutes provided that heirship would pass under the laws of descent for the state, or territory in which the allotment was located.<sup>9</sup> Because title to the lands and resources thereon was held by the United States in trust for individual Indians, the interests could not be divided among heirs, but rather held as undivided fractional interests. Reservation lands left over after allotment were sold to non-Indian interests for productive purposes, with the proceeds from sale held in trust for the benefit of the Indians.

This worked out very badly for the Indians. Many Indians were told, literally overnight, to change their previous, centuries old lifestyle, and become farmers on their own parcel of land. The incidence of ownership over land was a completely foreign concept to the vast majority of reservation Indians. So too was the payment of taxes once a fee patent was issued. Consequently, tax foreclosures on parcels of individual land were rampant, shrinking Indian Country precipitously. The lands' mineral and timber resources were sold off at criminally low prices, and more often than not, the proceeds were deposited in "Individual Indian Money" (IIM) accounts that went to the federal trustees and were never distributed to the beneficiaries. All the while, as each succeeding generation passed (which was exceedingly quick as the life expectancy of an American Indian was, and continues to be but a fraction of the majority white population),<sup>10</sup> the undistributed trust

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9. 25 U.S.C. § 348 (2000); see *Jefferson v. Fink*, 247 U.S. 288 (1918) (discussing the application of state laws of descent to Indian Allotments for the Creek Indians of Oklahoma).

10. See Rep. Bill Richardson, *The History, Future of U.S. Indian Policy: Government Has Failed Its Moral and Legal Obligations to Native Americans*, ROLL CALL, Apr. 11, 1994. Richardson noted before Congress:

93,000 Indian people on reservations are homeless or underhoused . . . [Twenty percent] of Indian homes lack toilets and half don't have telephones. Of the 1.8 million American Indians and Alaskan natives living in the U.S., 603,000 live below the poverty line . . . Unemployment on reservations has usually exceeded

accounts continued to fractionate malignantly.

Decades passed. In 1934, the Indian Reorganization Act (IRA)<sup>11</sup> repudiated the policies of allotment, and stopped the further flow of Indian lands from trust to fee status.<sup>12</sup> The IRA provided that land not already converted from trust to fee would remain in trust.<sup>13</sup> Much of the underlying legal authority of the Allotment Acts, however, was not repealed including provisions related to descent and devise. As a result, the fractionated undivided interests continue to descend and fractionate.

Huge tracts of lumber were harvested on allotted lands in the upper Midwest and Pacific Northwest. Grazing fees, while clearly undervalued, were collected on allotted lands in Montana and Wyoming. Millions of barrels of Oklahoma oil flowed from wells on Indian lands. IIMs continued to accept funds from such sales. Meanwhile, with the passage of time, the original Indian beneficiary had long since died, and a dollar of mineral rights or stumpage fees might now be split two or three hundred ways, with each beneficiary requiring his or her own IIM account.

The management of these IIM accounts fell to the Department of the Interior, Bureau of Indian Affairs (BIA). This was yet another bad piece of luck for Indians. The BIA has always been, and remains to this day, the federal government's worst run agency. The task of managing these impossibly fractionated accounts presents one of the greatest accounting challenges of modern times. It fell to an agency that only this year was forced to draw up new policies and engage in retraining of its employees when it was discovered that BIA workers "were using their government-issued credit cards to pay for rent, furniture and other personal expenses."<sup>14</sup>

The system collapsed under its own weight and the federal government's ineptitude. The most recent of numerous reform efforts is The Indian Trust

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40 percent nationally and is over 85 percent on some reservations . . . [Indians have] the highest rates of diabetes and tuberculosis of any [American] ethnic group . . . [T]he suicide rate of Indian teens is four times greater than any other ethnic group. Even the accidental death rate of American Indians is 166 percent greater than the rate for the U.S. population.

*Id.*

11. Wheeler-Howard Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479) (2000).

12. 25 U.S.C. § 461 (2000).

13. *Id.* § 426.

14. Eric Schmitt, *Is This Any Way to Run a Nation?*, N.Y. TIMES, Apr. 14, 2002, § 4, at 4 (citing a grading scale that shows the BIA continues to be the worst run agency in the federal government).

Reform Act of 1994.<sup>15</sup> The Act is essentially a series of half steps yielding dismal results. Tribes have resisted the incursion of the Federal Trustee, and Congress has balked at accepting recommendations mandated by the Act.<sup>16</sup> In short, nothing has worked as intended.

Fundamentally, the IIM system, as federal Indian policy generally, was doomed from the start. The Allotment Acts had buried within them the ticking time bomb of undivided fractionated interests, with this situation persisting to this day. Inevitably, every time one estate is probated, another deceased beneficiary is found whose estate contains multiple additional accounts. To solve the problem, the DOI, as trustee, must literally outrace death. This losing race renders the trust fund unaccountable in both fact and function. The ultimate question is whether the situation can ever be fixed. Any attempt at a bureaucratic fix seems doomed because of the hydra-like nature of problem. The bleeding must be stopped before the patient can be cured.

A key first step is to cure the basic insidious defect of the Allotment Acts, i.e., the defeasement of Indian trust lands to fee status through heirship, and an end to the continuing fractionation of Indian trust estates. Congress attempted to address this issue through the Indian Land Consolidation Act (ILCA)<sup>17</sup> but is frustrated by the small matter of the Fifth Amendment to the United States Constitution.

## II. The Corner Box

The United States Supreme Court twice turned back congressional attempts to at least start stanching the continuing fractionation of Indian interests in land and trust assets by consolidating such interests where they originally belonged — in the name of the Indian tribe. In *Hodel v. Irving*,<sup>18</sup> the Supreme Court considered the constitutionality of section 207 of the ILCA. That section provided that any portion of fractionated interests devised that “represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than \$100 in the preceding year” would escheat to the

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15. Pub. L. No. 103-412, 108 Stat. 4240 (1994) (codified at 25 U.S.C. §§ 162a(d), 4011 (2000)).

16. This Article does not endeavor to undertake a full critique of the current system, or the many approaches to reform that system. Judge Lambreth has done an excellent analysis of the entire system in the Findings of Fact in his opinion in *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7-25 (D.D.C. 1999).

17. 25 U.S.C. §§ 2201-2219 (2000).

18. 481 U.S. 704 (1987).

tribe with jurisdiction over the land rather than pass to the heirs. The ILCA did not provide for compensation to the owners of the affected interest holders or their devisees.

Justice O'Connor, writing for the *Irving* Court, clearly recognizes the insidiousness of the fractionation issue, and the strong federal interest in consolidating such interests in the tribal government.<sup>19</sup> This interest does not, however, outweigh the Fifth Amendment protections of heirs and testators.

[T]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property — the small, undivided interest — to one's heirs. In one form or another, the right to pass on property — to one's family in particular — has been part of the Anglo-American legal system since feudal times.<sup>20</sup>

Congress obviously saw the issue coming, and, while *Irving* was pending in the court of appeals, amended section 207 in three separate ways.<sup>21</sup> First, it looked back five years instead of one to determine the value of the descending fractionated interest, and created a rebuttable presumption that this level of income stream would continue. Second, it permitted devise of an interest otherwise escheatable to a person already owning an interest in the parcel. Third, it authorized tribes to develop their own codes governing the disposition of fractional interests.

The case of *Babbitt v. Youpee*<sup>22</sup> immediately challenged the amended section 207, and its constitutionality argued before the Supreme Court in December of 1996. That Court determined that while the 1984 amendments to section 207 addressed concerns in *Irving* regarding the nature of de minimus estates (albeit not persuasively), the unconstitutional federal action remained. These changes did not satisfy the Court that the basic Constitutional taking issue was solved. Writing for the majority, Justice Ginsberg noted: "Even if the economic impact of amended § 207 is not significantly less than the impact of the original provision, the United States

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19. *Id.* at 712 ("We agree with the Government that encouraging the consolidation of Indian lands is a public purpose of high order. The fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation."). Justice O'Connor, a former State Senator in Arizona, which has one of the nation's largest Indian populations, is well familiar with the plight of Indian Country. The Justice presents a comprehensive and compelling account of the failures of allotment and the disastrous effects of undivided fractionation in Part I of the *Irving* opinion.

20. *Id.* at 716.

21. Pub. L. No. 98-608, § 1(4), 98 Stat. 3171, 3173 (1984).

22. 519 U.S. 234 (1997).



correctly comprehends that *Irving* rested primarily on the “extraordinary” character of the governmental regulation.”<sup>23</sup> Thus, the Court effectively held that regardless of the “de minimus” scope of the extraordinary unconstitutional action, the federal government is unconditionally constrained by the Fifth Amendment from escheating fractionated interests to Indian tribes without compensation to the interest holders.

Of great interest however, is the manner in which Justice Ginsberg addresses the third change in section 207, or perhaps more appropriately *fails* to address the third change.

The third alteration made in amended § 207 also fails to bring the provision outside the reach of this Court’s holding in *Irving*. Amended § 207 permits tribes to establish their own codes to govern the disposition of fractional interests; if approved by the Secretary of the Interior, these codes would govern in lieu of amended § 207. The United States does not rely on this new provision to defend the statute. Nor does it appear that the United States could do so at this time: Tribal codes governing disposition of escheatable interests have apparently not been developed.<sup>24</sup>

Thus, the Court did not rule as to the allowability of this strategy, but defers to a curious sort of holding based on the ripeness doctrine. The tribal “fix” does not save the statute from its unconstitutional defect, but the Court remains noncommittal as to whether this particular provision of the ICLA violates Constitutional taking restrictions.

The effect of the *Youpee* decision significantly deepened the IIM quagmire. Thousands of interests in allotted lands were escheated under section 207. On Friday, Feb. 26, 1999, then Secretary of the Interior Babbitt published notice in the Federal Register that Interior would reopen all estates in which property escheated under section 207.<sup>25</sup> The escheatments reached back more than a decade. Once reopened, virtually all of the affected estates have escheated heirs that have themselves deceased. New probate files must then be opened for those heirs, requiring in turn opening thousands of new probates further dividing estates and interests that were already considered de minimus.

The Congress has taken the position that, based on *Youpee*, they are boxed in a corner. The Constitution requires compensation for any taking of the right of devise and heirship. The requirement applies regardless of the de

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23. *Id.* at 244.

24. *Id.* at 245.

25. Indian Land Consolidation Act, 64 Fed. Reg. 9520-21 (Feb. 26, 1999).

minimus nature of the right. Not only must any plan address the incredibly complex, indeed futile, task of identifying such interests, consolidating those interests requires compensation totaling hundreds of millions of dollars.

Tribes do not have the economic resources to make these consolidations. The federal government was willing to offer only five million dollars to fund a "pilot" project.<sup>26</sup> The likelihood of federal funding sufficient to address the problem is remote not only due to budget constraints. While there are presumably billions of dollars in the Treasury from undistributed trust payments, those funds must be distributed to actual heirs. Distribution must be based on an accounting of the actual value of the estates. The trick here is that the DOI has concluded that it is practically and functionally impossible to account for such distributions. The federal government is boxed in a corner.

In fact, there is a side door from the corner box. It was left functional by the *Youpee* court. The way out lies not in the maze of the federal bureaucracy, but rather in the ancient path of Tribal sovereignty.

### *III. The Nature of Tribal Sovereignty and Rights of Descent*

The legal status of American Indian tribes is a singular and somewhat arcane matter. The seminal definition of tribes as "domestic dependent nations,"<sup>27</sup> while itself filled with ambiguity, does not do justice to the subtlety and confusion that inures to the question of tribal sovereignty. One clear and consistent tenet, however, is that Indian tribes' special place in federal law is afforded (or heaped upon) them as a result of their historical primacy in pre-Columbian America.

The powers of Indian tribes are, in general '*inherent powers of a limited sovereignty which has never been extinguished.*' Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they

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26. Indian Land Consolidation Pilot Program. The funds for this project were awarded to the Great Lakes Agency of the Midwest Regional Office of the BIA, covering the lands of several Chippewa Bands in Wisconsin. The program is completely voluntary and by many measures, has been a success. The chief failings have been an inability to fully close estates on a given parcel because the program buys only multiple individual interests on various allotments, and the lack of authority to force sale of de minimus interests owned by individuals who are either not able to be located, or unwilling to voluntarily sell their interests. As a result, fractionation is forestalled, not solved.

27. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

But our cases recognize that the Indian tribes have not given up their full sovereignty . . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.<sup>28</sup>

It is thus, based on centuries of authority, that Justice Stewart announces the nature of the governmental powers of Indian tribes in *United States v. Wheeler*.

Stewart lays out a Platonic duality paradigm in which, before the European incursion, tribes were fully empowered, "ideal form" governments. Following the establishment of the United States' hegemony, the ideal form becomes an abstraction in practice, and subject to the manipulation of an outside force. By force of political nature, or "implication as a necessary result of their dependent status," tribes irrevocably lose certain attributes of their original, ideal form. Some of the abstractions from the ideal form are irrevocable. These include any governmental functions inherently incompatible with the United States' hegemony, for example, independent relations with foreign sovereigns.

Certain other preexisting forms of governmental powers are lost through negotiation, and as an incident of accepting the protection of the United States. These are powers changed by treaty, and include external relations with non-Indian Americans and the concomitant dominion over lands and resources.

The third species of control over the ideal form powers is statutory. This is the aspect of the plenary powers doctrine of congressional authority over Indian tribes. This is a far reaching power that includes the power to regulate

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28. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (citations omitted).

and proscribe relations among and between tribal members, and even to obliterate the present form of tribal government altogether — termination.<sup>29</sup>

However, even as the plenary powers of Congress are potentially the most disruptive shadow on the ideal form of tribal sovereignty, they are also the most transitory. In the words of Justice Stewart, “until Congress acts, the tribes retain their existing sovereign powers.”<sup>30</sup> They do not destroy the ultimate “form” of sovereignty. While the plenary power is imposed, the participation of the tribe in that aspect of ideal sovereignty is suppressed; when the plenary power is removed, the sovereign power is restored, without further action, as a function of the tribe’s pre-existing status.<sup>31</sup>

These attributes of sovereignty generally fall under the rubric of the powers of self-government. “[T]he powers of self-government . . . involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe’s dependent status.”<sup>32</sup> Among the specifically enumerated elements of self-government cited by Justice Stewart is the power “to prescribe rules for the inheritance of property.”<sup>33</sup>

#### *IV. Tribal Control of Rights of Devise and Inheritance as Aspects of Tribal Sovereignty*

One of the basic tenets of self government is the ability to control the laws of inheritance and devise. This right was recognized, albeit condescendingly, as intrinsically tribal in nature and not subject to defeasance under state law.

This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate

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29. *Id.* at 323 (“[Tribal] sovereignty exists only at the sufferance of Congress and is subject to complete defeasance.”).

30. *Id.*

31. This is true even in the face of the ultimate exercise of plenary powers, the termination of the rights of tribes and their members of their status as Indians. While hundreds of tribes were “terminated” under the power of Congress, many of the same tribes were re-recognized as having sustained their existence, and through federal action, are reconstituted with the same aspects of sovereignty as afforded any other Indian tribe. See generally COHEN, *supra* note 5, at 152-80.

32. *Id.* at 326.

33. *Id.* at 322 n.18.

estates have not the same rights in the tribe as those whose estates are held in common. Their machinery of government, though simple, is adapted to their intelligence and wants, and effective, with faithful agents to watch over them. . . . As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.<sup>34</sup>

This basic right is recognized as preexisting state and federal authority even after the existence of the hegemony of the United States, but before specific congressional action.

[For a] member of an Indian tribe, whose tribal organization was still recognized by the government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the tribe, and not by the law of the state of Minnesota, nor by any action of the Secretary of the Interior.<sup>35</sup>

However, as surely as the tribal right of control over inheritance is, by its nature, an aspect of the power of self-government, it is also certain that such power is subject to the powers of Congress.

The Allotment Acts uniformly and clearly abrogated the tribal right to control inheritance, and set up the current disaster of fractionated undivided estates. Congress also demonstrated however, in its various statutory gymnastics to divide and devolve Indian Country, that the assertion of plenary power was temporary in nature, and that the tribal power over inheritance is amenable to restoration. The allotment of the lands of the Creek Nation is indicative of Congress' power to assert and remove state or federal power over Indian inheritance, and judicial recognition of that power.

Between 1890 and 1898, Congress allotted lands of the Five Civilized Tribes in the Indian Territories located within the Territory of Oklahoma. The intent of such allotment was, ultimately, to provide for inclusion of the Indian Territory in the State of Oklahoma. As territorial governments in which the allotted lands were located moved to statehood, disagreement as to the law of inheritance engendered litigation that reached the U.S. Supreme Court in the case of *Jefferson v. Fink*.<sup>36</sup>

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34. *In re The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-57 (1866).

35. *Jones v. Meehan*, 175 U.S. 1, 29 (1899).

36. 247 U.S. 288 (1918).

The original allotment acts put in force the descent and distribution laws of the State of Arkansas over the allotted lands. The Court traces the subsequent history of the Allotment Act as applied to the Creek Nation:

[The imposition of Arkansas law] was the situation when the act of 1901, known as the Original Creek Agreement, was adopted. That act in the course of providing for the allotment in severalty of the lands of the Creeks *revived their tribal law of descent and distribution by making it applicable to their allotments* (sections 7 and 28). But the revival was only temporary, for the act of 1902, known as the Supplemental Creek Agreement, not only repealed so much of the act of 1901 as gave effect to the tribal law but reinstated the Arkansas law with the qualification that Creek heirs, if there were such, should take to the exclusion of others.<sup>37</sup>

Ultimately, the Court determined Oklahoma law was to be substituted for Arkansas law, upon Oklahoma's admission to the United States. The key point for our purposes, however, is that the Court just as readily accepted the power of Congress to allow the tribe to adhere to its own form of inheritance law. The *Youpee* Court never considered or reached the issue as to the allowability of a modern day Original Creek Agreement. And more importantly, it never took the crucial next step; determining whether such law could cure the constitutional infirmity of the escheatment of de minimus, or any interests for that matter, to a tribe.

#### V. Taking the Fifth, or Not

Three forms of government are committed to the United States Constitution: the federal government; state governments; and Indian tribes. However, tribes, as an element of their inherent sovereignty or ideal form, did not require the Constitution for their existence and function. The effect of the Constitution on the tribal governments follows accordingly. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."<sup>38</sup> The seminal case on which this proposition is based, *Talton v. Mayes*,<sup>39</sup> looked directly at the relevance of the Fifth Amendment to the operation of tribal governments. The *Talton* Court

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37. *Id.* at 291 (emphasis added).

38. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

39. 163 U.S. 376 (1896).

concluded that the principle of self-governance for tribes, as opposed to states, includes the exemption of the requirements of the Bill of Rights, and specifically the Just Compensation Clause of the Fifth Amendment, as it applies to transactions and relations of tribal members and their tribal government.

[T]he existence of the right in congress to regulate the manner in which the local powers of the [tribe] shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States. It follows that, as the powers of local self-government enjoyed by the [tribes] existed prior to the constitution, they are not operated upon by the fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the constitution on the national government.<sup>40</sup>

Thus, under this broad exemption, absent congressional action abrogating this tribal power, there are no Fifth Amendment restrictions on a tribe exercising its sovereign right over the laws of inheritance. Therefore, tribes, absent federal action, could enact a system under which fractionated undivided interests would pass to tribes through either intestate succession or restrictions on devise.

There are, however, two congressional actions that interfere with the right. The first action, as already discussed, was placed in the Allotment Acts conferring state law on tribal rights over inheritance. The second is the Indian Civil Rights Act of 1968 (ICRA).<sup>41</sup>

In reaction to *Talton's* broad exemption of tribes from the mandates of the Bill of Rights, Congress passed the ICRA. The ICRA specifically prohibits "tak[ing] any private property for a public use without just compensation." To fully understand the nature of this abstraction on the ideal form of tribal government however, it is important to consider the nature and effect of the ICRA as applied.

*The ICRA does not extend the provisions of the United States Constitution's Bill of Rights to tribal governments.* The *Santa Clara* decision makes clear that the provisions of the ICRA can not be enforced in federal court, and are primarily enforced in tribal fora.<sup>42</sup> "The interpretation and application of the

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40. *Id.* at 382-84.

41. 25 U.S.C. § 1302 (2000).

42. *Santa Clara Pueblo*, 436 U.S. at 65.

ICRA are largely matters for tribal institutions alone.”<sup>43</sup> Accordingly, the ICRA is a limited incursion on the right of tribal self government, of the “plenary power” form, not the “necessary result of their dependent status” form. Just as Congress may proscribe certain acts of tribal government, it can also lift the proscription and allow tribes to fully participate in their original form of authority over laws of inheritance without regard to the requirements of compensation for governmental taking.<sup>44</sup>

Under this analysis, Justice Ginsberg correctly concluded in *Youpee* that the tribal probate provision of the ILCA did not solve its Fifth Amendment infirmities. Actions of one sovereign on which the Fifth Amendment does not operate (the tribe) cannot render constitutional the actions of another sovereign (the federal government) on whom the Fifth Amendment is effective. The more important, and as yet unanswered question, is whether federal action is possible that reinvigorates the form of tribal governmental power over inheritance so as to allow tribes, at their discretion, to achieve the ultimate goal of section 207 — consolidation of fractionated undivided interest through escheatment of those interests to the tribal government. And even more wide ranging, could the reassertion of tribal control over inheritance ultimately lead to, or at least significant progress toward, stanching the bleeding and curing the pathology of IIM trust mismanagement.

#### *VI. Returning the Power to the Tribe*

Recognizing the crisis status of fractionation in Indian assets, Congress continues to work assiduously to craft an effective ILCA within the confines of the *Irving/Youpee* constitutional restrictions. Congress passed amendments in 2000,<sup>45</sup> limiting testamentary disposition of Indian trust lands to Indian heirs, where such heirs exist, life estates in non-Indians, or the tribe with jurisdiction over the lands.<sup>46</sup> Should the decedent not have any Indian heirs,

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43. COHEN, *supra* note 5, at 669.

44. This is entirely consistent with the history and custom of virtually all of the American Indian tribes prior to the European incursion. The concept of private property was foreign to Indian society before the European incursion, and all territory, if even considered able to be possessed by any one species, was considered communally or tribally owned. For an instructive (if somewhat ethnocentric) account of the “communism of living” practiced in and among American Indians, see LEWIS HENRY MORGAN, *HOUSES AND HOUSE-LIFE OF THE AMERICAN ABORIGINES* (Paul Bohannon ed., 1965) (originally published as 4 CONTRIBUTIONS TO NORTH AMERICAN ETHNOLOGY (U.S. Gov’t Printing Office, 1881).

45. 25 U.S.C. §§ 2201-19 (2000).

46. *Id.* § 2206(a)(1)(A).



any remainder interests in the property descend to the tribe,<sup>47</sup> unless an Indian co-owner purchases such interest for fair market value paid to the decedent's estate.<sup>48</sup> An Indian may specifically devise an interest in trust land to a non-Indian "heirs of the first or second degree or collateral heirs of the first or second degree."<sup>49</sup> However, the Tribe may acquire such interest for fair market value paid to the non-Indian heir.<sup>50</sup>

ILCA's provisions for intestate succession limit even more strictly the passing of lands from Indians to non-Indians, and accordingly from trust to fee. Interests in trust land may only pass to a decedent's spouse, or heirs of the first or second degree.<sup>51</sup> If the only surviving heirs are non-Indians, they are limited to life estates,<sup>52</sup> with the remainder vesting in the tribe with jurisdiction over the land.<sup>53</sup> An exception is again made in the common situation where there is an Indian co-owner of the trust parcel. Such co-owner may acquire the decedent's interest by paying fair market value for the interest into the decedents estate.<sup>54</sup>

The amended ILCA does not altogether ignore the use of tribal law as a further tool to limit the bleeding of trust land out of Indian control. Tribal probate codes are authorized to provide for purchase of testamentary non-Indian interests.<sup>55</sup> Tribal codes, however, are greatly limited in that they must be "consistent with federal law."<sup>56</sup> These codes must also be approved by the Secretary of the Interior<sup>57</sup> and the ILCA specifically prohibits approval of any code that "prevents an Indian person from inheriting an interest in an allotment that was originally allotted to his or her lineal ancestor."<sup>58</sup>

The Congress should be applauded for continuing to attempt a legislative answer to what was, ultimately, a congressionally created problem. What

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47. *Id.* § 2206(a)(4).

48. *Id.* § 2206(a)(5).

49. *Id.* § 2206(a)(6)(A).

50. *Id.* § 2206(a)(6)(B).

51. *Id.* § 2206(b)(1).

52. *Id.* § 2206(a)(2).

53. *Id.* § 2206(a)(4).

54. *Id.* § 2206(a)(5). There is a strong and vocal lobby for allottees' interests in Congress. Thus, there is a consistent option for consolidation not only in the name of the tribe, but in the name of individual Indian allottees as well. While allottee consolidation keeps the land in trust and in Indian hands, it is an imperfect solution. Ultimately, the lands are still subject to fractionation once the consolidating allottee dies.

55. *Id.* § 2205.

56. *Id.* § 2205(a)(2)(B).

57. *Id.* § 2205(b).

58. *Id.* § 2205(a)(3).

needs to happen, however, is for the Congress to discern the difference between culpability for creating the problem, and sources for solving the problem. In ILCA's findings, the Congress both confesses and misunderstands. "[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."<sup>59</sup> It is undoubtedly true that the morass of fractionation was the result of federal folly. What is a misunderstanding, however, is the nature of the evil visited upon Indian country by allotment. The greatest and most basic evil visited upon Indian tribes by allotment was the disruption of tribes' ability to exercise their sovereign rights over the affairs of matters of inheritance between members. Fractionation was, and is, a symptom of that basic evil.<sup>60</sup>

The problem of fractionation can be solved by Indian tribes. Such a solution would, of course, require congressional action. That action would require Congress to see past the federal "forms" of government, and recognize the potential of the tribal form, which it covered over with the assertion of state laws of inheritance over tribal property in the allotment acts. Thus, further amendment of ILCA could do much more. The most radical step would be for Congress to fully return the laws of inheritance to tribal jurisdiction. This includes interests in all trust assets, not just trust lands. In light of the foregoing constitutional restrictions Congress must carefully craft any vehicle for total reassumption of tribal authority over its own law of inheritance. As such, the legislation would necessarily include certain key elements:

- (1) Any removal of federal authority would be optional for each tribe.
- (2) Tribes as separate sovereigns, operate on a government to government basis with the federal government.
- (3) Should a tribe not wish to reassume the power over inheritance, and continue to operate within the current ILCA, it must be allowed to do so.

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59. Indian Land Consolidation Act, Pub. L. No. 106-462, § 101(13), 114 Stat. 1991, 1992.

60. This is not to suggest that the federal government should be somehow excused from its conversion of billions of dollars of Indian trust assets. The costs of any strategy to address the issue of fractionation must be met from the federal treasury. It was after all, into the federal treasury that these billions disappeared. Whether the ultimate solution is a tribal or federal mechanism, the ultimate recompense is owed from the federal fisc. Hopefully, the *Cobell* litigation will at least determine the gross amount due the affected Indian beneficiaries. The point of this Article addresses the even more nettlesome problem of distribution of the resources once liquidated.

(4) The provision would specifically authorize Tribes to fully draft and operate their own probate/ inheritance system consistent with the customs and traditions of each tribe, as understood and interpreted by that tribe.

(5) The authority would be *carte blanc*, and allowed without Secretarial approval of the code so as to remove any federal action that could be violative of the Fifth Amendment.

(6) The legislation must ensure that the enactment of the tribal probate code would do nothing to obviate the trust status of the assets, regardless of whether the assets are held for the benefit of a tribe or individual. As such, the tribe would essentially be operating consistent with the operation of self-governance programs under titles IV and V of Pub. L. 93-638. Under this program, tribes are empowered to take full management and control over their trust assets.<sup>61</sup>

(7) Consequently, there must also be a provision that before such code took effect, the tribe must show that it is possessed of the institutional and administrative capabilities to effectively administer a probate system consistent with the federal government's trust responsibility.<sup>62</sup> This capacity is related only to assuring that the trust responsibility is administered consistent with the requirements of procedural due process. There must be a provision for adjudication of the final probate order by an administrative law judge (ALJ) through the DOI's Office of Hearings and Appeals, which is currently responsible for the administration of Indian Trust Probates. The law could either grant limited ALJ authority to a tribal decision maker,<sup>63</sup> or allow ALJs to adjudicate tribal probate codes. The legislation must generally repeal any Allotment Act provision that gives effect to state law of inheritance over interests in assets held in trust for the benefit of individual Indians. This includes the provisions of the current ILCA. This could be accomplished

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61. Indian Land Consolidation and Education Assistance Act, 25 U.S.C. § 458bb (2000).

62. It is no stretch to feel confident in the tribe's ability to manage and account for IIM funds at least as well as the BIA. One of the purposes of the Self-Governance Act was to put control of resources closer to the resources themselves. Accordingly, tribes may assume functions performed by the Office of Trust Fund Management as regards members' IIMs under the terms of a Self Governance AFA, and three tribes have assumed that function. See *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 12 (D.D.C. 1999).

63. Section 115 of the Interior Appropriations Act of 2002 provided for the appointment of ALJs without regard to the provisions of title 5 of the U.S. Code. Department of the Interior & Related Agencies Appropriations Act, Pub. L. No. 107-63, 115 Stat. 414, 439 (2001). This legislation was passed specifically "for the purpose of reducing the backlog of Indian Probate cases." *Id.* This should be an ideal vehicle for the appointment of qualified tribal judges as ALJs.

simply through “Notwithstanding any other law” language. There would have to be a waiver of the applicable descent and devise provisions of subdivision 5 of the ICRA. While there would be, arguably, no federal ICRA jurisdiction in any event, because of the self-administered nature of ICRA, a specific exemption would make the exemption clear and consistent.

Through intermarriage between members of various Tribes, some of the land and resources on any given reservation have descended to members of other tribes. Tribal authority and jurisdiction over descendency of interests must be extended to all Indians, not just tribal members.<sup>64</sup>

Under such a system, a tribe would be given a range of options. The tribe could continue to operate within a system that is no different from status quo ownership of beneficial interests in trust assets. The bleeding would continue, abetted, at best, by half steps available under the constitutional restrictions of ILCA. At the other end of the spectrum would be a system wherein all trust assets within a tribe’s jurisdiction would completely transfer all beneficial interests to the tribe within a single generation through a restriction on descendency. That is, a tribe could pass a code providing that all trust assets (or at least interests in land) shall descend to the tribe upon death of an individual Indian interest holder.

The closer Indian Country comes to the latter option, the closer the federal government would be to solving its IIM nightmare. Gross accounting, wherein amounts are known to have gone into the Treasury from a specific tribe, is far easier than having to account for each fractionated share of an allottee’s heirs. Funds could be distributed to a tribe, and it would be that tribal government’s responsibility to determine the basis of allocation of trust account balances among all heirs and members.

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64. This same manner of legislation was drafted to address the situation in which the United States Supreme Court misinterpreted the intent of Congress to conclude “the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership.” *Duro v. Reina*, 495 U.S. 676, 679 (1990). Congress made clear its actual intent soon thereafter, and in direct response to the above holding, passed the “*Duro* fix.” In so doing, Congress amended the definition of “powers of self-government” to mean “the inherent power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Pub L. No. 101-938, § 8077(b)-(d) (1990) (codified as amended at 25 U.S.C. § 1301(2)).

### VII. Weighing the Interests of Justice

The ultimate question that Congress should, and hopefully would, consider in determining whether to address the IIM morass through reassumption of tribal authority is whether this is a "just" solution. Specifically, is this policy going to lead to the most just outcome for those victimized by prior congressional actions, i.e. the reckless disregard of beneficiary interests in Indian trust assets. Certainly, Congress must act carefully in considering the historically unexpected and unwieldy reactions to earlier Indian legislation when acted upon by time and circumstance.

Of course, a rudimentary difficulty arises in defining "justice" in the first place. This writer is not so ambitious, nor profoundly foolish, as to attempt to do so here. It is, however, the role and nature of Congress to make such attempt with great regularity. It is at least of some value then, to examine the effect of the suggested legislation on various interest groups in historical context, and further, within the confines of what might satisfy the requirements of the *Cobell* court's class of plaintiffs. This analysis is presumably how the committees of jurisdiction would ultimately consider the wisdom and justice of any legislation.

Surely, there are parties, particularly individual interest holders of the allotments, who find a return of tribal jurisdiction over inheritance objectionable. These parties have suffered the direct injury that is the subject of the *Cobell* case, i.e., a failure to account for assets held in trust for their benefit by the United States. The argument could certainly be made that depriving those individuals the rights and benefits attendant to the trust (both the right of enjoyment and devise) would serve to compound the injury. This was essentially the position of the *Irving* and *Youpee* courts.

We have seen however, that in the Indian context this analysis is not so pat. In the first place, the situation has so disintegrated that an actual accurate accounting of the involved interests is impossible. When Arthur Anderson reviewed the situation it found that any reasonable accounting would cost in excess of \$200 million, and then would yield a reconciliation only 85% reliable.<sup>65</sup> Many of the accounts are, in fact, de minimus. At the time of the *Cobell* Bench Trial in 1998, the BIA Office of Trust Management had identified 16,700 IIM trust accounts with a balance below one dollar and no activity in the preceding eighteen months.<sup>66</sup> The fact is, an exact accounting

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65. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 21 (D.D.C. 1999).

66. *Id.* at 15.

is impossible. Continuing the current system, even under the best of circumstances, it is unlikely that the interest holders will ever be made whole. The best that can be hoped for is some level of "rough justice."

But even beyond the impracticality of accurately reconciling all accounts, the nature of the initial injury was to tribes as opposed to individuals. The land and resources were taken from the community, the tribe. Functionally, and ethically, the land and resources were stolen from tribes. The fact that some of the stolen property was given to tribal members does not change that fact. While the allottees are by no means culpable for the injustice visited upon the tribe, their interest in the property is less compelling. In fact, even if a tribe undertakes the most Draconian inheritance system and requires escheatment of all trust resources without compensation, the tribal members' heirs still share and participate in the benefits as members of the tribe to which the resources are transferred. The harm is less severe than to the tribe which suffered complete defeasement of its resources on allotted lands.

The federal government has, in fact, recognized the tribes' claims for damages as a result of allotment. In 1946, Congress authorized the Indian Claims Commission<sup>67</sup> (ICC) to act as a forum to redress tribal grievances. In 1978, the powers of the Commission were transferred to the U.S. Court of Claims,<sup>68</sup> and hundreds of millions of dollars were awarded to tribes under such authority. Those funds are distributed as seen fit by the tribe, subject to a congressionally approved plan for use or distribution.<sup>69</sup> Significantly, the tribes have the option of distributing a portion of such funds on a per capita basis, or retaining all funds for tribal purposes.<sup>70</sup> This is a recognition of the requirements of justice to allow the tribe, the injured party, the power over distribution of its resources.

It is clear that the federal government understood that allotment inflicted an injustice on tribes, and that the tribe and its members share the same injury. The question remains, did allotment remove the tribes from the chain of distributive justice over what originated as tribal assets when they are in the form of IIMs? Did the sacred Anglo-American talisman of individual property (albeit owned in title by the federal government) destroy forever the power of traditional tribal governmental powers over community interest in the devise

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67. Indian Claims Commission Act, Pub. L. No. 79-726, 60 Stat. 1049 (1946).

68. 25 U.S.C. § 1505 (1978). Legislation was recently passed to extend the deadline for Tribes to file claims against the federal government to Sept. 30, 2003. S. 1857, 107th Cong. (2002).

69. 25 U.S.C. § 1402 (2000).

70. *Id.* § 1403(b).

and distribution of its assets? Is justice served by drawing culturally imposed distinctions between classes of tribal assets over which the tribe may exercise its traditional powers of self-government? By not returning full authority over the devise and distribution of all trust assets derived from membership in a federally recognized Indian tribe back to tribes, the federal government's position is that allotment answers all these questions in the affirmative.

The federal government continues to give such effect to the Allotment Acts at this late date based on balancing its understanding of competing trust responsibilities; on the one hand to individual allottees, on the other to the tribes. Reestablishing tribal sovereign rights, and building tribal capacity to exercise such rights and powers is now recognized as a key component of the federal trust responsibility.<sup>71</sup> In this context, part of the trustee's duty is to provide the beneficiary with the resources that will in fact decrease the beneficiary's reliance on the trustee. For the federal government then, a return of the tribal power over rights of inheritance is completely consistent with its trust responsibility. The oxymoronic role of the trustee here is in assisting tribes in their effort to "progress back" to their original form of self governing sovereign.

This is not inconsistent with the interests of the individual allottees. The resources subject to IIM accounts are there because of the allottee's status as a member of the tribe. Without the tribe, there is no trust relationship.<sup>72</sup> The first principle of the trust relationship is the tribe. Re-empowering tribal control over the devise of IIM assets is not choosing one beneficiary interest over another. The interests are consistent. In any event, it represents the best opportunity yet presented for some measure of recompense, albeit imperfect, from a system that will likely never resolve its accounts and arrears under federal control.

### Conclusion

In short, the best solution to the division of tribal assets diminished by allotment, but still held in trust, lies within the history, tradition, and jurisdiction of the diminished tribe. It is, at least, a starting point for the

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71. For a discussion of the relationship between the seemingly disparate goals of tribal empowerment and the ostensibly paternalistic trust responsibility, see Tadd M. Johnson & James T. Hamilton, *Self-Governance for Indian Tribes: From Paternalism To Empowerment*, 27 U. CONN. L. REV. 1251 (1995).

72. Termination is the best example of this direct relationship between tribal membership and the trust relationship. Once a tribe was terminated, all services and benefits to members based on their status as members of that tribe ceased. See COHEN, *supra* note 5, at 152-80.

federal government to craft a comprehensive solution to the *Cobell* litigation, and the bitter fruits of its failed stewardship of Indian assets. Justice lies in allowing tribes to reassert their original powers over tribal assets, and to further progress back to their original form of governmental power.

This is not to suggest that this is a prescription for perfect justice. No such solution exists. However, this solution may be the closest we can come to achieving some modicum of justice, bearing in mind that the entire tribe was the party that suffered the greatest injury by allotment in the first place. The land went into individual "ownership" at the expense of community or tribal ownership.<sup>73</sup> Thus, as lands were lost to tax foreclosure and forced sale, the ultimate victims, the party most diminished by allotment, was the community of Indians from whom the land was originally taken. How individuals should be compensated is, in the end, an issue that is tribal in nature, and limited to the relations between a tribe, its members, and their Indian descendants.

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73. See *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8 (D.D.C. 1999).



