A MIGHTY PULVERIZING ENGINE? THE AMERICAN INDIAN PROBATE REFORM ACT AND THE STRUGGLE FOR GROUP RIGHTS

by David Urteago

I. INTRODUCTION

> *[T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass [acting] directly upon the family and the individual . . . .*

-Theodore Roosevelt, U.S. President, First Annual Message (Dec. 3, 1901).[1]

The struggle for land has always dominated the relationship between the United States and its Native. Though the Indian Wars have long been settled and the fighting ended, that conflict still remains. This is a comment about that conflict. Specifically, this comment addresses the American Indian Probate Reform Act (AIPRA) of 2004 and its most recent amendment, which now permits those tribes still under the aegis of the Indian Reorganization Act (IRA) of 1934 to allow for the transfer of their land held in trust into fee holds.[2] This comment will proceed in four parts. First, it will examine the development of Native American property law starting with the United States Supreme Court decision in *Johnson v. M'Intosh* (1823), and continuing

1. Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity Into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 305 n.105 (2009).

2. *See infra* Parts II-IV.

through the Burke Act of 1906.[3] The first part will examine the underlying policy of this era as well as the resulting over-fractionalization of Native controlled lands.[4] Second, this comment will discuss the IRA of 1934, the shift in policy it represented, its attempt to reduce the fractionalization of Native controlled land, and its ultimate ineffectiveness.[5] Further, this part will examine the successor of the IRA, the Indian Land Consolidation Act (ILCA) of 1983, and its modification due to the United States Supreme Court decisions in *Hodel v. Irving* (1987) and *Babitt v. Youpee* (1997).[6] In the third part, this comment will turn to an amendment of the ILCA, the AIPRA.[7] This part will examine the apparent shift in policy the AIPRA represents and the probability that it will reduce Native controlled land, especially in light of the recent United States Supreme Court decision in *Carcier v. Salazar* (2009), which limits IRA protection to those tribes recognized at the inception of the Act, and not those incorporated after 1934.[8] Finally, this comment will discuss the philosophic underpinnings of past and present Native American policy.[9] The last part will frame the amended AIPRA in terms of the continued debate between individual and group rights and the ultimate shift towards self-determination.[10]

II. BENEVOLENT ASSIMILATION: FROM *JOHNSON V. M'INTOSH* TO THE BURKE ACT OF 1906

On March 10, 1823, Joshua Johnson and Thomas Graham lost their inheritance.[11] Four years prior, Thomas Johnson died, leaving his son Joshua and his grandson Thomas his undivided interest in two parcels of land conveyed to him by the chiefs of the Piankeshaw Indians in 1775.[12] However, in 1818 the United States government sold those parcels of land to William M'Intosh.[13] The United States Supreme Court found William M'Intosh's title superior by reasoning that European discovery of the New World gave the Europeans the "exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest," and the United States had "unequivocally acceded" to that right.[14] Justice Marshall's opinion explained the dilemma of the Europeans settlers, for to leave the Indians "in possession of their country,

3. *See infra* Part II.
4. *See infra* Part II.
5. *See infra* Part III.
6. *See infra* Part III.
7. *See infra* Part IV.
8. *See infra* Part IV.
9. *See infra* Part V.
10. *See infra* Part V.
11. *See* Johnson v. M'Intosh, 21 U.S. 543, 605 (1823).
12. *See id*. at 555-61.
13. *See id*.
14. *Id*. at 587.

was to leave the country a wilderness" and to "govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."[15] Justice Marshall then asked, "What was the inevitable consequence of this state of things?"[16] The answer: "enforcing those claims [to the country] by the sword."[17] Yet, *Johnson v. M'Intosh* merely aligned legal reality with that of the world's: the Indians had lost their country.

But not all was gone.[18] As a result of "treaty negotiations, forced relocation, and containment efforts," most of the remaining Native American populations settled in reservation lands by the late 1800s.[19] In an attempt to improve the condition of the Indians living on these reservations, Congress passed the General Allotment Act, better known as the Dawes Act, in 1887.[20] The Dawes Act divided up tribal land into 160-acre parcels, which were then conveyed to each Indian head of household.[21] Under this scheme, the new Indian landowners were deemed incompetent, and their land held in trust by the federal government for twenty-five years, with the management of trust lands given to the Secretary of the Interior.[22] Moreover, land remaining after meeting the requirements of the Dawes Act were considered surplus and purchased by the United States.[23] In 1906, Congress amended the Dawes Act by passing the Burke Act, which "allowed for allottees to be declared

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15. *Id*. at 590.

16. *Id*.

17. *Id*.

18. *See* Randall Akee, *Checkerboards and Coase: The Effect of Property Institutions on Efficiency in Housing Markets*, 52 J.L. & ECON. 395, 397-98 (2009) ("By the late 1800s most American Indian tribes had been permanently settled onto reservation lands.").

19. *Id*.

20. *See* Dawes Act, ch. 119, 24 Stat. 388 (1887); *see also* Akee, *supra* note 18. It is perhaps controversial to claim that the purpose of the Dawes Act was benevolent considering its disastrous affect on tribal lands; nonetheless, it is apparent that the purpose of the Dawes Act was to assimilate the remaining Native populations into the mainstream of American Society. Transforming the Indian into the yeoman farmer so idealized by the European settlers was integral to that end. *See* Angelique A. Eaglewoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383, 393 (2008). In this light, it is fair to claim that Congress at that time viewed assimilation as beneficial to the American Indian.

21. *See* Eaglewoman, *supra* note 20, at 393.

22. *See id*. Throughout the literature concerning Native American land ownership there is reference to two types of protected land: those held in trust and those otherwise restricted. Kristina L. McCulley, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 407 (2006). Kristina L. McCulley explains:

> The term "trust land" describes land, or an interest therein, for which the United States holds fee title in trust for the benefit of an individual Indian. In many situations, the federal government also serves as the trustee of allotments to individual Native Americans. The allotments created by the General Allotment Act were lands held in trust. "Restricted Land" refers to land to which an individual Indian or tribe holds legal title but can not alienate or encumber without the approval of the Secretary of the Interior because of limitations contained in the conveyance pursuant to federal law.

Id.

23. *See* Eaglewomen, *supra* note 20, at 393.

'competent'" by local Bureau of Indian Affairs officials.[24] However, neither the Dawes Act nor its 1906 amendment included any "educational component [or] training," and the twenty-five-year trust period alone proved inadequate to properly inform the new landowners—used to community held tribal lands—of the necessities of private land ownership.[25] Consequently, the Indian landowners, now free of the encumbrances of entrustment, often sold their land for less than market value, or simply forfeited their lands due to a failure to pay property taxes.[26] As a result of losses sustained by "surplus" status, selling, and forfeiture, the American Indian went from "controll[ing] approximately 138 million acres" prior to the enactment of the Dawes Act in 1887 to controlling a mere "48 million acres" by 1934, the year the Burke Act was replaced by the Indian Reorganization Act—"a loss of almost two-thirds of the 1887 total."[27]

III. A NEW DEAL AND OLD PROBLEMS

In 1934, Congress had a change of heart.[28] Concerned by the loss of tribal lands precipitated by the Dawes Act, President Franklin Roosevelt's administration "proposed to provide an Indian 'new deal.'"[29] The result was the Indian Reorganization Act (IRA) of 1934.[30] Within the Act, Congress provided for four "stop-loss" provisions: (1) the IRA "prohibited further allotment of tribally-owned lands"; (2) the IRA "extended the federal trust periods, and restrictions against alienation imposed upon Indian allotments, until further action by Congress"; (3) the IRA, absent approval of the Secretary of the Interior, prohibited the transfer of "Indian allotments by requiring that all sales or devises be to the tribe, other Indians, or the owners' lineal descendants"; and (4) the IRA authorized any tribe organized under the IRA to prohibit the sale, lease, or encumbrance of tribal lands or interests in the land without the consent of the tribe.[31] Further, the IRA also contained some provisions for consolidation of Indian Land; it allowed the Secretary of the Interior to transfer back to the tribes land previously deemed surplus, and it

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24. Angelique A. Eaglewoman, *The Philosophy of Colonization Underlying Taxation Imposed Upon Tribal Nations Within the United States*, 43 TULSA L. REV. 43, 50-51 (2007); *see also* Burke Act, ch. 2348, 34 Stat. 182 (1906).

25. Akee, *supra* note 18, at 399; *see also* Eaglewoman, *supra* note 20, at 393.

26. *See* Akee, *supra* note 18, at 398.

27. *Id*.

28. *See* Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 503 (2004) ("The IRA was enacted with the view that Indians should not be assimilated into American culture . . . .").

29. G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 578 (2009).

30. Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1995).

31. *See* Rice, *supra* note 29, at 579-80.

also allowed for the sale or transfer of restricted (held in trust) land to other tribes and members of tribes with the permission of the Secretary of the Interior.[32] Though these provisions "significantly retarded the rate of Indian land losses" they did not prevent either loss or increasing fractionalization altogether.[33]

In the 1940s and 1950s, Congress initiated a period later deemed the "termination era."[34] The Senate Report attached to S. 1721 explained:

> During this period . . . the Federal government made few efforts to address the effects of the GAA. The government sought to find ways to eliminate Federal responsibility to tribes and their members rather than address the problems associated with former policies. On most reservations, Indian owners continued to inherit smaller and smaller shares of the undivided interests in each tract of allotted land. Also, interests were not necessarily inherited by residents, or even tribal members, of the reservation where an allotment was located. As locating dozens of individuals with undivided interests in a tract became increasingly difficult, the Department of Interior simply relied on its authority to lease unused lands on behalf of their owners while discouraging Indian Owners from becoming active in the leasing, management, or development of their own lands.[35]

By the 1960s, there was again a policy shift as Congress sought to implement "Indian self determination."[36] The Senate Report continues:

> Fractionated ownership of reservation lands was seen as a problem that required immediate attention. From 1959 through 1961, House and Senate Committees undertook a significant effort to analyze the extent of land fractionation. These studies revealed that at least one-half of the 12 million allotted acres were held in fractionated ownership, with one-fourth of these lands owned by six or more heirs. Nevertheless, it was not until 1983 that Congress enacted a statute to address the fractionated ownership of Indian Lands.[37]

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32. *See id*. at 580-81. The Senate Report attached to the American Indian Probate Reform Act explained:

> The IRA provided some tools to reverse the effects of the allotment policy. First, the IRA formally ended the policy of allotting tribal lands, indefinitely extended the trust period on lands held in trust or restricted status, and ended the widespread practice of issuing so-called "forced-fee patents." Second, it directed the Secretary to restore tribal lands that the government had declared to be "surplus." The IRA also authorized the Secretary to acquire lands and associated interest in lands.

H.R. REP. NO. 108-656, at 4 (2004).

33. *See* Rice, *supra* note 29, at 580.

34. H.R. REP. NO. 108-656, at 4 (2004).

35. *Id*. at 5.

36. *Id*.

37. *Id*.

In an attempt to address the increasing fractionalization of allotted land, Congress enacted the Indian Land Consolidation Act (ILCA) of 1983.[38] The ILCA allowed for an individual with several fractional interests to exchange those interests for a single piece of land "subject to federal approval and appraisal processes."[39] Moreover, the ILCA had provisions that "forced escheatment of small interests with low income-earning potential back to the tribe on the death of the holder of the fragmented interest."[40] It was this escheatment provision that caused a great deal of controversy and eventual Supreme Court review.[41]

In 1987, the Supreme Court heard *Hodel v. Irving*, a case that dealt directly with section 207 of the ILCA, the escheatment provision.[42] Section 207 provided that an interest that constituted less than two percent of a tract of land and earned less than $100 one year prior to its escheatment will escheat to back to the tribe.[43] However, "Congress made no provision for the payment of compensation to the owners of the interests covered by § 207."[44] Though the court of appeals ultimately decided that section 207 constituted a taking "of private property for public use without just compensation," the Supreme Court instead upheld the judgment on due process grounds.[45] Justice O'Connor, writing for the Court, determined that the one-year "grace period" to "arrange for the consolidation of fractional interest in order to avoid abandonment" was insufficient to meet due process requirements; moreover, since "the statutory presumption of abandonment is invalid under the precise facts of this case" the court did not reach "the ground relied upon by the Court of Appeals."[46]

Nevertheless, the Supreme Court did reach those grounds in 1997.[47] While *Irving* was being decided by the Eighth Court of Appeals, Congress amended section 207, so a fractional interest would only escheat back to the

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38. Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2221 (2006). For an example of how fractionalized some American Indian land had become, *see Hodel v. Irving* where Justice O'Connor notes that one particular forty acre track earned $1,080 in annual income and had 439 owners. Hodel v. Irving, 481 U.S. 704 (1987). The largest owner received $82.85 annually and the smallest heir received $.01 every 177 years. *Id.* at 713. Additionally, it cost the Bureau of Indian Affairs $17,560 annually to administer the property. *Id*.

39. Jamie Baxter & Michael Trebilcock, *"Formalizing" Land Tenure in First Nations: Evaluating the Case for Reverse Tenure Reform*, 7 INDIGENOUS L.J. 45, 105 (2009).

40. *Id*.

41. *Id*. at 106.

42. *Irving*, 481 U.S. at 709.

43. *Id*.

44. *Id*.

45. *Id*. at 730-31.

46. *Id*.

47. Babbitt v. Youpee, 519 U.S. 234, 237 (1997). The method the court used to determine that revised section 207 was an unconstitutional taking is somewhat questionable. Justice Ginsburg, writing for the majority, states that *Irving* determined that section 207 was an unconstitutional taking, and that revised section 207 did not cure the constitutional deficiencies of the original. *Id*. at 237. Yet, it is seems clear that *Irving* did not determine whether there was or was not an unconstitutional taking. *See Irving*, 481 U.S. at 730-31. Strangely, neither Justice O'Connor nor any other Justice filed a concurring opinion or otherwise remarked upon this discrepancy. *See Babbitt*, 519 U.S. at 236.

tribe if it did not earn at least $100 in one of the five years preceding the decedent's death as opposed to the one-year period the Supreme Court previously invalidated.[48] In this case, the Court held that the amendment did not sufficiently rehabilitate section 207 as it still "severely restrict[ed] the right of an individual to direct the descent" of his or her property, as well as continuing to "restrict devise 'even in circumstances when the governmental purpose sought to be advanced . . . [did] not conflict with the further descent of the property.'"[49]

IV. THE AMERICAN INDIAN PROBATE REFORM ACT AND OTHER RECENT DEVELOPMENTS

In 2000, after the Supreme Court invalidated several provisions of the ILCA including section 207, Congress attempted to revamp the ILCA by passing several amendments, but only some were certified and became effective.[50] Still, in 2004 Congress ushered in a sweeping reform to the federal

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48. *See Babbit*, 519 U.S. at 241.

49. *Id*. at 244-45 (quoting *Hodel v. Irving*, 481 U.S. at 718). Though the Supreme Court in both *Irving* and *Babbitt* effectively put an end to the escheatment provision of the ILCA because of constitutional conflict, there is some evidence that the escheatment provision was ineffective to begin with. *See* Baxter & Trebilcock, *supra* note 39, at 106 ("During the seven-year period when the escheatment provisions of the ILCA were in operation, the number of fragmented interests in a twelve reservation sample more than doubled."). Moreover, Kristina L. McCulley observes that regardless of Congressional intent, federal policy since the GAA has only led to increased fractionalization, she explains:

> Because the federal government held allotments in trust and thus subjected them to complete restraints on alienation, it denied individual Indian landowners any ability to transfer their property freely and proscribed Native American tribes from effectuating local and customary property norms or applying their common laws of descent . . . Instead of subjecting the land interests to the control and will of the deceased Indian property owner, the intestacy laws of the surrounding states dictated the distribution of allotments, often to multiple children and relatives. . . . Allotment thus created a "grid-like cage" of small, increasingly divided, fractionated private interests that continue "to crowd increasing numbers of co-owners within these already small boxes, locking many individual Indians and Indian tribes into a self-perpetuating cycle of frustration and rigid federal control."
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> The miserable failure of the allotment process, set into motion by the Dawes Act, created this large problem of fractionation, where increasingly multiple co-owners share the already small parcels of land to the extent that it marginalizes their interests to the point of nearly negating any feasible economic or practical use of the land. The previous application of the states' probate laws to Indian landowner's property upon death has only compounded the problem by increasing the number and decreasing the size of the interests.

McCulley, *supra* note 22, at 407-08.

50. *See* Douglas Nash & Cecelia Burke, *Passing Title to Tribal Lands: Existing Federal and Emerging Tribal Probate Codes*, ADVOC, May 2007, at 26. Specifically, the 2000 amendments were meant to implement the five-fold policy of:

> (1) prevent further fractionation of Indian trust allotments;
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> (2) consolidate fractional interests and their ownership into usable parcels;
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> (3) consolidate those interests in a manner that enhances tribal sovereignty;
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> (4) promote tribal self-sufficiency and self-determination; and
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> (5) reverse the effects of the allotment policy on Indian tribes.

S. REP. NO. 108-264, at 11 (2004). Additionally, the 2000 amendments included a provision to restrict in trust and restricted interests to only Indian persons or to the Tribe. *Id*. An interest could still be devised to a

law governing Indian wills and estate planning when it passed the American Indian Probate Reform Act (AIPRA).[51]

It is fair to describe probate codes generally as designed to "provid[e] equitable distribution among legal heirs and protections for the surviving spouse" in intestacy situations.[52] Conversely, the AIPRA seems primarily

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non-Indian, but the interest would only be a life estate in the devisee, "with the remainder going to heirs of the 1st or 2nd degree if those heirs happen to be 'Indian.'" *Id*. at 12. As a result:

> Indian owners of trust or restricted interests in Indian lands would be unable to devise anything more than a life estate in those interests—or to have the interests pass by intestate succession—to their own children or grandchildren who were not Indian as defined in the ILCA. Not surprisingly, in the hearings in May and October of 2003 on S. 550, a bill that is, in essence, an earlier version of S. 1721, the Committee received statements from Indian landowners and tribal representatives expressing great concern over the limitations placed on landowners by the intestate and testamentary provisions of the 2000 Amendments, and indicating that some landowners have submitted, or were prepared to submit, applications for fee patents of their interest in order to avoid the limitations of the Federal probate code and assure their ability to devise the property to their children or other family members.

Id. The response to the proposed restrictions of succession of in-trust and restricted interests were primarily responsible for Congress directing the Secretary of the Interior to not certify the inheritance restrictions. H.R. REP. NO. 108-656, at 3 (2004). When discussing this episode, the House Report attached to the American Indian Probate Reform Act stated:

> This unfortunate result was never intended to happen with the 2000 amendments. To the contrary, the 2000 amendments were an effort to preserve the trust status of individual Indian lands, and to build on the federal Indian policy reflected by the enactment of the Indian Reorganization Act of 1934, including the 1934 Act's indefinite extension of the trust and restricted period on Indian lands and its repudiation of laws from an earlier period that facilitated the unilateral issuance of fee patents to owners of Indian trust land, even over their protests. Therefore, in addition to addressing the alarming rate of fractionation of Indian lands, S. 1721 [AIPRA] is intended to address the concerns of Indian landowners and their advocates over the impact that the probate code in the 2000 amendments would have if it were to be certified.

Id. at 4. The difference between the 2000 amendments and the AIPRA was that the latter would give a wider range of testamentary options with regard to trust and restricted interests as the AIPRA allows for the landowners to devise in trust or restricted interests to:

> [H]is or her lineal descendants, to any other person who owns another trust or restricted interest in the same parcel, to the Indian tribe, or to any Indian, or the landowner may also devise the interest: (1) as a life estate to any person; or (2) as an unrestricted fee interest to any person who is not Indian, as defined in ILCA (including the testator's non-Indian lineal descendants, provided they are not "Indian").

Id. at 5. Yet this characterization of the AIPRA was of an unpassed incarnation; the final version would more readily conform to the uncertified 2000 amendments by restricting eligible heirs of in-trust or restricted interests, whether or not the divestment is via will or probate, to Indian persons or direct lineal descendants. *See infra* note 42. The final version of the AIPRA simply made use of a more liberal definition of the term "Indian." *See infra* note 42. The AIPRA states that an "Indian" is a person who:

1. is a member of an Indian tribe,
2. is eligible to become a member of an Indian tribe,
3. is an owner . . . of a trust or restricted interest in land on October 27, 2004; or
4. meet[s] the definition of "Indian" under the Indian Reorganization Act.

See infra note 51. Of course an Indian could still divest his or her in trust or restricted interests to a non-Indian via a will, yet by doing so the interest will lose its in-trust or restricted status when it is transferred at death. *See infra* note 51.

51. *See* American Indian Probate Reform Act, 25 U.S.C. §§ 2201-2221 (2004).

52. Nash & Burke, *supra* note 50.

concerned with "land consolidation and retention of trust lands in trust status."[53] Douglas Nash and Cecelia Burke explain:

> Secondary for AIPRA are its provisions for equitable distribution to heirs and devisees. For example, the old English rule of primogenitor is applied to small land interests, known in the Act as the Single Heir Rule. Additionally, AIPRA provides that a surviving spouse will receive no intestate interests, other than a life estate. All trust or restricted land interests will be open to purchase at probate, and small intestate interests can be subjected to forced sale at probate with no consent of the heirs required.
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> AIPRA contains provisions for land consolidation, partition by sale with limited consent requirements, governs the passing of ownership interests in trust property, contains testamentary restrictions, encourages will drafting, defines who are eligible heirs and devisees, and contains specific provisions authorizing and limiting tribal probate codes.[54]

Additionally, the AIPRA is not simply concerned with land consolidation; it is also concerned with maintaining Native control of tribal land.[55] Under the AIPRA, only an Indian person or their descendant, within two degrees, may inherit.[56]

Thus, it is strange to note that a specific 2008 amendment to the AIPRA significantly changed the federal government's policy of encouraging the continued control of reservation land by American Indians.[57] In December of

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53. *Id*.

54. *Id*.

55. *See* U.S. Dept. of the Interior, Understanding the American Indian Probate Reform Act of 2004, http://www.doi.gov/indiantrust/final_approved_final_aipra.pdf (last visited Sept. 24, 2009).

56. *Id*. Kristina McCulley further explains:

> The AIPRA includes a particular definition of the word, "Indian," which does not always account for Native customs involving intermarriage among various tribes and with non-Indians, thereby potentially disinheriting legitimate legal and customary spouses who would otherwise be entitled to receive the land. For example, the Stockbridge-Munsee culture in Wisconsin recognizes as an "Indian" any person who is married to or lives with a tribal member and who resides on the reservation. The AIPRA disrespects this tribal custom in that it would not allow the transfer of the tribal member's land to such a person.

McCulley, *supra* note 22, at 417.

57. *See* Institute for Indian Estate Planning and Probate, The American Indian Probate Reform Act of 2004, http://www.indianwills.org/Documents/AIPRA%20%20w%20Dec2008%20redline%20tech%20amends .pdf (last visited Sept. 24, 2009). Additionally, the change in Congress' position is especially confusing, as the position of the AIPRA before the 2008 amendment was the product of two amendments, which placed further limitations on testamentary devises of Native land held in trust. *See* Douglas R. Nash & Cecelia E. Burke, *The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act*, 5 SEATTLE J. FOR SOC. JUST. 121, 137 (2006). Yet Amnon Lehavi suggests a tension between tribal members who resist tribal control of in-trust land:

> This is obviously not to say that there is consensus among Indian tribe members about the need to restore strong tribal control over the lands. Contemporary legislative reforms have faced political and constitutional challenges by individual members who objected to ceding their rights back to the tribes. The most current legislative reform, the American Indian Probate Reform Act of 2004, thus tries to toes a finer line between avoiding too harsh an infringement of vested individual

2008, attached to the Albuquerque Indian School Act, Congress passed an amendment that allowed the Tribes the discretion to allow for holders of tribal land to devise their land as fee simples to non-American Indians.[58]

Further, the 2008 amendment was passed and signed into law less than three months before the United States Supreme Court decided *Carcieri v. Salazar*, which greatly limited the number of tribes protected by the IRA and its amendment, the AIPRA.[59] *Carcieri* was the culmination of an eighty-two year struggle by the Narragansett Indian Tribe for federal recognition.[60] The Narragansett were the indigenous "occupant[s] of much of what is now the State of Rhode Island."[61] During the two-year conflict known as King Phillip's War between 1675 and 1676, the Narragansett were decimated and placed formally under the guardianship of the Colony of Rhode Island.[62] The *Carcieri* court explained:

> Not quite two centuries later, in 1880, the State of Rhode Island convinced the Narragansett Tribe to relinquish its tribal authority as part of an effort to assimilate tribal members into the local population . . . . In the early 20th century, members of the Tribe sought economic support and other assistance from the Federal Government. But, in correspondence spanning a 10-year period from 1927 to 1937, federal officials declined their request, noting that the Tribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government.
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> Having failed to gain recognition or assistance from the United States or from the State of Rhode Island, the Tribe filed suit in the 1970's to recover its ancestral land, claiming that the State had misappropriated its territory in violation of the Indian Non-Intercourse Act. The claims were resolved in 1978 by enactment of the Rhode Island Claims Settlement Act. . . .

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interests in land and regaining tribal collective power in cases of acute property disintegration. Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community*, 10 THEORETICAL INQUIRIES L. 43, 45 (2009).

58. *See* 25 U.S.C.A. § 2206(b)(2)(B)(ii)(I) (West 2010); *see also* Institute for Indian Estate Planning and Probate, *supra* note 57. Moreover, there is no recorded discussion concerning the amendment giving Tribes the power to transform land held in trust to land held by non Indians in fee. *See* 154 CONG. REC. S9218 (daily ed. Sept. 22, 2008) (statement by Sen. Reid) (senate passed the unamended Albuquerque Indian School Act with unanimous consent); *see also* 154 CONG. REC. H8718 (2008) (the House referred the Senate bill to the House Committee on Natural Resources); 154 CONG. REC. H10610 (daily ed. Sept. 29, 2008) (statement by Rep. Rahall) (the Bill is discharged from committee five days later, with only three days during the week, and with no report or hearing); 154 CONG. REC. H10612 (2008) (an amendment is submitted, which included the technical amendment to the AIPRA, the amendment is passed as amended unanimously); 154 CONG. REC. S10676-02 (daily ed. Nov. 19, 2008) (statement by Sen. Casey) (during the same day the Senate considers and passes with unanimous consent the amended bill).

59. *See* Carcieri v. Salazar, 129 S. Ct. 1058, 1065 (2009); *see also* Markham C. Erickson, Carcieri v. Salazar*: The Supreme Court's Definition of "Now" Creates Uncertainty for Indian Tribes*, 56 FED. LAW. 20, 21 (July 2009).

60. *Carcieri*, 129 S. Ct. at 1061.

61. *Id.*

62. *Id.*

> The Narragansett Tribe's ongoing efforts to gain recognition from the United States Government finally succeeded in 1983. In granting formal recognition from the Bureau of Indian Affairs (BIA) determined that "the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications."[63]

As a result of federal recognition, the Department of the Interior could hold a parcel of land in trust for the Narragansett Tribe.[64] The Narragansett Tribe planned to use this parcel to construct new housing.[65] The dispute arose in 1991 when it became a question of whether the new housing construction had to conform to local regulations.[66]

A district court "granted summary judgment in favor of the Secretary and other Department of Interior officials."[67] The District Court reasoned that the plain language of the IRA "to include members of all tribes in existence in 1934, but does not require a tribe to have been federally recognized on that date."[68] The Court of Appeals for the First Circuit affirmed.[69]

The crux of the controversy revolved around the meaning of the word "now."[70] The wording of the IRA limited the statute to those of Indian descent "who are members of any recognized Indian tribe now under Federal jurisdiction."[71] The Court concluded "the word 'now' . . . limits the definition of 'Indian,' and therefore limits the exercise of the Secretary's trust authority under section 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted."[72] The Narragansett Tribe was not under federal jurisdiction when the IRA became law; therefore, the Secretary could have no authority to hold the Tribe's land in trust. Thus, the Narragansett Tribe was outside the reach of the State of Rhode Island.[73]

From the birth of the United States to the present day, U.S. policy regarding American Indians verges on the schizophrenic. Yet most policy oscillation centers on the tension between collective and individual rights. Seemingly, protection of the American Indian hinges on the existence of the Tribe; if the individual is to garner special protection, then the individual must be wholly defined by his group association. Otherwise, he is only an American, like any other—at least in the legal sense.

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63. *Id*. at 1061-62 (quoting 48 Fed. Reg. 6177, 6178).
64. *Id*. at 1062.
65. *Id*.
66. *Id*.
67. *Id*. at 1063.
68. *Id*.
69. *Id*.
70. *Id*.
71. 25 U.S.C.A. § 479 (West 2010).
72. *Carcieri*, 129 S. Ct. at 1065.
73. *Id*. at 1068.

V. ARE GROUPS PEOPLE TOO?

At the beginning of this discussion, Theodore Roosevelt was quoted to be in favor of the General Allotment Act, for the Act was going to finally assimilate the Indian.[74] Yet, that was not the case.[75] Instead, the great tribal mass remained, in one form or another. Interestingly, the rest of the century has seen several important policy changes regarding the American Indian, yet all of these changes are in relation to what set of rights Congress has decided to champion. The IRA federally recognized the Tribes and sought to preserve them.[76] In the 1950s and 1960s, Congress chose to terminate those tribes too small to manage efficiently.[77] Congress then attempted to preserve the Tribes with the ILCA, which was ultimately struck down by the Court as it violated the rights of individual Native Americans.[78]

Though the tension between the group and the individual has become apparent, the question remains: why? How does the protection of Native Americans as a whole, and for that matter other minority groups, endanger the rights of individual Native Americans? And how does the American judicial system resolve this tension?

A. The European Legal Tradition and Group Rights

The legal history of the United States and the West is one that has been concerned with the adjudication of claims by individuals against other individuals or against the government, and not those based on non-particularized group rights.[79] Yet there is an increasing tension between the traditional recognition of individual rights and the growing concern for group rights as jurists and policy makers continue to explore mechanisms to ensure equality between majority and minority groups. For example, in a recent Supreme Court case concerning affirmative action in Seattle schools, the Court felt compelled to reiterate, "[O]ur precedent . . . makes clear that the Equal

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74. *See supra* Part I.

75. *See supra* Parts II-IV.

76. *See supra* Part III.

77. *See id*.

78. *See supra* Part IV.

79. *See* Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 333 (2009) ("United States law reflects this approach through its emphasis on the individual 'natural rights-bearing person' who possesses the capacity to exercise her rights as well as the freedom to exercise them against larger societal interests."). The necessity of an asserted individual right in the American court system is not to be underestimated; one merely has to look to constitutional standing doctrine to discover that to even have a claim heard in a federal court, the claim must not be based on an abstract injury that would extend to all members of a racial group lest the federal courts become "no more than a vehicle for the vindication of the value interests of concerned bystanders." Allen v. Wright, 468 U.S. 737, 756 (1984) (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

Protection Clause 'protect[s] *persons*, not *groups*.'"[80] Moreover, a recent commentator explains what he sees as a "perversion":

> [C]onstitutional rights are personal rights, the Court, in its radical reversal of law and precedent, invented a new legal doctrine of group rights (i.e., entitlements). In an effort to enhance the status of some groups, it rejected the constitutional and statutory claims of any and all individuals outside the preferred groups. Under this judicial invention, the principle of group need supplants that of individual merit, proportion supplants equality, and group rights supplant individual rights.[81]

Yet this outpouring of sentiment is undoubtedly a reaction to such decisions as *Grutter v. Bollinger*, which found that institutions of higher education could use race-based classifications in admissions decisions because they had "a compelling interest in attaining a diverse student body."[82] In other words, the current state of Supreme Court jurisprudence is that constitutional rights are personal rights, except when they are not. Dimitry Kochenov, while writing about similar struggles within the European Union, provides some insight into how nations built on Western political structures reconcile individual rights and the desire to protect minority groups:

> It is necessary to keep in mind, however, that simply focusing on equality without providing minorities with specific group rights is another approach consistent with the notion of democracy. In other words, the two-tier system of minority protection is desirable to protect fully the interests of the minorities, but there is no obligation in international law to institute such a system.[83]

Thus, group rights are often recognized as mere practical necessities, but not really as *group rights*.

Significantly, the struggle between the traditional notion of individual rights and the burgeoning doctrine of group rights has often driven the myriad policy changes concerning Native Tribes. The structure of American Indian tribes is such that the rights of the collective are emphasized over that of the individual, or as one commentator has written: "American Indians typically

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80. Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743 (2007) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)). Perhaps taking aim at Justice O'Connor's majority opinion in *Grutter v. Bollinger*, Chief Justice Roberts ended his majority opinion in *Parents Involved in Cmty. Schs.* by stating, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748.

81. Robert E. Hayes, *The Supreme Court's Perversion of Equality*, 13 TEX. REV. L. & POL. 283, 303-04 (2009).

82. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

83. Dimitry Kochenov, *A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection*, 31 B.C. INT'L & COMP. L. REV. 1, 10 (2008).

conceive of legal relations as existing between groups, not individuals."[84] Consider, for example, the difficulties underlying intellectual property rights of traditional knowledge in the context of many Native American Tribes:

> Patents and copyrights are usually individual rights, giving one person or a small group of people the power to exclude others . . . . As a matter of policy, traditional knowledge is often shared by all members of a culture. If the knowledge is already communally "controlled," giving rights to one particular person in the culture would be incongruous. Moreover, as a practical matter, a system of individual rights would often prove impossible to administer. Although traditional knowledge is not always ancient, in many cases the original inventor or author will have died, perhaps many years ago . . . . A group TKR [Traditional Knowledge Right] therefore better reflects the reality of ownership and control, and provides a feasible way to enforce the rights.[85]

In the traditional knowledge context, those traditional notions of individual rights which anchor Western concepts of justice and fairness are simply impractical. This is unsurprising, as the traditional knowledge in question arose from societies structured on different values. But land is not intellectual property. Land is discreet, tangible, and divisible. Therefore, one would assume, the traditional Western system would be easily applied.

However, Native Americans are not a monolith; there are over five hundred federally recognized tribes today, each with its own culture and history, and American Indians speak over one hundred languages and practice a variety of religions.[86] In other words, most Native Tribes are not robust institutions in charge of vast tracks of land, and consequently the transfer of land from a tribesman to a non-tribesman is often not a routine sale of property, but instead represents a noticeable loss of country. Such a loss can have profound negative consequences for the integrity of Native American community and culture.

"Community" is a concept that has increasing disparate meanings. Nonetheless, when we speak of community in the context of nations it is "in the sense of ethnic community."[87] Jeremy Waldron explains that community is "a particular people sharing a heritage of custom, ritual, and way of life that is in some real or imagined sense immemorial, being referred back to a shared history and shared provenance or homeland."[88] Waldron concludes, "This is

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84. Painter-Thorne, *supra* note 79.

85. John T. Cross, *Justifying Property Rights in Native American Traditional Knowledge*, 15 TEX. WESLEYAN L. REV. 257, 285 (2009).

86. *See* Painter-Thorne, *supra* note 79, at 334.

87. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 756 (1992).

88. *Id.*

the sense of 'community' implicated in nineteenth and twentieth-century nationalism."[89]

Importantly, Amnon Lehavi explains that actual physical territory is essential to the existence of Native American communities.[90] The reasons for this are threefold. First, shared territory is the fundamental basis of human communality, and interestingly, it resembles "the symbiosis of animals and plants in the same habitat."[91] Second, "common territoriality provides a dynamic arena for repeat-play encounters between persons" and thus, results in "over time a thickening web of meaningful ties and neighborly internal norms."[92] Lastly, territorial exclusion, meaning that areas labeled "Indian country" necessitates other areas which are *not* Indian country, have powerful symbolic effect.[93] It is in this context that Lehavi explains:

> The property drama revolves not only around whether it is Indians or non-Indians who own lands located within Indian reserves, but even more so, around the specific structure of land rights *within* the Indian communities. Thus, the 1887 Dawes Allotment Act, under which collective tribal landholdings were broken up to grant land allotments to individual tribe members, is considered in retrospect to have caused practically irreparable damage to the viability of Indian tribes. This is so because the allotment process, accompanied by subsequent federal restrictions and state intestacy laws dictating an ever-increasing number of multiple heirs to each allotment, resulted in severe over-fractionation of interests, the destruction of tribal economies, and broader-based undermining of traditional tribal institutions.[94]

The General Allotment Act imposed Western notions of individual rights on a society both unfamiliar with it and already based on group land ownership. As a result, the continued partitioning of land within tribal territory persists to threaten tribal existence.

Additionally, while Amnon Lehavi showed how territory is important to further the existence of American Indian tribes because of its community building function, Kristen Carpenter, in a recent article, proposes to apply Professor Margaret Radin's theory of the effect property has on personhood to "rethink" Native American interests in their traditional real property.[95] Professor Radin proposes that there exists some property so closely related to the individual as to be almost a part of the self.[96] Because of this close

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89. *Id*.
90. *See* Lehavi, *supra* note 57, at 45.
91. *See id*. at 49.
92. *Id*.
93. *Id*.
94. *Id*. at 44.
95. *See* Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L. J. 313, 341-44 (2008).
96. *See id*. at 341.

relationship, such property cannot be properly replaced.[97] As a result of this observation, Radin argues that the current state of property law, dominated by its need to place a monetary figure on everything, fails to adequately protect property that is essential to the personhood of individuals.[98] Instead, Radin suggests that "we transcend market-based rhetoric and instead adopt a concept of 'human flourishing.'"[99] This means that laws designed to regulate property exchanges should be based on transactions that would benefit the well-being of people.[100] Although Radin acknowledges that our current system is appropriate for dealing with property which is fungible to its owner, Radin asserts that "real property that is 'important to the freedom, identity, and contextuality of people' merits a different level, or even type, of protection."[101]

Kristen Carpenter uses Radin's theory of property and personhood and applies it to Native American tribes.[102] Carpenter analogizes between the individual concern of personhood and the group concern of peoplehood.[103] The implication being that property can be so important to a group that it is essential to its identity, and thus, deserving of a higher or different sort of protection than normally given real property.[104]

What has become clear is that the transfer of real property within American Indian reservations presents truly unique challenges. Not unlike the conundrum of copyrighting traditional knowledge, which is the product of a group and not of individuals, land ownership in Indian country is inextricably linked to the tribe as a whole. Policies that continue to emphasize individual transfers, especially those to non-Indians, do not present mere challenges to the strength of the tribes, but challenges their very existence.

Yet Congress has often been given only two options when crafting policy for American Indians; either champion the individual and attempt to accelerate assimilation, or favor the Tribe and attempt to strengthen that existing structure. However, as the discussion above has illustrated, whether the government chooses to act upon the individual—in conformity with Western legal tradition—or upon the group, it will have acted against the non-chosen option.[105] When dealing with the situation of Native American land ownership, which has become a hybrid of indigenous reality forced through a screen of

97. *See id*.
98. *See id*. at 342.
99. *See id*.
100. *See id*.
101. *See id*. at 343.
102. *See id*.
103. *See id*.
104. *See id*.
105. For example, if the U.S. government takes the side of the Tribe, then it would be effectively turning its back on the its own legal traditions; but if it champions the individual, the government would often be participating in the degradation and termination of the Tribal structure, a situation President Nixon called "morally and legally unacceptable." Painter-Thorne, *supra* note 79, at 356.

Western law, the "either or approach" is detrimental to Native Americans as individuals and to the tribe as a whole.

B. Self-Determination

Despite the practical and philosophic difficulties in crafting policy for American Indian tribes, the reality is such that it must be done. However, with the two obvious routes unsatisfying, Congress has, at times, turned to a third option: self-determination. The Indian Reorganization Act of 1934 championed such an approach as it allowed tribes to draw up their own constitutions and, to an extent, administer their own laws on the reservation.[106] Yet it wasn't until 1970 that self-determination became the dominant theme underlying Native American policy.[107] Rebecca Tsosie explains:

> In 1970, President Richard Nixon called for a new federal policy of self-determination for American Indians. The self-determination policy represented a welcome change from the previous federal policy of "termination," which sought to abolish the federal trusteeship over Indian tribes, dismantle the reservations, and end the Indian tribes' unique status as "domestic, dependent nations." The self-determination policy, intended to "strengthen the Indian's sense of autonomy without threatening his sense of community," encouraged tribes to assume control over many of the federal programs being administered on the reservation.
>
> Tribal self-determination persists as the official federal policy . . . .[108]

Ultimately, Congress upheld this approach when it amended the American Indian Probate Reform Act in 2008 to give Indian tribes the option of allowing for succession of real property within the reservations to flow to non-Indians.[109]

Although self-government of American Indian tribes is not a new development, and self-determination has at least been the nominal policy of the federal government since 1970, the active promotion of self-determination is still necessary. In a recent article, Susan Painter-Thorne explains that the "lives of American Indians are dominated by U.S. laws that emphasize the individual over the group."[110] Painter-Thorne further observes that "more than four thousand federal laws and treaties concern American Indians-laws that have been interpreted in thousands of court decisions," and "[m]any of these laws and regulations were implemented with little, if any, tribal input."[111]

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106. *See* Hall, *supra* note 28, at 504 ("The IRA represented a change in congressional attitudes and policies by reducing the supervision of tribes and recognizing tribes as units of government in the American system.").

107. *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Roles of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 229 (1996).

108. *Id*. at 229-30.

109. *See* 25 U.S.C.A. § 2206(b)(2)(B)(ii)(I) (West 2010).

110. Painter-Thorne, *supra* note 79, at 334.

111. *See id*.

Painter-Thorne concludes, "The inclusion of American Indian values and beliefs in the construction of laws that affect their lives is vital for the cultural survival of the tribe," and the move toward self-determination represents nothing short of "restoring control over cultural identity to the tribes."[112]

This is not to say that self-determination is not without its own pitfalls. For example, Daniel Green notes that "self-determination certainly does not exclude self-ownership by the individual," and that we should become alarmed if our arguments "begin to sound as if we are talking about a collective actor, or a homogenous group acting in concert, instead of a community of autonomous moral agents. . . .[c]oncern for a group should not make us lose sight of the autonomous moral agency of each individual member."[113] Furthermore, Green argues that the consequence of shifting moral rights from the individual to the group is to allow for the justification of destructive and oppressive group behavior.[114] Green concludes, "We must be mindful of the general applicability of law and remember that a law intended to (rightly) help one or more groups might be used by others in ways in which we have neither foreseen nor approved of . . . ."[115]

Additionally, Green's concerns are especially meaningful if examined within the context of the quintessential group right: the right to exclude.[116] Angela Riley writes:

> Individuals who are illegitimately denied entry (or are subject to forced exit) may suffer great losses in terms of community and cultural identity. This might constitute a particularly poignant loss for Indians, who are unlikely to be able to access a community outside the tribe where they will be able to speak their language, participate in religious ceremonies, commune with sacred sites, or engage with other Indians of the same (or similar) tribal affiliation.[117]

Yet even contemplating this potential consequence, Riley firmly concludes, "[t]he argument for Indian nations' autonomy to determine tribal membership by internal mechanisms is not a case for exile. Rather, it is an argument for the right of self-determination, which is critical to the continued political and cultural existence of Indian nations."[118]

Though the concerns raised by Riley and Green are well taken, one must recognize that self-determination is itself a safeguard against the excesses of protectionist policies. We must remember that the AIPRA was not designed

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112. *See id*. at 366-67.

113. Daniel Austin Green, *Indigenous Intellect: Problems of Calling Knowledge Property and Assigning it Rights*, 15 TEX. WESLEYAN L. REV. 335, 346-47 (2009).

114. *Id*. at 347.

115. *Id*. at 348.

116. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1073-74 (2007).

117. *Id*. at 1074.

118. *Id*.

simply to provide an equitable distribution of property upon the death of Native Americans, but also designed to protect and bolster Native American culture by way of consolidating fractionalized tribal lands.[119] As a means to that end, the AIPRA, before the 2008 technical amendment, did not allow for land held in trust to pass intestate to a non-Indian, nor did it allow for devising land held in trust to a non-Indian and remain in protected status.[120] If we accept the government's stated goal of the AIPRA, then the unamended Act represented an intolerable intrusion into the rights of Native Americans to decide the structure of their own society and culture. If the goal is to preserve Native American cultures, and the means of preservation is the probate code, and the writers of the code are not Native Americans (Congress), then the AIPRA is merely the instrument used by outsiders to impose their own values upon a minority group. Of course the 2008 technical amendment, which allows tribes to decide whether or not to implement such restrictions on tribal land held in trust, lessens this concern. Nonetheless, this situation raises a powerful counter to Daniel Green's argument. If we forgo self-determination because of the fear that empowered minority groups will create and implement policies abhorrent to the ideals and values of Western liberalism, but we still protect minority groups in conformity with our modern political sensibilities (in other words the dominant power to effect a group is with non-members), then this forces the minority group to take on the guise of whatever prevailing popular caricature of themselves the majority group holds. Jeremy Waldron puts it more elegantly when he writes, "To *preserve* a culture is often to take a favored 'snapshot' version of it, and insist that this version must persist at all costs, in its defined purity, irrespective of the surrounding social, economic, and political circumstances."[121]

Furthermore, Waldron explores the consequences of minority protection without self-determination. As an example, Waldron looks at Article 27 of the International Covenant on Civil and Political Rights. The article states that minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[122] The act itself is fairly innocuous, but Waldron focuses on what the act leaves out, namely what constitutes the "enjoyment of one's culture, the profession of one's religion, and the use of one's language."[123] Waldron asks:

> Are these goods secured when a dwindling band of demoralized individuals continues, against all odds, to meet occasionally to wear their national costume, recall snatches of their common history, practice their religious and

119. *See supra* notes 55-56 and accompanying text.
120. *See supra* notes 55-56 and accompanying text.
121. Waldron, *supra* note 87, at 788.
122. *Id.* at 757.
123. *Id.*

> ethnic rituals, and speak what they can remember of what was once a flourishing tongue? Is that the *enjoyment* of their culture? Or does enjoyment require more along the lines of the active flourishing of the culture on its own terms, in something approximating the conditions under which it originally developed?[124]

Surely Waldron's portrait of almost entirely assimilated minority groups gathering in parody of their former culture cannot be the goal of legislation designed to preserve them. Waldron explains that the natural result is that many have come to the conclusion that there must be some "affirmative measures" that entitle minority cultures "to protect themselves by placing limits on the incursion of outsiders and limits on their own members' choices about career, family, lifestyle, loyalty, and exit—limits that might be unpalatable in the wider liberal context."[125]

Yet this is not the end of the inquiry. So far Waldron has established that the protection of minority cultures requires something more than mere sufferance. But Waldron finds the idea of protection itself problematic. Waldron argues that "[t]o preserve a culture—to insist that it must be *secure*, come what may—is to insulate it from the very forces and tendencies that allow it to operate in a context of genuine choice."[126] Choice is essential for people to evaluate the value of a particular culture or way of life, be it their own or another's. Waldron concludes, "Either people learn about value from the dynamics of their culture and its interactions with others or their culture can operate for them at most as a museum display on which they can pride themselves."[127]

The difference between Waldron's scenario of minority cultures that are preserved, static, and dead and the likely result of self-determinist legislation is that the latter does not "insist that [culture] must be secure."[128] If we accept that fractionalized tribal land and subsequent transfer of tribal land to non-tribe members threaten Native Americans as a group, community, and culture, then the AIPRA with its heavy-handed, top down approach to cultural preservation fit the description of Waldron's scenario. However, the amended AIPRA makes preservation optional. In other words, the legislation is still a tool to be used, just not by the majority group. If the tribes wish not to use the tool to preserve, then that will be their choice. Thus, Waldron's concerns are neatly done away with because they assume the driving preservation force would be the majority group that crafts the legislation, not the members of the minority group itself.

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124. *Id*.
125. *Id*. at 758.
126. *Id*. at 787.
127. *Id*.
128. *Id*.

Additionally, Green's concerns are also met. Though this comment shows that on balance protection policies featuring self-determination are safer than those that do not, it remains to be said that Green's scenario of an empowered minority group drafting and enforcing abhorrent legislation would also be highly unlikely under self-determinist regimes because ultimately self-determination is about choice. Given a free choice, the chance of creating abhorrent political regimes is the same as in any other free society.

VI. CONCLUSION

The American Indian Probate Reform Act of 2004 and its 2008 amendment is ultimately an affirmation of self-determinism. For much of the history of Native American policy, the federal government has often resisted this shift as it often championed group rights and was thus seen as inimical to the Western emphasis of the individual. But the conflict between individual rights and group rights need not be a zero-sum game, for the two are not mutually exclusive. Though it is true that self-determination places a legal emphasis on the group instead of on the individual, it must be recognized that the right to self-determination is also an individual right, not solely a privilege of the group.[129] Allowing for the various tribes to decide on whether to allow for tribal land to transfer to non-Indians also allows for individuals that comprise these tribes to have a meaningful voice in the decision making process, which will ultimately decide on what to do with *their* property.

At first glance, the 2008 technical amendment to the American Indian Probate Reform Act would seem to threaten the viability of the tribal structure. And maybe it does. But the amendment is far from hostile to American Indian tribes rather, it rings a respectful tone, softening the, at times paternalistic, AIPRA. So, is the AIPRA Theodore Roosevelt's great pulverizing engine? One cannot say; the only thing that is certain is that now it is no longer his decision.

129. *See* Green, *supra* note 113, at 346.