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NOTES

RESERVATIONS: THE SURPLUS LANDS ACTS AND THE QUESTION OF RESERVATION DISESTABLISHMENT

*Susan D. Campbell**

The meaning of the surplus lands acts is now crucial to the integrity of a number of western Indian reservations. Enacted over a span of almost thirty years after the passage of the Dawes Act of 1887,¹ these statutes provided for the allotment in severalty of tracts of land on specific reservations to individual tribal members, and then for the opening of the surplus lands to settlement.² In recent years, the construction of the surplus lands acts has been the focus of litigation between the Indian tribes and state and local governments concerning the extent of tribal and federal jurisdiction over the opened parts of the reservations.³

The discovery of valuable minerals on the opened reservations and the prospects of taxing their severance have no doubt added impetus to efforts to resolve the status of the opened lands. Furthermore, the question of criminal jurisdiction over tribal members who have committed crimes in the opened areas has been a continuing source of tension between the tribes and state law enforcement officials. For the tribes and the state and local governments, much is at stake in the surplus lands cases.

A significant development in the legal contest over the meaning of the surplus lands acts came in early 1984 with the Supreme Court's decision in *Solem v. Bartlett*.⁴ In *Solem*, the Court considered whether an attempted rape committed by John Bartlett, a member of the Cheyenne River Sioux Tribe, occurred within the boundaries of the Cheyenne River Reservation in South Dakota. Bartlett had been convicted in state court and sentenced to ten years in the state penitentiary. He sought a writ of habeas corpus

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1. 24 Stat. 390 (1887).

2. See, e.g., Act of May 29, 1908, 35 Stat. 460; Act of Aug. 15, 1894, 28 Stat. 337-38; Act of May 27, 1902, 32 Stat. 245, 263; Act of Apr. 23, 1904, 33 Stat. 254.

3. See *Ute Indian Tribe v. Utah*, Nos. 81-1827 & 81-1901, slip op. at 3 (10th Cir. Aug. 29, 1983); *Bartlett v. Solem*, 691 F.2d 420, 420-21 (8th Cir. 1982). See also *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977).

4. 104 S. Ct. 1161 (1984).

in the federal courts on the grounds that although the crime occurred on the part of the reservation opened under the surplus lands act of May 29, 1908, this was still within the boundaries of the reservation and not subject to state jurisdiction.⁵

In a unanimous decision, the Supreme Court held that the language and history of the 1908 Act did not indicate that Congress intended that the 1.6 million acres opened to white property-ownership should lose reservation status.⁶ Bartlett's crime, therefore, occurred within the reservation boundaries, and he should have been tried in federal court. The result of this case, and the standard of construction used to reach the result, are of great importance to tribes and to state and local governments concerned with the extent of the Indian reservations.

This paper will focus on the problems of statutory construction in the surplus lands cases. The first section will analyze and criticize the standard of construction used in *Solem v. Bartlett* and four other leading surplus lands cases. The object of this critique is to expose inherent tensions in the standard and to explain complexities in the doctrine that have resulted when it has been applied to the surplus lands acts. Second, the paper will re-appraise the application of the standard to the statutory language and the history of the surplus lands acts. The object of this section is to suggest how different results in interpretation of some of the surplus lands acts might arise, giving the doctrine a different and, it is hoped, more rational content. Finally, the paper will present an alternate, and more radical, critique of present interpretations of the surplus lands acts. It will inquire into the propriety of using statutory construction at all, in light of the evolution of society's values and congressional Indian policy and in light also of developments in other areas of law.

I. *The Standard for Construction*

The standard for construction now used in interpreting statutes affecting Indians is that congressional intent should be determined by looking at "the face of the Act," "the surrounding circumstances," and "the legislative history." Moreover, the courts have developed special principles of construction for statutes affecting Indians. These can be summarized in the rule

5. *Id.* at 1163.

6. *Id.* at 1171-72.

7. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977).

that "the legislation of Congress is to be construed in the interest of the Indian."⁸ In surplus lands cases the corollary of this rule is that Congress must clearly express an "intent to change boundaries" before a reservation can be found to be "diminished."⁹

The courts must consider a number of factors, then, in interpreting statutes affecting Indian lands. These include the statutory language, the legislative history, and the circumstances that gave rise to the statute, as well as the judicial policy that in cases of vague statutes the Indian tribes should be given the benefit of the doubt. At various points in United States legal history, one or the other of these factors has been given greater weight.

Before 1900, when the Supreme Court discussed the construction of statutes affecting Indians, the language of statutes was all-important. In *Ex parte Crow Dog*,¹⁰ for example, a case involving the criminal jurisdiction of the United States over Indians, the Court stated that implied repeals were not favored, and that general and inconclusive words could not repeal express words of the previous law.¹¹

In *Leavenworth, Lawrence Railroad v. United States*,¹² the Court also stressed the need for specificity in legislation that would deprive Indians of their rights, especially rights in land. In that case, the Court was asked to construe federal legislation that generally granted public lands to encourage railroad construction. A railroad company had built across an Indian reservation in Kansas, and then had tried to claim reservation land as grants. The Court denied this claim on the ground that the reservation lands, previously reserved by treaty, were not expressly granted in the railroad land grant legislation. The Court said:

As the act does not mention it, there is no reason to suppose that Congress, in making the grant, contemplated the extinction of the Indian tribe at all. . . . The language used is to be taken as expressing the legislative intention, and the large influence attempted to be drawn from it is not authorized.¹³

8. *United States v. Celestine*, 215 U.S. 278, 290 (1909).

9. *Rosebud Sioux Tribe*, 430 U.S. at 615.

10. 109 U.S. 556 (1883).

11. *Id.* at 570.

12. 92 U.S. 733 (1875).

13. *Id.* at 744-45.

The Court also said:

Treaties, like statutes, must rest on the words used, nothing added thereto, nothing diminishing. In *Rex v. Barrell* [citation omitted], Patterson, J., said, "I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty." Courts have always treated the subject in the same way, when asked to supply words in order to give a statute a particular meaning which it would not bear without them.¹⁴

At this stage in the development of the standard of construction (which was, interestingly, the time when many of the surplus lands acts were passed), the courts combined formalistic statutory analysis, inherited from English practice, with a moral concern for the Indians. The result was an odd brand of positivism or strict construction that sought to protect the Indians: changes in Indian rights had to be expressed specifically in statutes or treaties, the legislative history notwithstanding.

At the same time that courts had little use for history in interpreting statutes, Congress also had little interest in compiling voluminous legislative histories. Before 1900 committee reports were generally sparse and inconclusive and only a few were retained.¹⁵ Members of Congress did not usually read into the record long statements on particular bills, nor did they consciously "make" the legislative history, as is now the practice.

How, then, did American courts arrive at the present standard of construction, which relies heavily on inquiries into the history of an act? While it is not within the scope of this paper to do a detailed study of the history of statutory construction, a few suggestions as to why this evolution occurred will be made. The shift in techniques of statutory construction appears to have come about at the same time as, and possibly as a result of, an intellectual movement called by some "the revolt against formalism."¹⁶ This movement, which gained momentum in the late 1800s, was associated with Oliver Wendell Holmes and his book *The Common Law*. Stressing substance over form and relying upon historical studies to get at meaning, Holmes and other jurists con-

14. *Id.* at 751.

15. See *infra* note 113 and text accompanying notes 129-130.

16. See generally M. WHITE, *SOCIAL THOUGHT IN AMERICA, THE REVOLT AGAINST FORMALISM* (1970 ed.).

sciously shifted away from the English method of interpreting statutes, which relied upon strict wording. As Holmes complained, courts too often said, "we see what you are driving at, but you have not said it, and therefore we shall go on as before."¹⁷ Rather than disciplining legislatures for failing to express their intent clearly, American jurists went to great lengths to divine intent from the general history of events to which an act was addressed. A new standard of construction evolved, stressing this historical approach, although not discarding entirely the older strict analysis of statutory language.¹⁸

Perhaps in partial response to this development in the courts, Congress in the early 1900s began making more detailed legislative histories. Yet, during this period of transition, statutes like the surplus lands acts still had little or no legislative history. Applying the modern standard of construction, which emphasizes legislative history, to these acts is often fruitless or must involve considerable speculation. Historical analysis is made even more difficult by the lack of studies giving specific evidence of the "surrounding circumstances" of particular statutes.

A further problem is the frequent tension between analyses of language and history. In any particular case, a court must produce a single result. That is difficult when the language and history of a statute conflict, or when either is inconclusive. And, in cases where a court must analyze a series of similar statutes that have sparse historical records and vague language, the court may be tempted to compromise the history or the language of certain acts. Out of this endeavor, a contorted body of doctrine can arise. It is submitted that this has happened in the construction of the surplus lands acts and is one reason that the present case law, discussed below, is now so confused.

17. *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908).

18. A note in the *Harvard Law Review* in 1937 observed a "constantly increasing reliance by American courts on legislative materials in the construction of statutes," and attributed this to the sense that the legislature is the "controlling instrument for the expression by means of statutes, of the popular will in the determination of legal relationships." Note, *Legislative Materials to Aid Statutory Interpretation*, 50 HARV. L. REV. 822 (1937). By the 1930s, the courts' strong approval of the use of committee reports led to the recognition of their "free employability." *Id.* at 826. The movement toward use of legislative history was justified as a response to "strong judges," see Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 890 (1930), who used the plain meaning of statutes to cloak "judicial legislation." See Miller, *The Value of Legislative History of Federal Statutes*, 73 U. PA. L. REV. 158, 170 (1925).

Before analyzing that case law, however, one other case touching on the problem of finding congressional intent in statutes affecting Indians should be mentioned. In the 1975 case, *Bryan v. Itasca County*,¹⁹ the Court found congressional intent by comparing the language of different statutes. The Court indicated that in construing a vague statute, it will consider the existence and language of other statutes. Where such other statutes more clearly express a particular meaning, the Court will be hesitant to ascribe that meaning to the vague statute. This comparative analysis rests on the assumption that Congress possesses the ability to express a particular meaning clearly if it has done so in another statute; thus if Congress intended the same construction to be given to the statute in question, it would not have worded the statute so vaguely. There are problems, of course, with this analysis, not the least being that it implies that Congress cannot express itself in different ways. Still, as will be shown below, this approach can be used to form a convincing positivistic argument about the wording of the surplus land laws.

*Current Judicial Interpretations of the Language
and History of the Surplus Lands Acts*

The current framework of discussion of surplus lands acts has been set by four United States Supreme Court cases, *Seymour v. Superintendent*,²⁰ *Mattz v. Arnett*,²¹ *DeCoteau v. District County Court*,²² and *Rosebud Sioux Tribe v. Kneip*.²³ These cases have applied the modern standard of construction and have established categories of statutory language into which lower courts now try to fit (however awkwardly) surplus lands statutes at issue before them. They have also produced two interpretations of the history of the allotment policy as applied to the surplus lands acts.

Seymour v. Superintendent grew out of a burglary allegedly committed by a member of the Colville Indian Tribe in the southern half of the Colville Indian Reservation in the state of Washington.²⁴ The accused petitioned for a writ of habeas corpus. He claimed that the "purported crime" was committed in

19. 426 U.S. 373 (1975).

20. 368 U.S. 351 (1962).

21. 412 U.S. 481 (1973).

22. 420 U.S. 425 (1975).

23. 430 U.S. 584 (1977).

24. 368 U.S. 351 (1962).

“Indian country”²⁵ and was within the exclusive jurisdiction of the United States.²⁶ The Washington Supreme Court denied his petition on the grounds that the southern half of the Colville Reservation was no longer an Indian reservation and so not within Indian country.²⁷

On writ of certiorari to the United States Supreme Court, the issue was the current status of the Colville Indian Reservation. The Court held that the southern half, where the crime took place, was still an Indian reservation and therefore still Indian country.²⁸

The Court found that neither a 1906 act of Congress nor a 1916 presidential proclamation did away with the original reservation boundaries. Rather, as the Court found, they “did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.”²⁹

Since the Court based its decision in large part on the language of the act and the proclamation, it is worthwhile to look at that language in some detail. The 1906 act was entitled “An Act to authorize the sale and disposition of surplus or unallotted lands of the diminished Colville Indian Reservation, in the State of Washington, and for other purposes.”³⁰ It provided “[t]hat the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the diminished Colville Indian Reservation.”³¹ The act then provided that the lands should be surveyed and allotted to tribal Indians, and that on approval of the Interior Secretary, patents would issue under the general allotment law of the United States. On completion of the allotment process, the surplus lands would be classified, appraised, and then opened to settlement under federal land and mineral laws. Finally, the proceeds of the

25. In 18 U.S.C. § 1151 (1982) and 18 U.S.C.A. § 1151 (1964), “Indian country” is defined as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent. . . .”

26. The Major Crimes Act gives the United States exclusive jurisdiction over certain crimes committed within Indian country. See 18 U.S.C.A. § 1153 (1964); 18 U.S.C. § 1153 (1982).

27. *Seymour v. Schneckloth*, 55 Wash. 2d 109, 346 P.2d 669 (1959).

28. *Seymour*, 368 U.S. at 357.

29. *Id.* at 356.

30. 34 Stat. 80.

31. *Id.* § 1.

sale of surplus lands were to be deposited in the United States Treasury to the credit of the Colville Indians and were to be expended for their benefit.³²

The Act of 1906 was a classic surplus lands act: it provided for allotment, then sale and settlement, of the unallotted lands, with the federal government standing in as real estate agent, surveyor, and trustee of the sale proceeds. The proclamation of 1916 was similar in structure and language. It provided that all

non-mineral, unallotted and unreserved lands within the diminished Colville Indian Reservation . . . classified as ir-
rigable lands, grazing lands or arid lands, shall be disposed of
under the general provisions of the homestead laws of the
United States and of the said Act of Congress [the 1906 Act],
and shall be opened to settlement and entry and settled upon,
occupied, and entered only in the manner herein described. . . .³³

The Court found that this language only opened part of the reservation to white settlement, but did not change the reservation boundaries.³⁴

The Court buttressed its construction of the 1906 act and the 1916 proclamation by distinguishing them from another statute, the Act of 1892,³⁵ which "vacated and restored" the northern half of the Colville Reservation (the status of which was not in issue) "to the public domain."³⁶ Although the Washington Supreme Court found this act to have the same effect as the 1906 act and the 1916 proclamation,³⁷ the United States Supreme Court found that it did not. The northern half of the reservation, the Court said, was dissolved and subjected by the 1892 act to state law.³⁸

By making this distinction, the Court created, by implication and in dicta, a second category of surplus lands statutes: those that were structured and worded almost identically to the Act of 1906, but which mentioned that the surplus lands were to be "vacated and restored to the public domain." (It was unclear whether the Court found the language of vacation, or restoration

32. *Id.* §§ 3-6.

33. 39 Stat. 1778.

34. *Seymour*, 368 U.S. at 356-57.

35. 27 Stat. 62, 63.

36. 368 U.S. at 354-55.

37. *Seymour v. Schneekloth*, 55 Wash. 2d 109, 346 P.2d 669 (1959).

38. 368 U.S. at 355.

to the public domain, or both, to be determinative.) The Court considered this language to be charged with meaning, reflecting Congress' intent that vast tracts of land should be subject to state law.

The *Seymour* Court thus found that the policy of certain surplus lands acts was to open reservation land to settlement so as to benefit the Indians. It further found that this policy and the language opening surplus lands to settlement did not require an end to reservation boundaries. The *Seymour* Court, however, created in dicta a category of statutory language that might end a reservation.

Mattz v. Arnett concerned the question of whether the Act of June 17, 1892 terminated the Klamath River Indian Reservation.³⁹ The act was similar to the one at issue in *Seymour*. It provided for the sale and settlement of unallotted Klamath Reservation lands pursuant to the United States homestead, mineral, stone, and timber acts.⁴⁰ The proceeds of sale were to go to a fund managed by the Interior Secretary and used for education of Indians on the Klamath Reservation.⁴¹

The Court concluded that the 1892 act did not terminate the reservation. It examined closely the history of the Klamath Reservation and the legislative history of the 1892 act. It concluded that the 1892 act was an express disavowal of "efforts to terminate the reservation by denying allotments to the Indians. . . ."⁴² The Court referred to a series of unsuccessful bills that had provided for express abolition of the reservation, removal of the Indians, and opening of the entire tract to settlement. As the Court noted, "The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. . . . Congress was fully aware of the means by which termination could be effected."⁴³ The Court noted that the meaning of the allotment provisions of the 1892 act should instead be ascertained from an overview of the earlier Allotment Act of 1887 (the Dawes Act).⁴⁴ The Court observed that the policy of that act was "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for

39. 412 U.S. 481 (1973).

40. 27 Stat. 52.

41. *Id.*

42. 412 U.S. 481, at 504.

43. *Id.*

44. *Id.* at 496.

agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished."⁴⁵

In *Mattz*, then, the Court developed a historical approach to the surplus lands acts. It found that those acts must be interpreted in light of the Dawes Act allotment policy, which did not contemplate an end to the reservation system. In addition, the Court found the language of the 1896 act to provide for allotment, sale, and settlement, not for dissolution of the reservation. The Court distinguished acts that contained "clear language of express termination."⁴⁶ The gist of *Mattz* was that something more than language providing for allotment and opening of the lands to settlement was required to eliminate an Indian reservation and wholly transform the legal status of its people.

In *Mattz*, and again in dicta, the Court expanded the category of language that terminated reservations. Now the category contained statutes that "vacated and restored to the public domain," that "discontinued" reservations, and that abolished reservation lines. Any reservation affected by a surplus land statute with such language was "suspect." Note that the Court at this point had created the potential for conflict between the history and the language of these statutes. It developed the idea that the allotment policy of the Dawes Act generally motivated the surplus lands acts, and yet it found that certain words in those statutes might wholly negate that policy.

In *DeCoteau v. District County Court*,⁴⁷ the Court found another surplus lands act, the Act of March 3, 1891,⁴⁸ to end the reservation status of the unallotted lands of Lake Traverse Reservation in South Dakota. The Court recognized that the act should be interpreted against the background of the Dawes Act. Yet, the Court found that the language of the 1891 act accomplished much more than the allotment and settlement envisioned in the Dawes Act.

The Court found the difference to be that the 1891 act contained language of consent. Neither of the statutes discussed in *Seymour* and *Mattz* had such language; both were unilateral acts of Congress. Yet, in *DeCoteau*, the Court seized on the apparent acquiescence of the tribe (however that may have been gained) in

45. *Id.*

46. *Id.* at 504 n.22.

47. 420 U.S. 425 (1975).

48. 26 Stat. 989.

the sale of the surplus lands. The Act of 1891 ratified an agreement by the Sisseton and Wahpeton Indians to sell their lands for a sum certain. Interestingly, the accounts of the negotiations mentioned by the Court show that the Indians agreed to sell the lands only on the condition that they would be paid the "loyal scouts' claim" they were due for loyalty to the United States in the uprisings of 1862. Moreover, the record indicated that the Indians were starving and in desperate need of cash.⁴⁹ Thus, unlike tribes who resisted allotment and had the sale of surplus lands forced on them, the members of the Lake Traverse tribes consented, exactly as the Dawes Act had envisioned.⁵⁰ They agreed to "cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments and additional allotments provided for in article 4 shall have been made."⁵¹ Although the 1891 act was still a surplus lands act, still a product of the allotment policy with a history very similar to the acts at issue in *Mattz* and *Seymour*, the *DeCoteau* Court found the language of cession and relinquishment to terminate the reservation.

In *Rosebud Sioux Tribe v. Kneip*,⁵² the Supreme Court also found that disestablishment had occurred through surplus lands statutes. The statutes at issue were acts of 1904, 1907, and 1910 that disposed of all unallotted lands in what are now Gregory, Tripp, Lyman, and Mellette counties in South Dakota. These counties fell within the boundaries of the Rosebud Sioux Reservation under the Act of March 2, 1889.⁵³ As in *DeCoteau*, the statutes contained language of cession and relinquishment.⁵⁴ Yet, in *Rosebud* the cession was not consented to; although an agreement like that in *DeCoteau* was drafted, three-fourths of the male members of the Rosebud Tribe did not accept it (on two occasions). Congress unilaterally required the tribe to cede and relinquish the surplus lands. Moreover, because Congress did not want to appropriate money, there was no lump-sum payment. The sale of the unallotted lands proceeded like the sale on other

49. 420 U.S. at 437.

50. See 24 Stat. 390, § 5 (1889).

51. 420 U.S. at 437.

52. 430 U.S. 584 (1977),

53. 25 Stat. 888.

54. 430 U.S. at 597. The Court said that this language, like that in *DeCoteau*, was "precisely suited" to disestablishment." *Id.*

Indian reservations, pursuant to the homestead and preemption acts. The absence of voluntary cession, and payment of a lump sum (voluntary cession and lump-sum payment had seemed to make the facts of *DeCoteau* different from those of *Mattz* and *Seymour*), did not deter the Court. Rather, it found that these had not been dispositive in *DeCoteau*. What mattered, said the *Rosebud* Court, was Congress' intent.⁵⁵

The Court found that intent partly through an analysis of the legislative history of the acts, which, it said, reflected a desire to end reservation status. Furthermore, the Court suggested that an important consideration in determining intent was what happened after the acts were passed. Although admitting that the subsequent jurisdictional history was unclear, the Court concluded that "the single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands. . . ."⁵⁶ Moreover, the Court noted:

The fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority, is a factor entitled to weight as a part of the "jurisdictional history." The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts. . . .⁵⁷

Apparently frustrated by statutory language, which was at odds with what actually happened (this called into question the statutory analysis in *DeCoteau*, and possibly also in other cases), the *Rosebud* Court made an incredible leap of logic. It relied upon subsequent events to infer Congress' intent as to what should have happened. In light of the history of western lands in this period, of the continual and massive trespass on Indian lands

55. *Id.* at 597-98. The Court notes that although the word "cession" is technically misused, it can still reflect a congressional intent to disestablish. Since Congress did not use the word to reflect what actually happened, it is unclear why any particular meaning should be attached to it. As Chief Justice Marshall suggests in his dissent, the words "cede, surrender, grant, and convey" were probably just borrowed from previous legislation without any thought given to whether they should reflect any particular congressional intent, 430 U.S. at 619. See *infra* text accompanying note 87.

56. 430 U.S. at 603. See also *id.* at 598-99 (esp. n.20), and at 605 (esp. n.28).

57. 430 U.S. at 604-05.

by whites, illegal assertions of state power over Indian reservations, and continual tension between federal and state authorities as to jurisdiction (all discussed below), this analysis was completely wrong. It wholly ignored the history of the allotment policy and the surplus lands acts found in *Mattz*, which was exactly the “strained reading” of the acts the Rosebud Tribe wished to make.

Currently, as a result of these four Supreme Court opinions, the interpretation of the surplus lands acts is confused. The Court has said that the surplus lands acts that opened reservations to sale and settlement did not disestablish reservations. It has blurred together in dicta a group of statutes which did just that—opened reservations to settlement—but also had language of vacation or restoration to the public domain, or termination of reservation boundaries and status. The Court has said that these statutes ended reservations and federal jurisdiction. It has said that language of cession and relinquishment also ended reservation status, although it has admitted that such language often was meaningless. Finally, the Court has advanced two historical interpretations of what the allotment process meant for the reservation system: one, that it ended the reservations, and another, that it did not.

The doctrinal problems facing the Supreme Court in *Solem v. Bartlett* were thus difficult ones.⁵⁸ Do phrases such as “opening to the public domain” reflect congressional intent to terminate reservation status? What does the general history of the allotment policy mean for individual surplus lands statutes? What happens when the legislative history of a statute conflicts with the statutory language?

Justice Marshall’s opinion recognized these questions and made some attempt to answer them. The Court determined that the phrases “public domain” and “the reservation thus diminished” are “isolated phrases” and “hardly dispositive.”⁵⁹ The Court stated that each surplus land act must be read as a whole. Yet, the Court did not carry this analysis much farther. It approved the finding in *Rosebud Sioux Tribe* that language of cession and relinquishment strongly suggests reservation disestablishment.⁶⁰ Thus, the category of statutory language terminating a

58. 104 S.Ct. 1161 (1984).

59. *Id.* at 1169.

60. *Id.* at 1166.

reservation has been reduced by eliminating "public domain" and "reservation thus diminished." It continues, however, to contain language of cession and relinquishment, payment of a sum certain, the abolition of reservation lines, and the discontinuance of reservations.

The Court generally returned to the interpretation of the history of allotment policy in *Mattz v. Arnett*: land pressure and belief in the civilizing effects of land ownership prompted Congress to pass the Dawes Act, which provided a national framework for allotment, and also to pass later the surplus lands acts, which were addressed to specific reservations. The Court recognized too that Congress generally believed or expected at this time that allotment would lead to the end of the reservations. But it refused "to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act."⁶¹

The Court stated that the reason the surplus lands acts did not say whether the opened lands retained reservation status was that "[w]hen the surplus lands acts were passed, the distinction seemed unimportant."⁶² "The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century."⁶³ The Court relied on the common law for this conclusion, and it found that only in 1948, with the passage of a statute defining "Indian country," did Congress "uncouple reservation status from Indian ownership. . . ."⁶⁴ The Court's reading of the history of the acts would imply that when Congress removed Indian lands from the Indians, it assumed that it ended the reservation status of those lands. This implication is one the Court must surely want to avoid, given its judgment. As will be discussed below, the Court's explanation of the absence of provision in the surplus lands acts for termination of the reservations seems to be new, highly speculative, and probably inaccurate.

Finally, the Court set out anew the principles of statutory construction pertinent to surplus land acts. It stressed that "only Congress can divest a reservation of its land and diminish its boundaries,"⁶⁵ and that "[d]iminishment will not be lightly in-

61. *Id.* at 1165.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1166.

ferred.”⁶⁶ Congress must “clearly evince an ‘intent to change boundaries’ before diminishment will be found.”⁶⁷ Further, the Court said that the best evidence of Congress’ intent is the “statutory language used to open Indian lands.”⁶⁸ Moreover, the Court reaffirmed its policy of giving the Indian tribes the benefit of the doubt:

When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.⁶⁹

This seems to reflect a return to the turn-of-the-century statutory analysis, which combined a strict reading of the statutes with a concern to protect the Indian tribes.

Yet, the Court’s shift back is only partial. It said that statutory language is not dispositive when “events surrounding the passage of a surplus land act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result. . . .”⁷⁰ Furthermore, the Court seemed to confirm that what happens after the passage of an act can figure in statutory construction.⁷¹ The Court admitted that this last index of intent, especially the demographic history of the opened areas, is “potentially unreliable” and “unorthodox.”⁷² The Court noted, however, that “in the area of the surplus land acts, where various factors kept Congress from focusing on the diminishment issue . . . the technique is a necessary expedient.”⁷³ The use of the subsequent history to determine Congress’ intent, while it might have produced the right result in *Solem*, has the potential of producing wrong results in many surplus land cases. As noted above,⁷⁴ and as will be

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1167.

70. *Id.* at 1166.

71. *Id.* at 1167.

72. *Id.* at n.13.

73. *Id.*

74. See *supra* text accompanying note 57.

discussed in greater detail below, the object of many persons moving onto the reservations pursuant to the surplus lands acts was to subvert federal policy and Indian rights. The federal agents and tribes were often unable to maintain their jurisdiction in the face of land speculators and state officials. The Court's resignation to the expedient of using subsequent history to interpret surplus lands acts may in some cases be diametrically opposed to its "traditional solicitude" for the Indian tribes.

Applying the various principles it described to the Act of 1908, the Court in *Solem* found neither the statutory language nor the history of the Act sufficiently clear to conclude that Congress intended to change the reservation boundaries. Further, the Court pointed to a significant Indian population in the opened areas; "de facto diminishment" had not occurred. In the absence of congressional intent to disestablish, and in light also of the Indians' presence in the opened areas, the Court fell back on the presumption that the original reservation boundaries remain intact.

At this point, then, the Court has contracted slightly the category of statutory language that causes reservation disestablishment. Yet, it has approved its previous interpretations of the words "cession" and "relinquishment" in surplus lands acts. It has reaffirmed partially its use of allotment policy history in interpreting the acts, but has refrained from saying that the allotment policy positively envisioned the continuation of the reservations until they were expressly ended. Rather, the Court has adopted a weaker (and somewhat risky) reading of the history, i.e., no one thought about whether reservations continued when they were opened up to white ownership. Finally, the Court has partially shifted back to the standard of construction favored by courts in the late 1800s and early 1900s, a standard that focused on the language of the statutes and construed ambiguities in favor of the Indian tribes. Yet, the Court has not given up its reliance on surrounding circumstances and legislative history. Moreover, it has voiced approval, albeit cautious approval, for the idea that in cases of vagueness, subsequent jurisdictional and demographic history of surplus lands acts should figure in their construction.

The Language of the Acts in the Parlance of Federal Public Lands Legislation

The Supreme Court has said certain surplus lands acts contain language indicating that Congress meant to do more than open

reservations to settlement. Analysis of the statutes shows that these distinctions often made little sense and that courts should not hinge the issue of reservation status on them.

First, comparison of the acts shows that they were all designed to accomplish the same thing, a real estate transaction. They generally contained detailed descriptions of what lands would be sold, how they were to be appraised, surveyed, and sold, and what would happen to the proceeds of sale.⁷⁵ Generally, the acts made no mention of altering reservation boundaries, extending state law over opened areas, or diminishing federal jurisdiction over the Indians. Many statutes alluded to, or incorporated, provisions of the Dawes Allotment Act, implying that Congress acknowledged and intended to supplement it.⁷⁶ Read in its entirety, each statute gives the impression that it was designed only to accomplish a transfer of lands to individuals. Language that "restores to the public domain" or "cedes and relinquishes unallotted lands," if meant to end the reservations, would have been out of place for nothing else in these statutes made a similar provision.

Indeed, a body of case law gives strong support to the argument, approved in *Solem v. Bartlett*, that the public domain language in surplus lands acts carried little meaning. This case law indicates that when the phrase "public domain" was used in federal public lands legislation, it merely referred to land available for sale or disposition under the general land laws. "Public domain" was used interchangeably with "public lands."⁷⁷ In *Southern Pacific Railroad v. Ambler Grains & Milling*,⁷⁸ the court summarized the meaning of "public lands":

What is meant by "public lands" is well-settled. As stated in *Newhall v. Sanger*, 92 U.S. 761, 763, 23 L. Ed. 769, 770: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Barker v. Harvey*, 181 U.S. 481-490, 21 S. Ct. 690, 45 L. Ed. 963-968; *Minnesota v. Hitchcock*, 185 U.S. 373-391, 22 S. Ct. 650, 46 L. Ed. 954-964. If it is claimed in

75. Compare these acts: Act of May 29, 1908, 35 Stat. 458; Act of May 29, 1908, 35 Stat. 460; Act of July 1, 1892, 27 Stat. 62. Note that the Act of July 1, 1892 allowed Indians to remain on the opened part of the reservation.

76. The Act of July 1, 1892, 27 Stat. 62, and the Act of May 27, 1902, 32 Stat. 245, 263, alluded to the allotment process of the Dawes Act.

77. *Barker v. Harvey*, 181 U.S. 481, 490 (1900).

78. 66 F.2d 670 (9th Cir. 1933).

any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation.⁷⁹

Thus, when Congress said that reservation land would be "restored to the public domain and made subject to entry,"⁸⁰ it was being repetitive. Any additional meaning (as to changes in jurisdiction over Indians, or in the extent of the reservations) would have to have been apparent from the rest of the statute (as noted above, it generally was not), or from the "surrounding circumstances" (as will be discussed below, this also was not apparent).

The "cession and relinquishment" language found in statutes like the Act of April 23, 1904,⁸¹ also seems out of place, if it was intended to reduce the size of the reservation. The 1904 act provided, exactly as the statute in *Mattz v. Arnett* did, for the opening and sale of unallotted lands under the general federal land laws and for the payment of the proceeds to the Rosebud Tribe.⁸² The United States was not committed to purchase the unallotted lands outright from the Indians; rather, the "intention of this act [was] that the United States shall act as a trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received."⁸³ Further, the act provided for the exception of tracts in the unallotted lands for the subissue station, the Indian day school, and the Catholic and Congregational missions.⁸⁴ It allowed tribal members to have allotments in the opened sections.⁸⁵ Finally, the 1904 act provided that nothing in the agreement "shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties and agreements, not inconsistent with the provisions of this agreement."⁸⁶ This last term was an explicit direction to courts to

79. *Id.* at 674.

80. Act of Aug. 15, 1894, 28 Stat. 286, 337-38.

81. 33 Stat. 254. This statute was discussed in *Rosebud Sioux Tribe*, 430 U.S. at 597-98. See *supra* text accompanying notes 52-55.

82. 33 Stat. 254, art. III; art. V, §§ 2, 3.

83. *Id.*, art. V, § 6.

84. *Id.*, art. V, § 2.

85. *Id.*, art. I. See also the acts of 1907 (34 Stat. 1230) and 1910 (36 Stat. 448), which also were to this effect, and allowed Indians without allotments in opened areas to secure them there. Justice Marshall discussed these acts in *Rosebud Sioux Tribe*, 430 U.S. at 621.

86. 33 Stat. 254, art. V, § 1.

minimize conflicts with the Treaty of 1889, which established the reservation boundaries.

A reading of the 1904 act in its entirety (as the *Solem* Court suggests should be done) reveals that the act was intended primarily to authorize the sale of unallotted lands on the reservation. Indian rights and landholdings, and federal agency and mission activities were to continue in the opened parts of the reservations. At most, the cession and relinquishment language meant the giving up of a proprietary interest in the surplus land so that it could be sold to whites. At the least, as Justice Marshall has suggested, the language was copied from an earlier draft of the agreement (which had been rejected by Congress) with little or no thought given to its implications for reservation status.⁸⁷

"Cession and relinquishment" language, like "public domain" language, should not be taken out of the context of the statute. The only language that should be interpreted to reduce reservations and to alter their boundaries is language that does so explicitly, such as language in the statutes affecting the Smith River, the Ponca, and the Missouri and Otoe reservations.⁸⁸

The analysis of *Bryan v. Itasca County* reinforces this conclusion.⁸⁹ *Bryan* suggests that the question for determining Congress' intent in the surplus lands acts is whether Congress was capable of expressing more clearly a change in the political or legal status of Indians than through the disputed language in the surplus lands acts.

The answer to the question posed by the Court in *Bryan* is yes. As just noted, Congress did explicitly redraw reservation boundaries, abolish them, and alter jurisdictional status when that was its purpose.⁹⁰ Indeed, the Dawes Allotment Act (as amended by the Burke Act) contains language setting out a process by which state or territorial law would be extended over the Indians.⁹¹ The surplus lands acts, which often incorporated the Dawes Act,

87. *Rosebud Sioux Tribe*, 430 U.S. at 619.

88. See *supra* text at notes 45-51 and note 90 *infra*.

89. 426 U.S. 373 (1976).

90. See, e.g., the Act of 1904, 33 Stat. 218, which provided that "the reservation lines of the said Ponca and Otoe and Missouri Indian reservations be, and the same are hereby, abolished; and the territory comprising said reservations shall be attached to and become a part of the counties of Kay, Pawnee and Noble, in Oklahoma territory. . . ." See *United States v. Celestine*, 215 U.S. 278, 290-91 (1909), which discusses the ability of Congress to answer these questions.

91. See section 6 of the Dawes Act, as amended by the Burke Act, now codified at 25 U.S.C. § 349 (1982).

made no attempt to alter that process. Examining other statutes of the period thus shows that Congress was able to fashion specific statutory language that would dismantle reservations and change jurisdictional relations. It did not do this with the surplus lands acts.

II. *The Surrounding Circumstances and Legislative History: The Surplus Lands Acts Taken in the Context of the Allotment System*

Putting aside for a moment all the various practical objections to using a historical approach in discussing old statutes, the discussion below assumes, as did the Court in *Mattz* and *Solem*, that the meaning of the surplus lands acts can be clarified through study of the prevailing federal Indian policy at the time the acts were passed, the allotment policy. This policy was first adopted by Congress as a national framework for dealing with the Indian reservations in the Dawes Allotment Act of 1887.⁹² This section will consider the history of the allotment policy as developed in the Dawes Act and later legislation, including the surplus lands acts, with the aim of judging the effect of the allotment process on the reservation system.

As has been noted above, the courts have developed two views of allotment policy: one view is that it envisioned the abolition of reservations, and the other view is that it did not. The former has often been supported by reliance on statements made by officials in government and members of various Indian reform organizations during the period leading to the passage of the Dawes Allotment Act.⁹³ Yet there was often a serious gap between what the

92. 24 Stat. 390.

93. See, e.g., *Ute Indian Tribe*, Nos. 81-1827, 81-1901 slip op. at 11-12 (10th Cir. Aug. 29, 1983). In *Ute Indian Tribe*, the Tenth Circuit quotes Secretary of the Interior Schurz, who in 1880 stated that allotment would put relations between Indians and whites on a "new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice." *Id.* at 12. The Tenth Circuit refers to Schurz's remarks as comments on the Dawes Act when it was pending as a bill. *Id.* The Dawes Bill, however, was not introduced until Dec. 8, 1885, 17 CONG. REC. 123 (1885), 49th Cong. 1st Sess. Further, in 1881, Schurz made clear that he saw the end to be reached by allotment as the "gradual absorption of Indians" into the body politic. He does not appear to have favored the immediate abolition of the reservations. See NORTH AMERICAN REVIEW 8 (July, 1881), cited in S. Taylor, "The Origins of the Dawes Act of 1887 (1927)" (Washburn Prize Thesis, 1927 Harvard Univ., copy on file at Harvard Univ. Archives). See also R. MARDOCK, THE

reformers hoped allotment would eventually do for the Indians and what members of Congress envisioned particular allotment legislation would accomplish.

As will become clear from the discussion below, considerable disagreement existed about the effects of allotment. Moreover, from this debate it is not altogether clear what the immediate historical forces or "surrounding circumstances" were that eventually led to passage of the Dawes Act.

The idea of allotment first gained prominence in the early 1800s and was incorporated into various Indian treaties. The idea was simple in theory: an Indian, by privately owning and cultivating a piece of land, would become civilized. The Commissioner of Indian Affairs, T. Hartley Crawford, expressed a widely held opinion when he wrote that without allotment in severalty "you will look in vain for any general casting off of savagism. Common property and civilization cannot co-exist."⁹⁴

The idea that owning private property would civilize the Indians was taken up with moral fervor by reformers after the Civil War. It became the animus of a crusade for the solution to the "Indian question." In the minds of members of the Women's National Indian Association, and later the Indian Rights Association, allotment would transform the Indians from a communalistic primitive to an individualistic and industrious yeoman farmer.⁹⁵

The reformers also believed that allotment would save some Indian land from white encroachment.⁹⁶ The Indian Commissioner wrote in 1879 of the extent of intrusion by white settlers and speculators:

In fact there is hardly a reservation within the limits of the United States which has not been subject to their encroachments. They resort to all kinds of devices and schemes to obtain a foothold on Indian soil, and offer ready and varied excuses for their continued unlawful occupancy of the Same.⁹⁷

The Indian Rights Association Report for 1887 stated, "We have

REFORMERS AND THE AMERICAN INDIAN 213 (1971) on Schurz's view that allotment should take place gradually.

94. Crawford wrote this in 1838. It is cited by Francis Prucha in his introduction to D. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS*, at x (1973).

95. See OTIS, *supra* note 94, at 33-34.

96. *Id.* at 31.

97. ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS XLIV (1879).

to choose between securing something for the Indians—as much as we can get—or having them lose all.”⁹⁸

While the writings of the “friends of the Indian” indicate that allotment was justified as a means of salvaging something for the Indian in the face of white encroachment, a more difficult question is whether white land seekers supported allotment. On this, opinion is divided, and there is little concrete evidence proving directly that land seekers actively supported allotment.⁹⁹ Land seekers no doubt preferred complete and immediate cession of all Indian lands. Yet, in the face of congressional resistance to that, they may have been content with allotment. Allotment promised eventual sale of the unallotted, or surplus, lands.¹⁰⁰

The Minority Report of the House Indian Affairs Committee in 1880 points to this less benevolent purpose:

The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them. . . . If this was done in the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse.¹⁰¹

Indeed, it is strange that those who supported allotment persisted in the face of knowledge that most previous experiments with allotment had ended in failure (at least for the Indians). The Chippewas, the Catawbias, the Shawnees, the Potawatomis, and the Kickapoos lost all or most of their lands through allotment. History attested that allotment was a formula for dispossession.¹⁰²

This dreary history prompted Senator Teller of Colorado to state in 1881, in debate on an allotment bill, that:

If I stand alone in the Senate, I want to put upon the record my prophecy . . . that when thirty or forty years shall have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation and if the people who are clamoring for it understood the Indian character, and Indian

98. 5th ANNUAL REPORT OF THE INDIAN RIGHTS ASSOC. 38 (1888).

99. OTIS, *supra* note 94, at 31.

100. *Id.*

101. H.R. REP. NO. 1576, 46th Cong., 2d Sess. 10 (1880).

102. OTIS, *supra* note 94, at 50-51.

laws, and Indian morals, and Indian religion, they would not be here clamoring for this at all.¹⁰³

Opposition to allotment came, too, from the Indians. In 1881 the Five Civilized Tribes submitted a petition against allotment on the grounds that it would lead to loss of their lands and removal.¹⁰⁴ Resistance continued after the passage of the Dawes Act, and petitions came to Congress continually through the 1890s and early 1900s.¹⁰⁵

Other forces were at work in the allotment debate. One was general concern with the expense of the Indian wars and the reservation system. Advocates of allotment believed it would relieve government from supporting Indians by making them self-sufficient and by forming a fund from sale of the surplus lands to be applied to their improvement."¹⁰⁶ The Reports of the Board of Indian Commissioners indicate that allotment was expected to cut federal outlays.¹⁰⁷ But, the expense argument was used both ways: whites settled on the borders of Indian reservations opposed allotment because they feared the Indians would rapidly lose their lands and become paupers and a burden on local government.¹⁰⁸

Samuel Taylor presents a convincing argument that the future of the cattle syndicates was also at stake in the allotment debate. In the 1880s cattle companies had leased vast acreages from Indian tribes, such as the Crows in Montana and the Five Civilized Tribes.¹⁰⁹ These syndicates opposed allotment (and may have been successful in preventing it in Indian Territory). Moreover, some white settlers viewed allotment as a way of breaking up the cattle interests by making the leasing of Indian lands more difficult.¹¹⁰

103. 11 CONG. REC. 783 (Jan. 20, 1881). See discussion in OTIS, *supra* note 94, at 18.

104. OTIS, *supra* note 94, at 51.

105. Protests against allotment: H.R. Misc. Doc. No. 18, 47th Cong., 2d Sess.; S. Misc. Doc. No. 119, 48th Cong., 1st Sess.; Report of protest of Coeur d'Alene Indians to sale of surplus lands, H.R. REP. No. 3352, 59th Cong., 1st Sess.; Testimonial of the Indians of the Quapaw Agency, S. REP. 615, 52d Cong., 1st Sess.

106. MARDOCK, *supra* note 93, at 222. See also J. KINNEY, A CONTINENT LOST—A CIVILIZATION WON 187, 190, 204 (1937).

107. See discussion in OTIS, *supra* note 94, at 88, 100-04.

108. So Judge Draper told the Fifth Mohonk Conference. LAKE MOHONK CONF. PROC. 18-19 (1887); OTIS, *supra* note 94, at 160 n.33.

109. Taylor, *supra* note 93, at 38. See also remarks of Rep. Springer, 18 CONG. REC. 226, 49th Cong., 2d Sess. (1886).

110. Taylor, *supra* note 93, at 38.

The allotment idea, then, in the years up to the passage of the Dawes Act, had varied supporters (and opponents) whose motives were complex. To take the aim of any one group as the "purpose" of allotment, or the intent of Congress in passing an allotment bill, would be a grave error. If anything can be gleaned from the allotment debate in the years leading up to the introduction of the Dawes Bill, it is only a very general idea as to what the "surrounding circumstances" of the bill were. The most significant of these seemed to be white land pressure and concern for the expense of supporting dependent Indians. Neither of these, however, was necessarily inconsistent with continuing the jurisdictional boundaries of the reservations.

In striking contrast to the reform literature on the allotment idea and early congressional debates on allotment bills, the legislative history of the Dawes Act is relatively sparse and inconclusive. The Act itself provided that each reservation Indian would be allotted a tract of land on the reservation. On allotment, the Indian would receive a trust patent and become a citizen. For twenty-five years the allotted land was inalienable, and at the end of that period the allottee would receive a fee patent. On completion of the allotment process, the allotted Indians would be subject to state or territorial civil and criminal laws. The unallotted or surplus lands could, in the discretion of the executive branch and with the Indians' consent, be purchased from the Indians and sold. The proceeds of sale would go to the federal Treasury and could be paid out by Congress for the Indians' benefit.¹¹¹

The Dawes Act was passed quickly, in little more than a year.¹¹² It apparently was hurried through Congress. The committee reports that survive furnish little insight, and the debates were generally brief and focused on minor points.¹¹³ Some parts of the debates are of value, however, in providing an idea of the intentions of those who formulated the allotment policy.

111. 25 U.S.C. §§ 331-358 (1976).

112. The bill, S. 54, was introduced on Dec. 8, 1885, and passed in the spring of 1887. 17 CONG. REC. 123, 49th Cong., 1st Sess. (1885); 18 CONG. REC. 1577, 49th Cong., 2d Sess. (1887).

113. 18 CONG. REC. 190, 225, 975-77, 49th Cong., 2d Sess. (1887). The only committee report that survives is the conference report. It lists amendments, but gives little or no explanation. The debates are admittedly of much less value than the committee reports. They do give glimpses, though, of what the Forty-ninth Congress meant to accomplish by allotment.

In general, the records of debates on the Dawes Bill show that although allotment was expected to end tribal relations and the reservation system, it was meant to do so gradually, with many of the details left to the future. Senator Skinner of North Carolina stated:

[The Bill] means that the tribal relations must be broken up; that the practice of massing large numbers of Indians on reservations must be stopped; that lands must be allotted in severalty; that where there is more land in any reservation than the Indians can profitably use, such lands must be so disposed of that the white man may get possession of them and come in contact with the Indians. We offer the pending bill, intending for it to fill the full measure of these requirements, and believing that it points out the most direct route to citizenship for the Indians.¹¹⁴

While Senator Skinner indicated that the Dawes Act was meant to cause drastic change, he did not say when the change would occur. Other congressmen recognized that the Act would not civilize the Indians overnight. Congressman Holman, discussing the sale of surplus lands, the last stage of the allotment process, stated that "many years must elapse before those lands will be sold. . . . They are not going to be sold next year or the year after, or for several years to come."¹¹⁵

Moreover, the debates reflected concern that the Act was incomplete and left too many details to future congresses or the executive. Senator Dolph believed that the Act gave too much freedom to future congresses to decide how to spend the proceeds of sale of surplus lands and so possibly to squander them. Dolph suggested an amendment, but like other amendments it was not included because it was submitted too late. Dolph commented: "We are now passing a law that is in the nature of an agreement and contract with these Indians, and certainly it is prudent to put it in the best shape in which it can be placed."¹¹⁶ Dolph's com-

114. 18 CONG. REC. 190, 49th Cong., 2d Sess. (1886).

115. *Id.* at 225.

116. *Id.* at 974. Since the Dawes Act did not provide that land sale proceeds should be saved any length of time, the fate of the Indians and the allotment system beyond the period of inalienability was dependent on future appropriations. As Commissioner of Indian Affairs Thomas Morgan wrote in 1891: "No change in the practical administration of Indian affairs can alter the one fundamental, absolutely indispensable condition to its success, growing out of the fact that the money requisite must come by vote of Congress." *The Present Phase of the Indian Question*, in *THE INDIAN PROBLEM* 6 (1891).

ment, and his prediction that after twenty-five years the Indians would be paupers, were glossed over by Senator Dawes, who stated that future congresses would be able to take care of future exigencies.¹¹⁷

Thus, while there is evidence that the Dawes Act was expected to break up tribal relations and to end the reservation system, there is also evidence that this was expected to take many years and that Congress was expected to supplement the provisions of the Dawes Act with other legislation. Moreover, aside from Senator Skinner's remarks, no discussion of an end to the reservations or of change in the Indians' legal status occurred. Congress simply did not say when it expected the allotment process to be complete.

This does not mean that these issues were not before Congress. On the contrary, at the time the Dawes Bill was debated Congress received numerous petitions to abolish and open to settlement various reservations.¹¹⁸ Furthermore, Congress had considered and rejected allotment bills that also generally changed the limits of reservations. For example, S. 931 in the Forty-seventh Congress was drafted to provide "for the improvement of the condition of uncivilized Indians, the reduction of the reservations to proper limits, the making of the same permanent, and the allotment thereof and the granting of patents in severalty."¹¹⁹ Indeed, around the time the Dawes Act was passed, and afterwards, Congress enacted laws dealing with specific reservation boundaries (both enlarging and contracting them) and jurisdiction.¹²⁰ This suggests that Congress separated the question of land tenure from that of jurisdictional boundaries. It also suggests that Congress intentionally omitted provisions affecting boundaries and jurisdiction from the Dawes Act.

The drafters of the Dawes Bill may have had good political reasons for omitting clauses that would abolish reservations and immediately immerse the Indians in white society. Many of the early allotment bills had been bogged down because they sought to address questions more controversial than a change in land

117. 18 CONG. REC. 973-76, 49th Cong., 2d Sess. (1887).

118. In the second session of the Forty-ninth Congress, petitions were received from settlers and state and territorial legislatures to open the Coeur d'Alene, the Sioux, and the Crow Creek reservations. See 18 CONG. REC. 349, 1736, 1801 (1887).

119. 13(2) CONG. REC. 1824, 47th Cong., 1st Sess. (1882).

120. See 33 Stat. 220-21 (1904).

tenure. When the Coke Bill was first proposed, for example, the Committee on Indian Affairs purposely left out a citizenship provision.¹²¹ Senator Pendleton explained:

The committee sought carefully in the framing of this bill to avoid questions which might give rise to as great a difference of opinion as that subject [citizenship] will. Their purpose was to strip the bill, as far as possible, of all extraneous questions and to direct the attention of Senators solely to the question of the tenure by which the Indians should hold their property. And this was done not because they sought to avoid any responsibility, or because they sought to leave the Indians in any unprotected position, to leave them where their rights could not be asserted in the completest and fullest form, but because they were extremely anxious that this bill should be stripped of every other question than the single one of holding in severalty of the lands of the Indians.¹²²

Admittedly Senator Pendleton made these comments several years before the Dawes Bill was introduced, and so their application to the Dawes Bill is only speculative. Still they indicate that congressional committees consciously omitted controversial topics from allotment bills. The absence of reservation boundary provisions is all the more striking in light of this parliamentary strategy.

Moreover, the Congress that considered the Dawes Bill was apparently reluctant to reduce reservations or remove Indians. A series of Sioux bills, reducing the great Sioux Reservation, had been rejected (one, in fact, had been introduced by Senator Dawes).¹²³ This resistance in Congress to wholesale division and reduction of reservations might have hindered the Dawes Bill if it had contained such provisions.

Finally, Congress may have left the reservation system (the agencies, restrictive laws, and army) intact as a precautionary measure. Allotment was an experiment. Persons within and outside Congress harbored doubts as to whether it would succeed. The Indians often opposed allotment, as their petitions and memorials to Congress proved.¹²⁴ They might resist, and allot-

121. 11 CONG. REC. 904, 46th Cong., 2d Sess. (1881) (debate on S. 1773).

122. *Id.*

123. See *supra* note 118.

124. See *supra* notes 104, 105 and accompanying text.

ment might have to be imposed. If allotment did not work, federal guardianship, carried out through the reservation system, would have to continue. Although little in the congressional record (except that the process would be gradual and that other legislation would be needed) expresses these points, the undeniable fact is that the reservation system did continue and was strengthened as the allotment of Indian lands was implemented. Indeed, land was allotted and Indians were controlled on allotments through the reservation system.¹²⁵ This suggests that the fact that the reservation system would have to continue in the period of implementation was simply too obvious to mention.

Beginning in the 1890s, and with increasing frequency in the early 1900s, Congress passed acts that applied the allotment process to individual reservations and provided for the sale of the surplus lands.¹²⁶ As noted earlier, courts have often interpreted these acts in light of the allotment policy of the Dawes Act. Their grounds for doing so have been that the surplus lands acts were passed largely out of congressional impatience with the slowness of implementation of the allotment process by the executive branch.¹²⁷ Since most surplus lands acts incorporated by reference parts of the Dawes Allotment Act and deviated little in the remainder of their provisions from the Dawes process, this is probably true. Nevertheless, each surplus lands act had its own legislative history (some more detailed than others). Although this essay will not present a detailed study of any particular act's history, it will summarize several justifications that often appeared and will relate those to the allotment process of the Dawes Act.

First, it was argued that opening the reservations to settlement would better the condition of the Indians. As the House Committee Report on a bill to open the Uintah Reservation noted: "If the residue of the lands are settled by whites the Indians will be more directly brought in contact with civilization and be able to make greater progress by the example thus afforded them."¹²⁸

125. OTIS, *supra* note 94, at 52.

126. For examples of these acts, see *supra* note 2.

127. Under the Dawes Act the President was not required to, but could in his discretion, open the reservations to allotment and sale. The Court in *Mattz* points to congressional desire to assure allotment by a surplus lands act, when the President had not yet ordered allotment. The Court also notes the more benevolent purpose of encouraging interaction between the races. 412 U.S. at 496-97. See also *Seymour*, 368 U.S. at 356.

128. H.R. REP. NO. 660, 53d Cong., 2d Sess. 3 (1894).

Second, proceeds from the sale of the surplus lands were intended to pay for various improvements on the reservations (which Indians needed to become allotment farmers). In its report on the disposal of unallotted lands on the Yakima Reservation, the House Committee of Indian Affairs noted that monies from the sale were needed for irrigation, wagons, houses, farm implements, and "other necessary and useful articles as may be deemed best to promote [the Indians'] welfare and aid them in the adoption of civilized pursuits and in improving and building homes for themselves."¹²⁹

Finally, the lands were sold because of white pressure for settlement. This factor was mentioned often in committee reports.¹³⁰ Indeed, white land hunger appears to have had a stronger, more direct effect in the passage of the surplus lands acts than in the passage of the Dawes Act.

In general, then, the purposes of the surplus lands acts were to improve the Indians' condition, to allow whites to settle on the reservations, and to reduce the cost of making the allotment system work. All these were consistent with the purposes of the allotment system created by the Dawes Act, and they can fairly be said to have been part of a continuing "allotment policy." At no point do legislative histories, however, mention a dismantling of the reservation system or termination of federal jurisdiction or guardianship. Indeed, many surplus lands acts applied allotment for the first time to reservations, while others allowed the sale of surplus lands before allotment was completed.¹³¹ This would suggest that the surplus lands acts did not complete the allotment process, and so were not the legislation the Forty-ninth Congress envisioned would end the reservation system.

The silence of the Dawes Act on questions of jurisdiction and the timing of the breakdown of the reservations did not go unnoticed. This deficiency was readily pointed out, especially by members of the legal community. Their criticism provides con-

129. H.R. REP. No. 2346, 58th Cong., 2d Sess. 4 (1904).

130. See, e.g., *id.* and H.R. DOC. No. 191, 54th Cong., 1st Sess. 18 (1896).

131. The Uncompahgre Act of Aug. 15, 1894, 28 Stat. 337-38, applied allotment for the first time. Most surplus lands acts provided that sale of the surplus lands should occur after the "completion" of allotment. In practice, though, the surplus lands were sometimes opened when considerable numbers of Indians still had not taken allotments. See M. JOHNSTON, *FEDERAL RELATIONS WITH THE GREAT SIOUX INDIANS OF SOUTH DAKOTA, 1887-1933, WITH PARTICULAR REFERENCE TO LAND POLICY UNDER THE DAWES ACT* 95, 103 (1948).

siderable insight into what the allotment process was intended to accomplish.

James B. Thayer of Harvard Law School, a constitutional law professor, published a cutting analysis of the Dawes Act in *The Atlantic Monthly* of March, 1888. Thayer described the "exact scope" of the law: "It deals with two subjects only, namely, the ownership of land and citizenship. These things have no necessary connection with each other."¹³² He continued:

Of these two things, it is the land question with which the severalty law is primarily and mainly taken up,—with provisions looking first to securing to the individual Indians the ownership of separate parcels of land; and second, after taking out land enough to satisfy these separate allotments, to getting the rest of the reservations into the market, and thus opening them to settlement and occupancy by the whites.¹³³

The process by which the lands were to be divided and purchased from the Indians, Thayer noted, was left entirely to the executive's discretion.¹³⁴ The speed of this process, he pointed out, was likely to be related to pressures brought by the "land-grabber."¹³⁵

Thayer noted that citizenship was dealt with in only a few lines, which were "not free from ambiguity."¹³⁶ Thayer seemed to have accepted Dawes's interpretation of the act that persons who took allotments and patents became citizens immediately. Yet, he suggested that there was room for uncertainty as to when the Indians and the reservation would become subject to state or territorial law.

[W]hen all the Indians on any reservation have thus been made citizens (and perhaps as each in succession becomes a citizen), they are to pass from under the special control of Congress and to come, *so far as Congress may authorize this*, under the jurisdiction of the States and Territories.¹³⁷

Thayer preferred the view that state and territorial law would not

132. Thayer, *The Dawes Bill and the Indians*, 61 ATLANTIC MONTHLY 316 (Mar. 1888).

133. *Id.*

134. Thayer, *supra* note 132, at 318.

135. *Id.*

136. *Id.*

137. *Id.* at 319 (emphasis added).

extend to the reservation until the completion of the allotment process. Moreover, he suggested that this extension would not occur automatically, but by congressional authorization, and that even then Congress could restrict the power of the states or territories over the Indians.

Thayer proceeded to consider "what [the Act] does not accomplish, and does not aim at. It is hardly necessary to say that the law does not seek to reach these grave results at once. That is apparent on the face of it."¹³⁸ He noted that the act did not apply to a large number of reservations and that it provided for no courts or system of law on the allotted reservations.¹³⁹ He noted that under the act the allottees still could not lease, make contracts respecting, or exchange their lands. He pointed out that the act did not provide for roads or other public improvements,¹⁴⁰ and that it failed also to provide any sort of education. Not only was the law, in Thayer's view, ambiguous and its application uncertain, it was incomplete.

Thayer made a remarkable observation about the effect of the Dawes Act: "It leaves the whole reservation system untouched."¹⁴¹ The nonintercourse acts, the restraints on trade and travel by outsiders, the absolute power of the federal government, he noted, all continued as before. Even more, Thayer suggested that legislation was needed to end this state of affairs and to have the ordinary laws of the land applied by the general government to the Indians. But, he cautioned, "as regards this last matter it would seem wise to wait a little, until it can be seen just how, and how fast, the severalty law is likely to work."¹⁴²

Concern about the gradualness of the allotment process, the incompleteness of the act's provisions, and the uncertainty resulting from both of those, was also expressed by the Law Committee of the Indian Rights Association:

Even where a reservation is made subject to allotment by the exercise of the discretionary authority of the Executive, the time at which the Indians residing on it become subject as a

138. *Id.* at 320.

139. *Id.*

140. *Id.* at 321.

141. *Id.*

142. *Id.* Concern about the need for additional legislation was widespread among the reformers. The Fifth Mohonk Conference resolved that other legislation was needed. See OTIS, *supra* note 94, at 59-60.

whole, to the local law, and entitled to citizenship, is still uncertain. . . . The effect of the Dawes Act, while beginning at once, will yet be gradually exerted, but also . . . a large number of Indians may be expected for a considerable time to be unable to avail themselves of its most important provisions. . . . The Dawes Act is principally for the disposition of Indian land in severalty, and it seems desirable to supplement its provisions for the ultimate extension of law over the Indians . . . by some further legislation.¹⁴³

Like Thayer, the Law Committee recognized that additional legislation was needed to substitute state for federal and tribal jurisdiction.

Austin Abbott, writing in the *Harvard Law Review*, also recognized that a period of time must pass before the Indian would be subject to state or territorial law:

This period must necessarily be considerable. It will take a considerable number of years to complete the process of optional allotments by which Indians are made citizens. Additional time will be needed for compulsory allotments. After allotments are made, a quarter of a century must be allowed before the lands can all be subjected to taxation, and, therefore, before the State and Territorial courts can be expected to bear the burden of administering justice to Indians and whites without distinction.¹⁴⁴

Abbott pointed to a grave difficulty in the Dawes Act: Although the act purported to provide a process by which local law would extend over the Indian, it hindered that process by exempting Indians from taxes needed to support local government.¹⁴⁵ The states simply would not provide protection or government services unless Indians paid taxes. Moreover, even if local courts had been provided for Indians, Abbott noted, "antipathies of race and the animosities of warfare, must deprive trial by jury of much of the effectiveness and the confidence necessary to its usefulness."¹⁴⁶

Concern about lack of law (state or federal) on reservations, and the Indian's uncertain legal status, prompted Professor

143. FIFTH ANNUAL REPORT OF THE INDIAN RIGHTS ASSOC. 5-6 (1887).

144. Abbot, *Indians and the Law*, 2 HARV. L. REV. 167, 176 (1888).

145. *Id.* at 175-76.

146. *Id.* at 175.

Thayer, Austin Abbott, and Phillip C. Garrett of Philadelphia to draft a statute extending law to and creating courts on the reservations. The "Thayer Bill," as it was known, provided that Indians, whether citizens or not, would no longer be subject to restrictions on trade, contracts, and power to sue (with certain qualifications while the reservation system continued). The cornerstone of the bill was section 3, which provided for "the immediate extension over every reservation of the civil and criminal laws of the State or territory in which it [was] situated, with savings clauses [to protect against] local legislation unfavorable to the Indians."¹⁴⁷ Since reliance on state and territorial courts was impracticable for a long time, the bill provided for the creation of commissioners' courts having jurisdiction over all civil and criminal (but not capital) cases where an Indian was a party. The bill also provided for committing magistrates for each reservation, exercising powers in aid of the commissioners' courts.¹⁴⁸

The Thayer Bill was introduced in the United States Senate by Senator Dawes in 1888 (although he did not approve it). It did not gain much support, largely because it was complicated and would involve great expense. It was still in committee in 1891. At the American Bar Association Meeting in 1891, Professor Thayer tried to drum up support for his bill. He succeeded in getting the Association to pass unanimously a resolution that the United States should provide a system of courts and law for the reservations.¹⁴⁹

The discussion at the meeting indicated that it was commonly accepted that progress under the Dawes Act was bound to be slow. Thayer observed: "[The Dawes Act] can and will, perhaps, finally dispose of the Indian Question. The question is, however, as to the time it will take."¹⁵⁰ Thayer predicted that at the present rate it would take sixty years.¹⁵¹ Moreover, he stated that, aside from the Major Crimes Act, the United States furnished no law over the Indians, "and of course there is no law furnished by any State for these Indians as among themselves."¹⁵² One of the participants, Adelbert Moot, remarked that on many reservations,

147. *Id.* at 177-78.

148. *Id.*

149. 14 REP. OF THE A.B.A. 14-25 (1891).

150. *Id.* at 18.

151. *Id.*

152. *Id.* at 14.

such as those of the Iroquois in New York, the Indians lived in peace and prosperity, occasionally using the state courts outside the reservation, without need of any federal law. John Sanborn of Minnesota, however, noted that the prejudice and bias against Indians in state courts was so strong that the Indians' rights were like those "enjoyed by the slaves in the Southern states before the war."¹⁵³

While the Thayer Bill never passed (largely because of the cost it was expected to involve), its proposal reflected the fact that lawyers saw the Dawes Act as deficient. The Dawes Act simply did not dismantle the reservation system; rather, the Thayer Bill was intended to do that and to fill the void that would result.

The legal community's criticism of the Dawes Act brought into bold relief the fact that the Dawes allotment policy was almost entirely a policy of land tenure. Its main accomplishment was that it made possible the separation of tribal land holdings into common areas and individual allotments, and then provided for the eventual sale of the common areas to whites. The act did this while leaving the reservation system, with all its restrictions, intact. As a result, the legal status of the Indian became even more complex. The act produced uncertainty as to when local law would be extended over the reservations, and also as to when federal and tribal jurisdiction would end.

As the previous discussion has indicated, a number of lawyers believed that the Dawes Act caused only uncertainty as to legal jurisdiction over the reservations and dire need for further legislation. This suggests that the provisions of the Dawes Act, and the surplus lands acts passed to implement it, did not, and were not meant to, accomplish the extension of state law over the reservations. Further discussion must take into account the legal chaos produced by the allotment process, the harsh effects of allotment on the Indians, and the concomitant strengthening of the reservation system. Allotment, paradoxically, did not weaken the reservation system, but necessitated its expansion.

In 1928 the Institute for Government Research presented an extensive study to Secretary of Interior Hubert Work, concluding that the allotment process was a dismal failure.¹⁵⁴ In this study, known as the Meriam Report, the Institute stated that a "serious

153. *Id.* at 19, 25-26.

154. INST. FOR GOV'T RESEARCH, THE PROBLEMS OF INDIAN ADMINISTRATION (1927) [hereinafter cited as MERIAM REPORT].

impediment to the Indians' social and economic development" was "the confusion that exists as to legal jurisdiction over the restricted Indians in such important matters as crimes and misdemeanors and domestic relations."¹⁵⁵ Further, the Report stated that:

In some instances the state courts, in order to provide some semblance of law and order, have enforced their authority on reservations without legal warrant, but eventually the jurisdictional question has been raised by attorneys appearing in behalf of Indian clients, and thereafter such courts have declined to take cognizance of the cases.¹⁵⁶

In other instances, states did not exercise jurisdiction (whether they had the legal power to do so or not) because Indians did not pay taxes and because Indians were considered the "exclusive problem of the national government."¹⁵⁷ Even in the late twenties, forty years after the passage of the Dawes Act, the allotment process had not accomplished the extension of state law over the reservations.

The ambiguity in the Dawes Act as to when state law should apply had not been clarified by any amending or supplemental legislation passed after 1887. Indeed, much legislation only exacerbated the confusion. The Burke Act, passed in 1906, altered section 6 of the Dawes Act so that citizenship and amenability to local law would be entirely within the discretion of the Interior Secretary.¹⁵⁸ No longer did the 25-year period apply; the Secretary could delay issuing the patent in fee until the Indian was "competent." Since few Indians were "competent," the Burke Act further slowed the allotment process. It also contributed to the confusion as to legal relations on allotted reservations. As the report of the Executive Committee of the Indian Rights Association noted in 1912:

Incongruous conditions have arisen by operation of the Act of May 8, 1906. Perhaps 100,000 allottees had become citizens and were subject to state laws prior to May 8, 1906. A like number may have been allotted since that date who are refused

155. *Id.* at 16.

156. *Id.* at 768.

157. *Id.* at 768-69.

158. Act of June 21, 1906, ch. 3504, 34 Stat. 325, 327 (codified at 25 U.S.C. § 391 (1982)).

rights of citizenship and are subject to the *exclusive jurisdiction of the United States*.

An example of the anomalous situations brought about by the amended act is presented within the Pine Ridge and Rosebud Reservations, South Dakota, where almost 5000 allottees are citizens of the State of South Dakota, and more than that number are under the exclusive jurisdiction of United States' laws. The application of the laws in the family relation is unprecedented, and if not so serious would be ludicrous in the extreme.

The more rigid the subjection to the law, the greater the wrong in having the husband or wife amenable to the State, while the remaining members of the family remain subject exclusively to Federal Statutes.¹⁵⁹

The uncertain legal situation was worsened also by acts providing for leasing and the sale of the surplus lands because both of these types of legislation brought land speculators and settlers on the reservations.¹⁶⁰ The aim of whites was often not only to take land and other property legally, but also to take it illegally from the Indians. Moreover, whites frequently employed state courts and officials to accomplish their ends. This caused confrontations with the Indian agents and police. The picture sketched by historians and Indian agents of the period of 1890 to 1930 is one of constant tension between state and federal officials over jurisdiction over the reservations, the tension generally arising from illegal activity by whites.¹⁶¹

Partially in response to attempts to exploit the Indians and challenge federal jurisdiction, the federal Indian Service expanded.¹⁶² The allotment process itself, however, also caused

159. EXEC. COMM. OF THE INDIAN RIGHTS ASS'N, 30th ANNUAL REPORT 62 (1912) (emphasis in original).

160. See Act of Feb. 28, 1891, ch. 383, 26 Stat. 794 (leasing). Examples of later mineral and surface leasing statutes include 25 U.S.C. §§ 394, 396, 398, 399, 403 & 415 (1982). See surplus lands acts cited *supra* note 2.

161. Otis discusses the harmful effects of leasing. See OTIS, *supra* note 94, at 99-131, 150. Otis describes an incident on the Winnebago and Omaha reservations. Land companies and speculators moved onto the reservations and sought to lease illegally. This led to a confrontation between the federal agent, who called in fifty extra police supplied by the federal government and armed with seventy rifles, and state deputies and white tenants who had a state court injunction. See also JOHNSTON, *supra* note 131, at 76-84.

162. See generally L. SCHMECKEBIER, THE OFFICE OF INDIAN AFFAIRS (1927). See also F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 143 (Strickland et al. eds. 1982), which discusses the extensive federal supervision over the everyday life of Indians during the

increased federal activity. As Senator Teller had predicted, the allotment of lands to the Indians caused their loss to whites. Leasing also had this effect.¹⁶³ Moreover, those Indians who took allotments were unprepared (financially and otherwise) to farm them. Many allotments were too small and too infertile to support farming or grazing.¹⁶⁴ The overall result of allotment was thus the dispossession and impoverishment of Indians and their increased dependence on the federal government.¹⁶⁵

This increased dependence contributed to the expansion of the reservation system. For example, in the period 1890 to 1900, when the need for the federal reservation infrastructure was expected to vanish, the number of agencies increased from fifty-eight to sixty-one.¹⁶⁶ Government requisitions increased each year of allotment,¹⁶⁷ when they should have decreased. Schmeckebier gives a detailed picture of the medical, agricultural, educational, forestry, land, and administrative work done by the federal agencies on the federal reservations in the 1920s.¹⁶⁸ He also notes that federal supervision and benefits extended to virtually all Indians on opened and closed parts of the reservation because of the inheritance of restricted lands by citizen Indians.¹⁶⁹ In the end, the allotment process did not dismantle the reservation system; it only provided reasons for its expansion.

The strengthening of the reservation system and the reassertion of federal administrative power, in the face of the failure of allotment, argues against the idea that the Dawes Act or the surplus lands acts caused, or were meant to cause, the termination of the reservations. Indeed, the reservation system, the agencies and Indian police, were instrumental not only in protecting the

allotment period (e.g., government control over the Indians' capacity to make contracts, even with their attorneys). In the 1942 edition of Cohen's *Handbook*, for example, the observation is made about one appropriations bill that it enhanced federal control, introducing "an element of administrative discretion and flexibility into a system which when originally proposed had been considered a means of releasing the Indian from dependence upon administrative authorities," F. COHEN, *FEDERAL INDIAN LAW* 80 (1942).

163. OTIS, *supra* note 94, at 150.

164. For example, see H.R. Doc. No. 191, 54th Cong., 1st Sess. (1896).

165. This is the conclusion of Otis, *supra* note 94, and the writers of the Meriam Report, *supra* note 154.

166. OTIS, *supra* note 94, at 88.

167. *Id.* at 101. The Meriam Report also reports increased costs of administering allotment. See *supra* note 154, at 461.

168. SCHMECKEBIER, *supra* note 162, at 289-90.

169. *Id.* at 286-87.

Indians, but in imposing (often in vain) the allotment system on the Indians. The failure of allotment to improve the Indians' condition and make the reservations unnecessary led to an explicit rejection of the allotment policy in the early 1930s.

The history of allotment policy cannot end with its failure. Rather, and especially for the purposes of interpreting the surplus lands acts, this history must include its rejection. In the early 1900s, and especially in the 1920s with the writing of the Meriam Report, Congress and the public at large became increasingly aware that the prophecy of Senator Teller had come to pass. Allotment had pauperized and dispossessed the Indians. In the late 1920s and early 1930s, Congress and the federal government reconsidered the policy, and in the Indian Reorganization Act of 1934 (IRA) explicitly rejected it.¹⁷⁰

The reversal of the allotment policy came, however, before the allotment process had been completed. A large number of Indians still resisted allotment. Many who had taken allotments after 1906 were still "incompetent." Many who had received patents in fee had inherited restricted land, and so were still effectively under the control of the reservation superintendent.¹⁷¹ The reservation system and federal jurisdiction had not yet been abolished, and the passage of the Indian Reorganization Act ended at last the uncertainty as to when, or whether, that would happen. It reaffirmed the reservation system.

The confusion as to legal jurisdiction over allotted reservations was addressed not only by the Indian Reorganization Act,¹⁷² but by a later federal statute defining "Indian country."¹⁷³ As the Supreme Court stated in *Moe v. Confederated Salish & Kootenai Tribes*,¹⁷⁴ "Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within our existing reservations, and our cases have followed Congress's lead in this area."¹⁷⁵ The policy of the IRA and later federal statutes was to reaffirm the jurisdictional integrity of the reservations and their boundaries.

170. 48 Stat. 984, 25 U.S.C. § 476 (1982).

171. See SCHMECKEBIER, *supra* note 162 and accompanying text. See also JOHNSTON, *supra* note 131 and accompanying text.

172. 48 Stat. 984, 25 U.S.C. § 476 (1982).

173. 18 U.S.C. § 1151 (1982); 18 U.S.C.A. § 1151 (1964).

174. 425 U.S. 463 (1976).

175. *Id.* at 479.

The Allotment Policy and the Reservation System

Historical analysis suggests, then, that Congress' failure to mention whether the surplus lands retained reservation status did not simply reflect a failure to consider or conceive that the opened lands should remain a part of the reservations. Congress had rejected at least one allotment bill that provided for the abolition of reservation lines and allotment. It also resisted a number of bills and petitions, about the time it embarked on the allotment policy, calling for reduction or termination of reservations. On a few occasions (recall the Ponca and Otoe and Missouri reservations), Congress expressly altered reservation lines.

These points, along with other aspects of the legislative history discussed above, suggest that in enacting the Dawes Act, Congress had undertaken a radical experiment. It did not simply abolish reservations, as it had done so often in the past. Rather, it provided for a very gradual process of assimilation, the first stage of which was the taking of allotments by tribal members across the reservations, in the unopened and later the opened areas. Then, whites were to take up lands and it was hoped that their presence would encourage Indian assimilation. The reservation system, with the federal agencies, the military, the Indian police, and the government lawyers, remained to implement the allotment system and assist the allottees. Their support services and jurisdiction extended across entire reservations.

Uncertainty existed as to whether state law extended over the Indians in both the allotted and the unallotted lands. This uncertainty, however, was largely the result of efforts (generally resisted by federal officials) by white settlers and state officials to exert state jurisdiction to deprive the Indians of their lands. Legal scholars recognized that in the period of transition, until Congress passed legislation extending state law over the reservations or appending the reservations to adjacent counties, the Indians were, under the terms of the Dawes and other allotment acts, subject only to their own law and federal law.

The Supreme Court, in its recent opinion in *Solem v. Bartlett*, has suggested that the distinction as to whether the opened lands remained within the reservation, and subject to federal jurisdiction, was "unimportant" to persons concerned with Indian affairs at the time the various allotment bills were considered in Congress.¹⁷⁶ The foregoing analysis would suggest, to the con-

176. 104 S.Ct. at 1165. See also text accompanying note 62 *supra*.

trary, that the distinction was very important and that the allotment policy represented a radical shift in Indian policy in which the reservation system was left intact while the system of landholding was changed. Again and again, congressmen, federal officials, and legal scholars stressed that the allotment process was to be gradual. This meant that they recognized that the "civilizing" effects of allotment were bound to be slow and that the reservation system should not be dismantled until there was no longer any need for it. That point, however, was never reached and under the allotment process the reservation system was only strengthened.

III. *An Alternate Critique of Statutory Construction of the Surplus Lands Acts*

In light of the history of the allotment policy, the absence of language in the Dawes Act and the surplus lands acts abolishing the reservations and their boundaries is not so puzzling. Congress intended the allotment legislation to cause primarily a land transaction, which, over the course of time, it was hoped would "civilize" the Indian peoples. The reservations were left intact, possibly for reasons of parliamentary strategy, more likely to aid the implementation of allotment, to provide a back-up system in case allotment failed or the Indians rebelled, and, perhaps also, to protect the Indians from settlers and state authorities. During the debate on the Dawes Act, remarks made that the allotment system would be implemented gradually and that future congresses should handle future exigencies, suggest that formal abolition of reservation boundaries and federal jurisdiction was expected to occur much later, through an explicit terminating statute, when the Indians were "civilized."

The final stage of allotment, the ending of the reservations, however, was never reached. The Indian Reorganization Act expressly repudiated the allotment policy in 1934. Moreover, in the years since the passage of the surplus lands acts, the values of American society have changed dramatically. Courts dealing with the question of the boundaries of western Indian reservations, however, still rely on the construction of statutes which, in terms of Indian policy, are anachronistic.

Why, then, do courts continue to take the safe course of statutory construction, tacitly assuming the validity of the surplus lands acts? The answer lies in a general policy of the courts to defer to the "plenary power" of Congress in the field of Indian

affairs.¹⁷⁷ Because the Constitution expressly grants Congress the power to regulate commerce with the Indian tribes¹⁷⁸ and to regulate and dispose of the public lands,¹⁷⁹ it is argued, Congress has virtually absolute power to control Indian affairs. Courts will almost always dismiss challenges to the constitutionality of federal statutes dealing with Indians and Indian reservations on the grounds that they are not justiciable.

That the courts exercise great deference, especially with legislation affecting groups of people who are as economically and politically disadvantaged as the Indian peoples,¹⁸⁰ is disturbing. Moreover, it causes one to suggest that the focus of legal inquiry concerning the surplus lands acts should shift from a relatively superficial inquiry into the language and history of the acts, to a deeper constitutional inquiry into the validity of the acts for determining legal relationships today.

Several considerations might lead to, or even compel, inquiry into the constitutionality of the surplus lands acts, and the strength of the plenary power doctrine. First, it is useful to review what the surplus lands act did. The laws singled out particular Indian tribes, confiscated their means of survival, and sought to transform radically their living arrangements in order to destroy their culture and "civilize" them. Further, a dominant force behind the acts was the desire of settlers and speculators to obtain the surplus lands from the Indians. The Indian tribes were relatively weak and defenseless (as the courts so often recognize); they had no realistic opportunity to protect themselves through the political process. Although the surplus lands acts often followed negotiations with the tribes, and were ostensibly ratifications of agreements to cede lands, in practice few tribal members acquiesced, and the statutes were generally unilateral acts of Congress. The decision in *Lone Wolf v. Hitchcock* eliminated any need for Indian participation in the allotment legislation.¹⁸¹ Finally, whatever compensation came to the In-

177. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The courts have also described Indian affairs as a "political question." See *Lone Wolf*, *supra*.

178. U.S. CONST. art. I, § 3.

179. *Id.* art. I, § 3.

180. In other areas of law, for example, equal protection analysis, the Court has accorded a "more searching inquiry" to statutes affecting those "discrete and insular minorities" who are disadvantaged in the political process. *United States v. Carolene Prod.*, 304 U.S. 144, 152-53 n.4 (1938).

181. 187 U.S. 553 (1903).

dians for their lands was generally nominal and rarely went to the Indians themselves.¹⁸² Thus, unlike many treaties between the United States and the Indian tribes, which respected tribal sovereignty and were the product of consent, the surplus lands acts were in substance, if not in form, unilateral legislative deprivations directed against readily identifiable and politically disadvantaged groups. Seen in this light, the surplus lands acts have the unmistakable hue of bills of attainder.¹⁸³

If the surplus lands acts can be characterized as bills of attainder, then the courts' assumption that they are constitutional on grounds of the plenary power doctrine is not entirely accurate. The bill of attainder clause is a textual restriction on Congress, and it should be read with, and to limit, other sections of the Constitution, including those relating to the Indian tribes and the public lands. The Bill of Rights, incidentally, and in particular the clauses guaranteeing freedom of expression and association,¹⁸⁴ should also be read to restrict grants of power to Congress. The notion that Congress has "plenary" or "absolute" power in the area of Indian affairs is doubtful in light of the fundamental notions of limited government and the separation of powers that underlie the bill of attainder clause and the Bill of Rights.¹⁸⁵

A further constitutional consideration is that of the limits to which an unconstitutional policy can be used by courts to interpret statutes or the Constitution itself. In the case of *Brown v. Board of Education*,¹⁸⁶ for example, the Court at last dispensed with historical construction of the fourteenth amendment and reexamined it in light of changed values.¹⁸⁷ In *Loving v. Virginia*,¹⁸⁸ another case stemming from a concerted attack on the separate but equal doctrine, this time in the area of statutes banning interracial marriage, the Court struck down as un-

182. Under the Dawes Act and many of the surplus lands acts the sale proceeds went to a trust fund held by the U.S. Treasury Dep't for the Indians. This trust fund was in turn subject to appropriation by Congress for the education and civilization of the Indians. See 24 Stat. 390, § 5 (1887); Act of May 29, 1908, 35 Stat. 460, 463, § 6.

183. See U.S. CONST. art. I, § 9, cl. 3. For a general discussion of the bill of attainder clause, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 484-95 (1978 ed.) and cases cited therein.

184. U.S. CONST. amend. I.

185. See generally TRIBE, *supra* note 183.

186. 349 U.S. 294 (1955).

187. A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION* 862 (5th ed. 1976).

188. 388 U.S. 1 (1967).

constitutional a Virginia statute “designed to maintain white Supremacy.”¹⁸⁹ These are examples of limitations on judicial deference to the substance of legislative policy, and these limitations have been well defined in the area of black/white race relations. A similar definition is needed in the area of Indian affairs. This is especially so with respect to the surplus lands acts, which were passed as a result of an allotment policy reflecting outdated assumptions that Indian peoples were uncivilized and inferior.

This analysis suggests that a new inquiry is needed, one that will go beyond statutory construction of the surplus lands acts to the more difficult question of whether Congress overstepped the bounds of its authority in enacting them. Such an inquiry should be the start of a reconstruction of the law affecting the western Indian reservations. It should have as its next step a search for the treaties¹⁹⁰ and common law principles,¹⁹¹ which might provide a sounder basis for determining the relationships between the Indian tribes, the states, and the federal government.

189. *Id.* at 11.

190. For example, the Treaty of June 29, 1868, 15 Stat. 635, and the Act of Mar. 2, 1889, 25 Stat. 888, ratifying an agreement with the Sioux of the Dakotas.

191. Such as those developed by the Marshall Court, deriving the relation between the United States and the Indian nations from the political process of treaty-making and recognizing Indian nations as self-governing political communities not subject to state jurisdiction. *See* *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832).