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CONTRARY JURISPRUDENCE: TRIBAL INTERESTS IN NAVIGABLE WATERWAYS BEFORE AND AFTER MONTANA V. UNITED STATES

Russel Lawrence Barsh*
James Youngblood Henderson**

In 1974 the Crow Tribal Council enacted a resolution restricting reservation hunting and fishing to tribal members. No distinction was made between lands owned by the tribe or its members and the nearly thirty percent of the reservation area held in fee simple by non-members and the State of Montana. The resolution also purported to govern the Big Horn River, the bed of which the tribe claimed under its 1868 treaty with the United States.¹ The State of Montana refused to recognize the tribe’s jurisdiction to enact and enforce this restriction and continued to license non-member hunting and fishing within the reservation. As record owner of Indian land on the Crow reservation “in trust” for the tribe, the United States filed suit in 1975 to quiet title to the riverbed and to establish exclusively federal and tribal authority to regulate hunting and fishing on the reservation.

Crow claims to the bed of the Big Horn River were first considered in 1976 in United States v. Finch.² The Ninth Circuit upheld federal title to the riverbed “in trust” for the Crows, but its judgment was vacated by the Supreme Court on unrelated grounds the following year.³ When the same issues of title were renewed in United States v. Montana,⁴ the Ninth Circuit reaffirmed its holding in Finch. Both Ninth Circuit decisions noted similarities to the Supreme Court’s 1970 opinion in Choctaw Nation v. Oklahoma.⁵ Like the Choctaws, the Crows relied on a treaty that described their territory in metes and bounds enclosing the contested wa-

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2. 548 F.2d 822 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676 (1977).
3. Finch v. United States, 433 U.S. 676 (1977). The basis for the decision was double jeopardy.
The United States promised the Choctaws "virtually complete sovereignty" over their territory; the Crows were to enjoy "absolute and undisturbed use and occupation" of theirs. If anything, the Crows' case was stronger. The Choctaws emigrated from the southeast to resettle on lands patented to them in fee by the United States, while the Crows' territory was original and never had been subject to the power of the United States to dispose of lands by patent. The Choctaws' treaty subjected their government to federal preemption, while the Crows relinquished legislative jurisdiction only over the allotment of lands in severalty to consenting tribal members.

While the Crow litigation was awaiting review by the Supreme Court, the Court held in Oliphant v. Suquamish Indian Tribe that Indian tribal governments lack inherent criminal jurisdiction over non-Indians. Impling congressional intent from legislative silence and assuming its own conclusions, Oliphant embodied a carelessness with history and precedent we criticized in an earlier article as indicative of a dangerous intellectual trend. This fear appears justified in light of the Court's opinion in Montana v. United States. In holding that title to the bed of the Big Horn passed to the state upon its admission to the Union, Justice Stewart for the majority forecloses the conclusion by framing the question, dismisses the leading case in point as "peculiar" in a footnote, and advances as controlling a decision which, upon closer examination, stands for the opposite proposition. This is law by fiat, not reason; but a full appreciation of the Court's new jurisprudence must begin with a review of the established principles and authorities it chose to confuse or neglect.

7. This is the Court's description given in Choctaw Nation v. Oklahoma, 397 U.S. 620, 635 (1970).
12. See part IV.A. infra.
13. See part IV.C. infra.
14. See part IV.B. infra.
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I. TRIBAL LAND TENURE THROUGH THE LOOKING-GLASS

The road to Montana v. United States is fraught with doctrinal confusion, bred of superficial analysis. Over the years courts have confused the various meanings of "reservation" in conveyancing, public land law, and Indian treaty law,15 confused federal title in public lands with the United States' "naked fee" title in tribal lands,16 and confused the United States' role as public "trustee" for the states in management of public lands and waters with its role as "trustee" for Indian tribes and their citizens.17 In general, the law has flirted periodically with consolidating tribal lands in the general mass of the public domain, wavering between respect for historical tribal entitlements and impatience for the assimilation of Indians' resources into the nation's economy. An examination of the role of Montana v. United States and its antecedents in this process must begin with an identification of the principles and catchwords that populate the history of tribal land tenure law.

A. "Reservation"

When it "reserves" land by treaty, is the tribe the grantee or the grantor? In the common law:

A technical distinction exists between a "reservation" and an "exception." A reservation reserves to the grantor some new thing issuing out of the thing granted and not in esse before, and an exception excludes from the operation of the grant some existing portion of the estate granted which would otherwise pass under the general description of the deed.18

There is some authority that the use of the term "reservation" in conveyancing implied not only a right that did not exist before, but one of use only, such as an easement regranted by the grantee, and in some instances only a life estate.19 A strictly formal reading of Indian treaties, therefore, might lead to the conclusion that, in "reserving" certain lands, tribes

15. See part I.A. infra.
17. See part I.E. infra.
received regrants from the United States of the usufruct, during “life” (the existence of the tribe), of a portion of the lands ceded to, and therefore now part of, the fee estate of the United States.20

Even if it were proper to base delineation of tribal rights on a nice terminological distinction Indians scarcely would have understood a century ago, the common law denotation of “reservation” is by no means settled. “Only a cursory examination of cases is necessary to indicate the terms reservation and exception often are used interchangeably and that their distinction is technical, ‘slight and shadowy’. ”21 As stated by one court:

In the United States, . . . the historical significance of this language has been lost sight of and it is used almost interchangeably. Moreover, the Courts, without regard to the particular terms used in the conveyance, construe the language as an exception or reservation according to the character of the right intended to be created.22

From an early date, American courts recognized that lands “reserved” by Indian treaties were unceded rather than regranted. The 1824 case of Eu-che-lah v. Welsh23 involved conflicting claims to a tract of land reserved for an individual Cherokee by treaty. If the reservation was in the nature of federal regrant after title had passed from the tribe to the United States, the plaintiff argued, then title to the land had vested in the state before it could repass to the Indians. North Carolina’s Supreme Court disagreed, ruling that the tribal interest had never lapsed.24 Subsequent federal decisions agreed. A reservation of land “was so much carved out of the territory ceded, and remained to the Indian occupant, as he has never parted with it,”25 the Supreme Court concluded in 1850. “He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation.”26 “The treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted.”27

23. Id. at 155 (1824).
26. Id.
27. United States v. Winans, 198 U.S. 371, 381 (1904). This construction of treaty terms “reserving” land was necessary in the early days of the Republic while the constitutionality of federal
The confusion began with the federal government’s practice of withholding land for new states and disposing of it over a period of decades. The unopened federal lands within states were “reserved” from immediate sale or private appropriation, but not in the same way that Indian lands were “reserved”. In the former case, Congress had power to hold the unopened lands only for the purpose of disposal to the state and its citizens, as provided by the state’s enabling act. In other words, these “reservations” were public domain lands temporarily held “in trust” by the United States for the state under an express compact with state citizens. The federal interest was purely administrative. Any disposal of these lands for other than a legitimate public benefit to state citizens was a breach of trust and, in the opinion of the nineteenth-century Supreme Court, void.

As late as 1913 federal courts still recognized the distinction between federal lands “reserved from sale” for a period of years after statehood and “country to which the Indians retained the right of use and occupancy, involving—under certain restrictions—freedom of action and of enjoyment in their capacity as a distinct people.” But the routine administration of both classes of lands was consolidated in the Department of the Interior in 1849 and, during Reconstruction, Congress began to combine all federally managed territory for legislative purposes. Beginning in 1862 the railroad donation acts granted free rights-of-way through both federal and tribal lands, describing both as “public”, although proprietorship within a state remained unsettled. If the “cession” clause of an Indian treaty passed title to the state, the United States’ regrant of a “reservation” might violate both the exclusive legislation and just compensation clauses of the Constitution. See U.S. CONST. art. I, § 8, cl. 16; U.S. CONST. amend. V. To prevent this, early state and federal decisions went so far as to hold that treaties “reserving” lands for individuals passed title without the need for a formal patent from the United States. See, e.g., Francis v. Francis, 203 U.S. 233, 241–42 (1906); Niles v. Anderson, 4 Miss. 145, 152–53, 5 How. 365, 383 (1841); Newman v. Doe ex dem. Harris & Plummer, 3 Miss. 520, 558, 4 How. 522, 560 (1840); Godfrey v. Iowa Land & Trust Co., 21 Okla. 293, 95 P. 792, 797 (1908). Some of these early cases are reviewed thoroughly in Jones v. Meehan, 175 U.S. 1 (1899). Any lapse in time between cession and the vesting of an individual’s rights might have defeated the purpose of the reservation by interposing state title.

28. Perhaps the earliest judicial discussion of this terminology appears in McConnell v. Wilcox, 2 Ill. (1 Scam.) 344, 359 (1837).
29. One of the earliest federal decisions to distinguish reservations of public lands from reservations for Indians is United States v. Myers, 206 F. 387, 394 (8th Cir. 1913).
32. United States v. Myers, 206 F. 387, 394 (8th Cir. 1913).
34. See, e.g., Act of March 1, 1873, ch. 217, 17 Stat. 484.
vision routinely was made for compensation of tribes and their citizens. Depressed-era national recovery legislation such as the 1935 Federal Power Act frequently defined Indian reservations expressly as ‘‘public lands’’ for subsidy and management purposes.

The tribal/public distinction is further confused by historical changes in treaty policy and terminology. It would be grossly misleading to suppose that all, or even a significant proportion, of tribal lands are held under the same language or conditions. Therefore, generalizations about the nature of the rights created or retained by Indian treaties are dangerous. It


37. A brief review of the United States' more than 300 treaty land transactions with tribes will illustrate the problem. See 2 INDIAN AFFAIRS: LAWS AND TREATIES (C. Kappler ed. 1904) (compilation of all Indian treaties). Seventeen treaties simply stipulate the boundary line between U.S. and tribal territories. Thirteen use terms of confirmation or recognition; for example, the United States 'secures,' 'guarantees,' or promises to 'protect' tribal land, to 'consider [the tribe] the rightful owner.' or to 'acknowledge it to be their property.' The term 'reserve' appears in 48 treaties, but special care must be taken to notice and distinguish its variations. Twenty-seven of these instruments—all but one of them executed before 1850—`reserve' small tracts for individual Indians out of the ceded area. In a score of treaties the United States similarly promised to 'grant' parcels of the ceded area to individual non-Indians chosen by the tribe.

Land within or adjacent to ceded territory was 'reserved,' 'saved and reserved,' 'reserved and excepted,' or 'reserved and set apart' for tribal use 19 times, and simply 'set apart' seven times. Other treaties elaborated on the nature of the rights described. Among the variations, with the frequency of each indicated parenthetically, are: 'reserved [or set apart] for the use and occupation' of the tribe (twice); 'reserved for the present use and occupation' of the tribe (seven times); 'reserved for the sole use and occupation' of the tribe (once); 'set apart for the exclusive [or perpetual] use' of the tribe (twice); 'set apart as the permanent home' of the tribe (once); 'set apart and designated as a permanent reservation' (once); and 'set apart for the absolute and undisturbed use and occupation' of the tribe (eight times). In a few instances the United States merely promised to set apart some as-yet unidentified lands in the future (five times); or to set apart or reserve lands in the President's discretion (thrice) or subject to divestment at the President's discretion.

Still more troublesome are treaties suggesting an outright conveyance from the United States, rather than federal confirmation of existing rights. The terms of conveyance employed by treaties ranged from 'allot' (five times), 'sell,' 'possess,' and 'provide' (once each), to 'grant title' or 'in fee' (eight times) and 'quit claim' (twice). One tribe's 'permanent home' was 'assigned.' Many provisions describe the conveyance, circularly, as granting lands 'as other Indian lands are held,' while in nine treaties the United States actually 'cedes' territory to tribes as it would to any foreign state. There are two treaties suggesting that the tribe's new home is little more than a temporary settlement on the public domain: the President merely agrees to 'set apart and withhold from sale' or to 'withdraw from sale' the requisite lands. To make matters even more unsettling for analysis of the issues in Montana v. United States, Congress expressly reserved for itself a paramount interest in the navigable waters of a tribal 'reservation' in only one treaty, the Osage Treaty of 1825. See Treaty of June 2, 1825, art. 2, 7 Stat. 240, 241.
may be permissible, however, to distinguish three broad categories of tribal/federal land transactions. Most familiar are treaties ceding and retaining portions of a tribe's original national territory. If identified specifically at all, the retained portion typically was "reserved," "set apart," or "secured,"38 which may be taken as words of recognition and confirmation of pre-existing territorial rights.

In the second kind of transaction many of the eastern tribes that retained original lands in the early years of the Republic subsequently agreed to emigrate west of the Mississippi into what was to become known as Indian Territory. Indian Territory lands were ceded by the original inhabitants to the United States, then "given," "granted," or "ceded"39 back to the emigrant tribes, suggesting at least in some cases that tribal title was not merely acknowledged, but created and held under federal law.40 Presumably, the United States could regrant ceded land to a tribe in any form of tenure.

The third category of tribal lands are those "set apart" or "withdrawn" for tribal use by executive order not in the execution of a specific treaty engagement or act of Congress. Out of the 162 Indian "reservations" managed by the Bureau of Indian Affairs in 1890, fifty-six were created and fifteen enlarged by bare executive orders,41 nearly all occurring after the Act of March 3, 187142 brought an end to federal treaty-making with tribes. Because these tribal holdings are truly only temporary dispositions of public lands, and because they typically were created after statehood, they may properly be subjected to different rules. The danger lies in failing to distinguish strictly between tribal use of public lands withdrawn from entry after statehood, and tribal retention of unceded aboriginal domain in which neither the state nor the United States ever held an unencumbered fee. This failure to distinguish lands properly subject to public domain rules from lands originally and continually occupied by Indians and therefore properly involving Indian land tenure law persists in modern cases and is perhaps the major problem with the Court's reasoning in Montana v. United States.

B. The "Naked Fee"

To those unfamiliar with Indian law, a "naked fee" may sound more

38. See note 37 supra.
39. See id.
42. Ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 27 (1976)).
like the entrance charge to a nudist camp than the foundation upon which most of the land titles in this country rest. Although the British Crown always accorded the territorial claims of Indian tribes the greatest respect, it was customary from the first European settlement on this continent to subdivide the task of colonial settlement and administration through vast land grants. Crown grants in North America delegated responsibility for the preservation of order, regulation of trade and commerce, and acquisition of actual possession of the soil from the natives. The grants were jurisdictional rather than proprietary in nature. Grantees supported themselves by reselling and taxing or leasing lands purchased from the aboriginal inhabitants.

When the colonies rebelled, they used a similar scheme for financing the war. Lands still occupied by Indians could be granted to financiers as collateral, or to officers and common soldiers in lieu of wages. The right of actual possession of granted lands was conditioned upon the successful conclusion of the revolution and subsequent purchase of the Indian interest by the fledgling government or by the grantees themselves. "It was one of the great resources that sustained the war," the Supreme Court observed two generations later. Unfortunately, the scheme also proved to be a great source of confusion and labor for the courts, as peace and westward emigration generated conflicts between grantees from state and national authorities, from different states with overlapping western claims, or from American officials and tribal officials. Grantees began to seek federal help or, through ejectment actions, the help of the courts in clearing away the encumbrance of Indian possession. Since the continent remained chiefly in tribal hands and all the Republic's new governments were in debt, all of these governments had an interest in maximizing their share of the authority to grant lands still occupied by Indians.

The Supreme Court first faced this problem in 1810. The real issue in *Fletcher v. Peck* was whether Georgia's state legislature, having granted a strip of land to private speculators, could subsequently revoke the grant on grounds of fraud or mistake and regrant the land to others. In a lengthy opinion the Court held that legislative land grants, once vested, are protected from confiscation by the contracts clause. The Court ducked the regrantees' alternative argument that the original grant had been void when made, because the land was then occupied by Indians. In the con-

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46. 10 U.S. (6 Cranch) 87 (1810).
cluding paragraph of the opinion, without citation of authority, Chief Justice Marshall summarily ruled that the original grantees’ interest had been lawful, but not such as to sustain ejectment against the tribe. “The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the state,” or the state’s grantees.47

In dissent, Justice Johnson objected to the majority’s characterization of the state’s interest as a “fee,” although he did not deny its alienability while the Indians remained in possession. The majority, he asserted, clouded the issue by identifying but not defining the tribe’s overriding estate. “That is,” Justice Johnson wrote, the Court held “that the state of Georgia was seized of an estate in fee-simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia.”48 Tribes retain their national political character, he argued, except to the extent that the United States preempts the cession of their lands to other nations. Hence “[a]ll of the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets . . . .”49 “Can, then, one nation be said to be seized of a fee-simple in lands, the right to soil of which is in another nation?,”50 he asked. Until the tribal estate was purchased for Georgia by the United States, Justice Johnson concluded, “[t]o me it appears that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seized to a use.”51 Georgia had an estate, but not in fee simple.

The Court took up Justice Johnson’s argument thirteen years later in Johnson v. M’Intosh,52 a conflict between the United States’ patentee to Illinois land and a prior grantee from the tribe itself. The nature of the tribe’s estate was raised unavoidably: was the tribe’s interest such that it could convey a fee title good against a subsequent grant from the United States? In order to preserve the nation’s profitable practice of granting “possibilities” in lands still occupied by tribes, the Court had to finesse the meaning of “fee simple,” leaving the United States the power to grant, and the Indians the right to remain. The Chief Justice’s solution was to distinguish between two meanings of “title,” giving the United

47. Id. at 142–43.
48. Id. at 146.
49. Id. at 147.
50. Id.
51. Id. at 146.
52. 21 U.S. (8 Wheat.) 543 (1823).
States "title" in the international sense and the tribes the operational equivalent of title in the common law sense.

When European nations found themselves in conflict over their New World claims, Chief Justice Marshall wrote, they fixed upon a law by which the right of acquisition [from the natives], which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.53

The natives themselves "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion," except only in the matter of sale to Europeans.54 Finally, European nations "claimed and exercised, as a consequence of this ultimate [i.e., international] dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy."55

A European grant, therefore, gave the grantee title good against all the world except the Indians. As a practical matter this left the Indians in full possession, immune from ejectment, albeit their estate was characterized as only "possession" or "occupancy" as if it were merely a servitude or encumbrance. Early federal legislation, for example, exempted unceded tribal lands from survey even if they had been granted.56 If the tribe did sell to an individual non-Indian, rather than to the United States, the purchaser took simply what interest the tribe itself had—undisturbed use and possession until the tribe's territory as a whole was ceded to the Union. Unless expressly saved by the terms of cession, the purchaser's right then passed to the United States' patentees.57

Subsequent decisions confirmed the power of the states and the United

53. Id. at 573 (emphasis added).
54. Id. at 574 (emphasis added).
55. Id. (emphasis added). This line of reasoning is nicely restated in Holden v. Joy, 84 U.S. (17 Wall.) 211, 242-44 (1872). "Discovery" as a source of title among nations has been rejected by the International Court of Justice, where the "discovered" land is already inhabited by tribes having a social and political organization. See Advisory Opinion on Western Sahara, [1975] I.C.J. 3, 39-40; cf. Judgment on North Sea Continental Shelf Cases, [1969] I.C.J. 3 (disputes regarding title over continental shelf land are to be settled by agreement; discovery or occupation gives no rights). See also Island of Palmas (United States v. Netherlands), Hague Ct. Rep. 2d (Scott) 98 (Perm. Ct. Arb. 1928), reprinted in 22 AM. J. INT'L L. 867, 883-84 (discovery must be accompanied by occupation to create title).
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States to make fee grants of unceded tribal lands, and it became common in the latter part of the nineteenth century to refer to the tribe’s original and unceded estate as a “right of occupancy,” and the result of a fee-simple grant of the same land as a “naked” or unconsummated fee. Although the courts agreed, as a “settled principle, that [the tribes’] right of occupancy is considered as sacred as the fee-simple of the whites” under the law, this terminology invited confusion—and confusion obliged. As early as 1842, in Martin v. Waddell’s Lessee, the Supreme Court hinted that the Indian’s right, because it was not “title,” was not permanent and might be cut off involuntarily. Chief Justice Taney wrote for the Court in Martin:

For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of this country was first discovered. Whatever forbearance may have been sometimes practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants.

As the century progressed, courts leaned towards the spirit of this Taney dictum, and John Marshall’s cunning device of separating title from possession fell apart.

C. “Plenary Power”

For a hundred years no one supposed that tribes’ “right of occupancy” could be terminated or “extinguished” involuntarily. Indeed, for a hundred years no one supposed that the United States had power, absent a specific delegation of authority by treaty, to interfere in tribes’ internal police of commerce. A change in policy and law evolved, not surprisingly, during Reconstruction, a period when even the reserved constitu-

62. Id. at 409 (emphasis added).
tional powers of states were superseded, albeit temporarily, by "beneficial" federal supervisory administration.\textsuperscript{64} Within a generation, Congress subjected tribal areas to a broad range of "protective" laws, federal containment and policing, and coercive subdivision and sale of unceded lands.\textsuperscript{65} The process by which the Reconstruction-era Supreme Court gradually accepted and rationalized this federal encroachment on tribal affairs laid the groundwork for nearly transforming the Marshallian right of permanent "occupancy" into a mere tenancy-at-will.

The root of this doctrinal tree was \textit{Beecher v. Wetherby},\textsuperscript{66} decided in 1877. When Wisconsin became a state in 1848, much of its land area was unceded Chippewa territory. The Chippewas subsequently ceded the tract at issue to the United States. In 1870 the state granted the "school lands" sections of the tract, and in 1872 the United States patented the same sections adversely, resulting in an action to try title. The Supreme Court held that these sections had vested in Wisconsin automatically as soon as the tribe ceded them, since the United States previously had covenanted to convey them by compact—the state enabling act—with the state's citizens.\textsuperscript{67} This settled the actual controversy, but in dictum the Court went on to characterize the nature of the Chippewa estate prior to their cession.

But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be \textit{interfered with or determined} by the United States.\textsuperscript{68}

Was the Court suggesting that the United States could "interfere" with tribal possessory rights without tribal consent? As if to dispel any doubt that this indeed was its intention, the Court observed that in interfering with or determining tribal rights "'[i]t is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.'"\textsuperscript{69} This phrasing subtly ascribed to Chief Justice Taney's earlier dictum\textsuperscript{70} that the tribal right is one of "'humanity or policy'" only.

\textsuperscript{64} \textit{See generally M. Bailey, Reconstruction in the Indian Territory} (1972).
\textsuperscript{66} 95 U.S. 517 (1877).
\textsuperscript{67} "'In the present case, there can hardly be a doubt that Congress intended to vest in the State the fee to section sixteen in every township, subject, it is true . . . , to the existing occupancy of the Indians . . . .'" \textit{Id. at} 526.
\textsuperscript{68} \textit{Id. at} 525 (emphasis added).
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{See text accompanying note} 62 \textit{supra.}
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rather than a constitutionally protected property right. Although dictum itself, the observation in *Beecher* was to be relied on as authority for a succession of decisions eroding tribal land rights.

In *Cherokee Nation v. Southern Kansas Railway*, the Cherokees sought to enjoin the United States' grant of a railroad right-of-way through their territory. Although the tribe had agreed to the right-of-way in an 1866 treaty, providing a readily available ground for decision, the Court embarked on a protracted general discussion of tribes' "dependency" on the United States and of Congress' general powers under the Constitution to make "needful rules" for the management of the public domain. The Court concluded that tribal sovereignty was sufficiently inferior to federal sovereignty, and tribal territory sufficiently part of the territory of the United States, that Congress could exercise eminent domain over it as though it were "like the lands held by private owners everywhere within the geographical limits of the United States."

Shortly after *Southern Kansas Railway*, Congress "allotted" the Cherokee Nation's territory in severality. The United States' appointment of an all-white board, the Dawes Commission, to determine entitlement to the land was highly unpopular. In *Stephen v. Cherokee Nation* the Cherokees challenged the authority of Congress to interfere with the tribe's determination of its own membership. The Supreme Court summarily upheld the power of the Dawes Commission, relying entirely on *Southern Kansas Railway*. Without discussion, the power to exercise eminent domain over Indians' fee patent lands, previously alleged merely in dictum, became the power to alter tribal legislation regulating its citizenship.

This doctrinal tree branched and flowered three years later in *Cherokee Nation v. Hitchcock*. Questioning Congress' power to regulate mineral exploration and development on tribal land, the Cherokees argued that the

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71. 135 U.S. 641 (1890).
73. 135 U.S. at 654–55. As we have shown elsewhere, the "dependency" of tribes first suggested by *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), was meant in the international sense as a consensual relation of protection. See R. BARSH & J. HENDERSON, supra note 65, at 50–61.
74. 135 U.S. at 657. In its haste the Court neglected to note that a different principle should apply to unceded aboriginal land. The Cherokees' land in Indian Territory was held under fee patents from the United States and, except as limited by treaty, Congress might well subject that kind of land to the same principles that govern non-Indians' fee-patent property. A case involving unceded tribal territory would have to base congressional power, if any, on some other theory.
76. 174 U.S. 455 (1899).
77. *See id.* at 484–86.
78. 187 U.S. 294 (1902).
supervision was a "taking" of property vested by treaty. The Supreme Court disagreed, stating that Stephen's holding that Congress may regulate tribal membership "necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe." The power of Congress over tribes and their property indeed was pervasive or "plenary," the Court suggested, extending to every legislative object. Moreover, "the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." In effect, the Court waived jurisdiction of any further challenges of congressional Indian affairs legislation.

D. Indian Lands and the Public Domain

What was the source of this seemingly unlimited proprietary and legislative power? Here also the threads of public domain law and Indian law began to intertwine. Although as early as 1846 the courts behaved as if federal power over tribal communities had something to do with the property clause, the connection did not ripen into an express doctrine until nearly a century later. Understanding the origins and meaning of federal "trusteeship" over tribal lands today takes the inquiry back to 1828, when the Supreme Court was called on to decide whether Congress could acquire and rule territory outside of the original states, a question that had been hotly debated since the Louisiana Purchase in 1803. In American Insurance Co. v. 356 Bales of Cotton, Chief Justice Marshall reasoned for the Court that the power of territorial acquisition is implicit in the constitutional powers of war and treatymaking, since it is one of the most common objectives of foreign affairs. On federal authority to govern communities within an acquired area, Chief Justice Marshall was equally certain of the existence of the power but less so of the source.

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state acquired the means of self-
government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.85

What had been done, then, was lawful because it had been done.

The tie-in to Indian law was made in *United States v. Rogers*,86 another Taney decision penned shortly after his pronouncement on Indian title in *Martin v. Waddell's Lessee*. Here again, Chief Justice Taney sowed the seeds of broad doctrine through dictum. *Rogers* was a criminal prosecution under federal laws regulating the conduct of non-Indians trading or residing in tribal territory. The defendant, a non-Indian citizen of the United States by birth, unsuccessfully claimed at trial to be a naturalized Cherokee. Because the Cherokees had acknowledged the United States' jurisdiction over non-Indians within their territory in several treaties,87 federal power over the defendant plainly existed. Chief Justice Taney nevertheless based the court's holding on a novel and expansive principle:

> [W]e think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.88

Chief Justice Taney was analogizing to the principle set forth in *356 Bales* that national territory outside of any state must be governed exclusively by the laws of the United States. Although his formulation implied that Congress lacked regulatory power over unceded tribal lands within the boundaries of a state, a decade earlier the Court in *Worcester v. Georgia*89 had held that states also lacked jurisdiction over tribal lands within their boundaries. The *Rogers* dictum therefore would have made tribes within state boundaries more self-governing than tribes in the unsettled west!

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85. 26 U.S. (1 Pet.) at 542–43. For other discussions by the Supreme Court of the federal power to acquire and govern territory outside of the original states, see Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 32–46 (1890); Murphey v. Ramsey, 114 U.S. 15, 44 (1885); Cross v. Harrison, 57 U.S. (16 How.) 164, 194 (1853); Benner v. Porter, 50 U.S. (9 How.) 235, 242 (1850).
86. 45 U.S. (4 How.) 567 (1846).
88. 45 U.S. (4 How.) at 572.
89. 31 U.S. (6 Pet.) 515 (1832).
This apparent paradox was resolved forty years later in United States v. Kagama.\(^{90}\) Holding that Congress may enact criminal laws for Indians residing in unceded territory within a state, the Supreme Court explained:

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.\(^{91}\)

According to Kagama, then, Congress, by process of elimination, must be the tribes’ supreme legislature—the same process of elimination that had led the Marshall Court in 356 Bales to repose plenary authority over the territories in Congress. The Kagama Court explained the congressional plenary power as follows:

But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country...\(^{92}\)

Since the United States owned the “naked fee” in unceded tribal lands,\(^{93}\) it followed that the United States enjoyed supreme legislative authority over tribal people, whether or not located within a state. The nation’s “naked fee” in tribal lands was evolving into something considerably more than a preemptive right of purchase.

This expansion of congressional authority over Indian lands occurred alongside the evolution of expanded federal powers over the general public domain. The Court in 356 Bales had addressed only the power of Congress over territory outside of the states. Pollard v. Hagan,\(^{94}\) decided in 1845, involved public lands retained by the United States within the new state of Alabama. The validity of a Spanish land grant made prior to the Louisiana Purchase was dispositive of the actual controversy,\(^{95}\) but the Court took the opportunity to expound at length on the nature of the United States’ tenure in public lands generally. When Alabama was ad-

\(^{90}\) 118 U.S. 375 (1886).

\(^{91}\) Id. at 379–80.

\(^{92}\) Id. at 380 (emphasis added). See also United States v. Celestine, 215 U.S. 278, 284 (1909).

\(^{93}\) See generally part I.B. supra.

\(^{94}\) 44 U.S. (3 How.) 212 (1845).

\(^{95}\) See id. at 225–28.
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mitted to the Union in 1819, the United States had retained control of "waste and unappropriated lands," some of which it subsequently granted directly to individuals.96

Indefinite federal management of the retained lands was unlawful, the Supreme Court concluded.97 In retaining the unappropriated lands, the United States had been only a temporary administrative intermediary between, on the one hand, the states of Virginia and Georgia, which had earlier surrendered their claims to the land to the United States, and the new State of Alabama on the other. Since the instruments surrendering the land provided that any new states formed from the surrendered area were to stand on equal footing with the original members of the union, "[w]hen the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to the same extent, in all respects, that it was held by the States ceding the territories."98 But the court did not limit itself to these facts. It contended further that in general "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases in which it is expressly granted."99 New states may, "temporarily, [be] deprived of control over the public lands,"100 but permanent federal proprietorship is limited by the exclusive legislation clause101 to arsenals, dockyards and the like.102 "We, therefore, think," the Court concluded, that "the United States hold[s] the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess."103 The Court even went so far as to suggest that Alabama’s disclaimer of "waste and unappropriated lands" was unconstitutional and void.104

Pollard’s sweeping condemnation of federal land ownership within the states arose on peculiar facts. Only a fraction of the nation’s trans-Appalachian acquisitions were, like Alabama, carved out of areas ceded to the United States by one or more of the original states. The breadth and popu-

96. Id. at 224.
97. Id. at 221.
98. Id. at 222–23 (emphasis added). The Court defined "eminent domain" in this context as the power "of disposing, in case of necessity, . . . of all the wealth contained in the State." Id. at 223.
99. Id. at 223 (emphasis added).
100. Id. at 224.
102. "And these are the only cases, within the United States, in which all the powers of government are united in a single government . . . ." Pollard, 44 U.S. (3 How.) at 223.
103. Id. at 224.
104. Id.
larity of Pollard's dictum nevertheless resulted in its universal application to situations not involving state-cession lands. 105 When this extension finally was challenged in 1894, 106 the Supreme Court simply pointed to its numerous decisions applying Pollard to other states, without distinction or discussion, and closed the matter as fait accompli. 107

Pollard accomplished more than the establishment of the right of states to public domain lands within their borders. It also gave birth to the idea that the United States holds these lands “in trust” for the states and their citizens, a characterization of federal tenure that was to achieve widespread familiarity. Indeed, Pollard’s “trust” terminology became its only lasting achievement, for later decisions of the Supreme Court were to recast the United States as “trustee” for all the people of the nation, rather than just for the people of the state in which the public domain land is located, and accordingly to extend the powers and duration of the “trust” in defeat of state claims. 108

Unfortunately, the characterization of the federal government as “trustee” would also work in time to erode Indian tribes’ sovereignty over unceded aboriginal lands.

E. ‘‘Trusteeship’’ and Title ‘‘In Trust’’

Groping for a term of legal art to describe the political status of Indian tribes in treaty relations with the United States, Chief Justice Marshall in Cherokee Nation v. Georgia 109 hit upon “dependent.” 110 As understood in international law, a “dependent” nation was one that had, by treaty, sought and received the protection of another state without surrendering its domestic sovereignty or statehood. 111 Such an arrangement well suited the Cherokees, whose treaties delegated powers of war, foreign affairs, and foreign trade to the United States. Subsequent Courts, however, neglected the requirement that this relationship arise by mutual consent, not merely out of the supposed condition or geography of tribes. 112

107. Id. at 26–31.
110. Id. at 17.
112. This neglect is particularly apparent in United States v. Kagama, 118 U.S. 375, 383–84 (1886): “From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, . . . there arises the duty of protection, and with it the power.”
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sion was further engendered by Marshall’s ill-chosen analogy between international “dependency” and a common-law guardian and ward relationship. This analogy became the foundation for turn-of-the-century rationalizations of “plenary power” as inherent in the United States’ role as Indians’ legal guardian. All that was needed to draw together these threads of public domain law with Indian affairs was to conclude that the United States holds the “naked fee” in unceded tribal lands “in trust” for the Indians, as it holds the fee in public domain “in trust” for citizens.

The first step in this direction was taken by Congress. The 1887 General Allotment Act subdivided tribal lands and allotted them among individual Indians. Title to each tract was held by the United States “in trust” for the allotsee, with express authority to supervise and restrict alienation. The courts readily inferred from this statutory arrangement greater power than Congress had specified. Since title was in the United States “in trust,” the allotments were deemed to be federal instrumentalities immune from state and local taxation. There was implied power to manage timber and other natural resources on allotted lands. And, because the object of the Act “could not be accomplished if the enforcement [of restraints on alienation] were left to the Indians themselves,” the United States had implicit standing to sue on allottees’ behalf, with or without their consent. According to the Court, Congress even possessed power to terminate its “trust” at pleasure, regardless of the wishes or interest of the allottee.

The courts confined the idea of trusteeship and the powers that went with it to allotted lands only briefly. As early as 1912 the Supreme Court concluded that “[t]his national interest [in exercising its guardianship] is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a

113. 30 U.S. (5 Pet.) at 17.
116. Id. § 5.
117. Id.
120. Heckman v. United States, 224 U.S. 413, 438 (1912).
121. Id.
122. In re Heff, 197 U.S. 488, 508–09 (1905). The Supreme Court recently has returned to construing the United States’ trusteeship duties under the 1887 General Allotment Act strictly, apparently in response to pressure from the Justice Department to narrow potential federal liability for misfeasance. Barsh, supra note 119, at 2.
Like the earlier concept of "plenary power," trusteeship flowed from the condition of tribes rather than from any particular bilateral or unilateral instruments. It was not long before the Court would say:

[As regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare. The United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession.]

The shift from "plenary power" to "trusteeship" as the rationalization of power is of more than academic interest. On its face, at least, it suggested some degree of accountability for exercises of the power, notwithstanding earlier Court decisions placing congressional dispositions of tribal property beyond judicial competence. It also opened the door to a host of conflicts between the United States' dual roles as trustee of lands both "for the people" and for the tribes.

Nowhere was the conflict between these dual "trusts" more evident than in the United States' use of its expanded public domain powers to implement its obligations to the tribes. Federal land transactions with tribes after 1871 were administered increasingly through public lands orders rather than through treaties or agreements. "Reservations" for
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tribes were enlarged by withdrawing adjacent public lands from entry, and diminished by opening them to entry. The more common these practices became, the more tempting it was for courts simply to equate tribal lands with public lands and to apply the same rules to both. Numerous federal railroad donations acts expressly including “Indian reservations” in their definitions of “public lands” encouraged this trend.128

F. “Recognition” of Tribal Tenure

The twentieth-century concept of “recognized” tribal title forms the last piece of the puzzle, serving to protect some part of the tribal estate from the radical implications of nineteenth-century concepts of “plenary power” and federal “trust” management of the public domain. The first hint of “recognition” appeared in the Supreme Court’s 1835 opinion in Mitchel v. United States.129 After reviewing Chief Justice Marshall’s discussion of European title-by-discovery in Johnson v. M’Intosh,130 Justice Baldwin turned his attention to the effects of treaties on tribal tenure.

128. See, e.g., Nadeau v. Union Pac. R.R., 253 U.S. 442 (1920); Kindred v. Union Pac. R.R., 225 U.S. 582 (1912). The extreme expression of this line of thinking was United States v. Cook, 86 U.S. (19 Wall.) 591 (1874), a federal action to replevy logs cut from “reservation” land by individual Indians. The land had been ceded to the United States by the Menominee, then regranted to a party of emigrant New York Indians to be held by them “as Indian lands are held.” “[T]o justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land,” the Supreme Court reasoned. Id. at 593. It stated: “Any cutting beyond this would be waste and unauthorized. . . . What a tenant for life may do upon the lands of a remainderman the Indians may do upon their reservations, but no more.” Id. at 593–94. Who was the remainderman, the people of the state or of the United States? In either case, the tribe’s estate was as “sacred as the fee-simple of the whites” in words only. Cook seemed to mean that tribal land was to be treated as a temporary withdrawal of public lands for a limited federal purpose.

129. 34 U.S. (9 Pet.) 711 (1835).

130. 21 U.S. (8 Wheat.) 543 (1823) (discussed in notes 52–57 and accompanying text supra).
By thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties.131

Once the Crown or the United States acknowledged a tribe’s statehood by treaty, then, the tribe no longer held its unceded territory merely by “right of occupancy,” but as property protected by municipal as well as international law. As property within the European land-tenure paradigm, the tribe’s lands henceforth were “inviolable by the power of Congress.”132

Justice Baldwin’s insight lay dormant for nearly a century while courts applied “discovery” principles indiscriminately to all unceded tribal lands, whether or not acknowledged by treaty. Thus, for example, the Court’s 1850 decision in Gaines v. Nicholson133 described treaties as merely “confirming” tribes’ right of occupancy, rather than as waiving discovery and substituting complete title under European law.134 In 1902, the Court held in Minnesota v. Hitchcock135 that the administrative power of Congress over unceded tribal lands never confirmed by treaty was as great as its power over lands expressly reserved by treaty. “[I]n order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract,” the Court argued.136 “It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.”137 The Court held forty years later that, when asserting a tribal interest in land, the United States’ claim need not be based “upon a treaty, statute, or other formal government action,” since the tribal right arises in all cases from original occupancy.138

The courts’ failure to distinguish confirmed from unconfirmed tribal tenure went largely unchallenged as long as the context in which the issue

131. 34 U.S. (9 Pet.) at 749 (emphasis added).
132. Id. at 755 (emphasis added). Can an argument be made that U.S. recognition, by treaty, of some tribes was an implied recognition of the state character of tribes, and hence waived title-by-discovery as applied to all tribes? “Recognition” of tribal tenure is analogous to the principal that a non-tribal treaty “vests” private property rights in the fifth amendment sense. See Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1888); Society for the Propogation of the Gospel in Foreign Parts v. Town of New Haven, 21 U.S. (8 Wheat.) 206, 218 (1823).
133. 50 U.S. (9 How.) 356 (1850).
134. Id. at 364.
135. 185 U.S. 373 (1902).
136. Id. at 390.
137. Id.
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arose was the expansion of federal management power. When tribes began to sue the United States in their own right for possession or for damages, the distinction was revived and eventually used against them. In the 1935 case of *United States v. Creek Nation*, the Creek Nation sought fifth amendment compensation for federal mismanagement and disposal of tribal lands granted, by treaty, in the Indian Territory. The Supreme Court agreed that an assertion of trusteeship or plenary power does not "enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' "

Three years later, in *United States v. Shoshone Tribe*, the Court expanded this rule to compensate the Shoshone Tribe’s interest in minerals and timber involuntarily converted to the use of another tribe by the United States. The *Shoshone* case was significant because it involved original unceded tribal territory acknowledged by treaty, while the land in *Creek Nation* had been held under a federal patent.

In *United States v. Santa Fe Pacific Railroad*, decided in 1941, the United States attempted to eject the railroad from lands claimed by the Hualpai tribe by original occupancy alone. According to the Court, original occupancy alone, not voluntarily ceded and not extinguished by the United States, was sufficient to create "'Indian title.'" Congressional power to extinguish this right was "'supreme,'" however, and not subject to judicial review.

139. 295 U.S. 103 (1935).
140. *Id.* at 110 (quoting *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919)).
141. 304 U.S. 111 (1938).
142. The Court stated:
Minerals and standing timber are constituent elements of the land itself. For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee.
143. 314 U.S. 339 (1941).
144. *Id.* at 345, 347.
145. 314 U.S. at 347. Ironically, the decision to some extent turned on whether either of two nineteenth century efforts by federal agents to remove the tribe from this land had been authorized by Congress. If authorized, the Supreme Court concluded, the removal left the Hualpai without a remedy at law. Only the United States may extinguish a tribe’s "'right of occupancy,'" Justice Douglas wrote for the Court, "'[a]nd whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *Id.* See also *id.* at 350–51. In fact, the Court decided against Hualpai right of occupancy but on the grounds that, by voluntarily accepting a reservation, the tribe had ceded its original occupancy of the property in question. *Id.* at 357–58.
A situation similar to *Santa Fe Pacific Railroad* was presented in *Tee-Hit-Ton Indians v. United States*, decided in 1955. A fifth amendment claim for just compensation arose out of the United States' removal of timber from Alaska lands anciently occupied by the tribe but never acknowledged or confirmed by treaty or legislation. “Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking,” the Supreme Court noted, affirming the results in *Creek Nation* and *Shoshone*. In other cases the tribe could have only “Indian title,” which means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised “sovereignty,” as we use that term. This is *not a property right* but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

In *Tee-Hit-Ton*, the Court thus combined in a single rule the principal of *Mitchel v. United States* with a polar principle from the 1874 case of *United States v. Cook*. Tribal title that is somehow adequately “recognized” by federal law is property in the fifth amendment sense, and in dealing with it Congress is subject to the usual requirements of due process and just compensation for takings. “Unrecognized” tribal lands claims, however, exist at the pleasure of Congress and may be abolished without compensation. But here the apparent symmetry and simplicity of the formula breaks down. Given the perverse variety of means that the United States historically has used in choosing to tolerate, confirm, or
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secure tribal land claims, not to mention the absence of any conventional terminology in treaties or statutes,152 "recognition" must be adduced case by case. There can be little hope of consistency or predictability.

In the days when all those multifarious "reservations," "exceptions," "set aparts," and other terminological devices were being used to record agreements with the tribes, the leading American decisions on tribal tenure were Johnson v. M'Intosh153 and Mitchel v. United States,154 both agreeing that tribes' rights were "as sacred as the fee-simple of the whites" whether or not they were confirmed by treaty.155 Surely the tribes could not have known that the form of words in a treaty, or the absence of certain words, might someday retroactively be held to deprive them of legally enforceable rights. If the soul of property law is certainty and security, then tribes have just cause to complain of a nation whose laws, at the time tribes partitioned their lands, declared that what remained unceded would always be theirs, but subsequently were interpreted to mean that the tribes might keep only that which had been set aside by words and rituals the necessity of which was revealed only after it was too late to use them. The lone consolation of the recognition doctrine has been that those tribes fortunate enough to have the magic words in their treaties would enjoy compensable title in their reserved lands. It will be seen, however, that even this hope is challenged by the Montana decision.156

G. The Rules of Liberal Construction

When law encounters vague facts, ambiguous instruments, or inconsistent terminology, resolution of the parties' rights commonly depends upon a rule of construction or a presumption. Such rules assign the burden of caution, foresight, or—after the fact—the hardship of error to one class of litigants in favor of another. The assignment may reflect assumptions about who may best or most cheaply bear the cost of avoiding future ambiguities, once charged by law with that burden. The assignment may represent considerations of equity, as in giving the benefit of the doubt to historically under-represented or disadvantaged groups. In the last resort, an assignment of the burden of caution may be arbitrary. The goal of increased certainty and predictability of the law demands that the placement of the burden be consistent.

152. See note 25 supra.
156. See notes 329–335 and accompanying text infra.
Almost from the beginning, American courts have been sensitive to the special problems of Indian treaties. Not only were these instruments variously worded, often in terms at odds with conventional legal usage, but it was all too apparent that documentation in English placed the tribes at the mercy of foreign interpreters and their own limited command of that language. It was a simple matter for an unscrupulous negotiator to take advantage of a tribe's lack of ability in Anglo-American law and the English language to produce "agreements" the legal effect of which might be the opposite of that intended by the Indians. The Supreme Court recognized these problems in Worcester v. Georgia and established two related canons of treaty construction. First, "[h]ow the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction," so that extrinsic evidence of the tribe's desires or intent may supersede the usual meaning of terms of art. Second,

[the language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.]

In other words, any treaty terms susceptible of more than one interpretation should be construed against any surrender of the tribe's rights.

As a practical matter, then, the United States bore the burden of clearly documenting the tribes' consent to part with their rights. Ideally this also could help put tribal negotiators unambiguously on notice when they were asked to surrender those rights. As the Supreme Court noted:

[It cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.]

157. In international practice multilingual versions of the treaties would have been used, but in the 19th century few Indian languages were written and courts have been reluctant to accept tribes' oral versions when they differ from the official written text. For one such case history, see United States v. Bouchard, 464 F. Supp. 1316 (W.D. Wis. 1978). We are aware of only one bilingual Indian treaty, the Micmac treaty of 1752, printed in English and in French, a language already commonly spoken by the tribe. See Treaty, or, Articles of Peace and Friendship Renewed, between Governor Hopson and the Micmac Indians, November 22, 1752 (printed at Halifax in 1753 by John Bushnell and known from copies at the New York Historical Society and New York Public Library), reprinted in part in A BIBLIOGRAPHY OF THE ENGLISH COLONIAL TREATIES WITH THE AMERICAN INDIANS 30 (H De Puy ed. 1917).

158. 31 U.S. (6 Pet.) 515 (1832).
159. Id. at 582 (McLean, J., concurring); see also id. at 522–53.
160. Id. at 582 (McLean, J., concurring).
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The Court also was sensitive to the possibility that tribes might too readily part with their rights out of fear or in response to threats, a danger partly ameliorated by reading treaties strictly against the United States’ interest. “The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right,” the Court explained in 1886, “without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.”

These principles have not absolved tribes entirely from the premise of international treaty law that courts “are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice.” Every part of the treaty is to be given effect, but in that light most consistent with the Indians’ interests and apparent purposes. The rules of liberal construction are thus consistent with the notion at international law that nations part with the incidents of sovereignty only by their express consent, so that any grant of rights or powers to another nation by treaty is to be construed strictly against the grantee. At least when dividing their original sovereignty and territory with the United States, then, tribes should be taken to have lost only that which they have given freely and unambiguously.

When the principal controls on federal/tribal relations passed from bilateral treaties to unilateral legislation in the late nineteenth century, courts were quick to extend the rules of liberal construction to the interpretation of congressional acts. Indeed, during the “plenary power” doctrine’s turn-of-the-century zenith, statutory construction was virtually the only check on Congress that Indians could invoke. “It is not within the power of the courts to overrule the judgment of Congress,” the Supreme Court maintained in *In re Heff*, but “[i]t is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation . . .” So, too, of federal legislation purporting to extinguish tribal possession and use of part of its reservation. “That Congress could have effected such an extinguishment is not doubted,” the Court concluded in *United States v. Sante Fe Pacific Railroad*, “[b]ut an extinguishment

162. Choctaw Nation v. United States, 119 U.S. 1, 28 (1886).
165. See generally notes 78–81 and accompanying text supra.
166. 197 U.S. 488, 499 (1905).
167. Id.
cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.'"

Hence, as applied to legislation, construing ambiguities in tribes' favor was reconceived as a matter of deference to Congress' overall benevolent intentions, rather than—as in Worcester—an assumption that the United States would sometimes act in bad faith.

Indian treaties and Indian legislation tend to be silent or to speak only in general terms about the nature and scope of tribal self-government. Hence, resolving ambiguities in tribes' favor has operated to slow state and federal encroachment on tribal lands and jurisdiction. The doctrine of liberal construction was, in practical effect, the tribes' tenth amendment. But, just as judicial vindication of federal social programs as exercises of the commerce power have weakened the principle of reserved state powers since the New Deal, Montana v. United States culminates a judicial assault on liberal construction of Indian laws and treaties that began in 1978.

II. TITLE TO RIVERBEDS AND TIDELANDS: MONTANA'S ANTECEDENTS

A. Navigability and the Golden Age of State Rights

The Supreme Court's 1824 decision in Gibbons v. Ogden established the preemptive federal regulatory prerogative over waterborne
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commerce, extending even to "[t]he deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising" the states' right to engage in domestic and foreign trade.\(^1\) But the power described in Gibbons was supervisory, not proprietary, leaving the states for the time being in undisputed possession of the title to submerged lands and to the waters and fish moving over them. It was not until 1842, in Martin v. Waddell's Lessee,\(^2\) that the power of the states to dispose of submerged lands was challenged.

*Martin* was more of a fishing case than a title case. It involved a 100 acre tract of oyster beds under the navigable Raritan River and Bay in New Jersey. The area had been part of a seventeenth-century royal patent to the Duke of York delegating, as was customary at the time, both governmental and proprietary powers to the patentee. In 1702 the patentee surrendered all of his governmental authority to the Crown, retaining, in general terms, only the property. His heirs deeded the oyster bed to Waddell in 1834, whereupon his lessee sued Martin for ejectment, who claimed under an 1824 deed from the state. The issue was whether ownership of the river and bay attached to the governmental capacity of the colony of New Jersey, and so passed to the government of the state after the Revolution, or whether it was part of the private property retained by the Crown's patentee in 1702. From these peculiar facts, Chief Justice Taney's Supreme Court fashioned sweeping new doctrine.

The Duke of York's patent from the Crown did not include the oyster beds by express terms. Should a grant of them nevertheless be implied from their location within the metes and bounds of the patent? Chief Justice Taney's review of English decisions convinced him that at common law the Crown always held the navigable waters of the realm "in trust" for public use, and lacked power to deed private rights or monopolies to fisheries.\(^3\) Hence, it was reasonable to assume that the letters patent merely delegated this trust to the Duke of York in his temporary capacity as chief executive of the New Jersey colony, that this trust had reverted to the Crown in 1702, and that the Duke and his heirs never acquired any private proprietary right to fisheries or submerged lands. As was noted by Chief Justice Taney,

Indeed, it could not well have been otherwise; for the men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their

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\(^{1}\) *Id.* at 195.

\(^{2}\) 41 U.S. (16 Pet.) 367 (1842).

\(^{3}\) *Id.* at 409–10.
very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shellfish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another.\(^{177}\)

Having decided that the Duke and his heirs had had no title under the common law to grant to Waddell, it remained for the Chief Justice to explain if and how Martin acquired good title from the state. Taney observed:

> [W]hen the revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.\(^{178}\)

State power to grant submerged lands away in fee to individuals was confirmed by long usage,\(^ {179}\) Taney concluded, hence the state’s patentee had good title.\(^ {180}\)

The problem of title to submerged lands returned to the Court three years later in \textit{Pollard v. Hagan}.\(^ {181}\) In \textit{Pollard}, however, the issue was the power of the United States, rather than that of a state, to make private grants of submerged land. Originally submerged but later drained and reCLAIMed, the land in controversy lay on the shore of Mobile Bay in Alabama.

Justice McKinley maintained for the Court that the United States could hold unappropriated lands within Alabama only as a temporary trustee, exercising only those administrative powers necessarily incident to distributing the lands to the state and its citizens.\(^ {182}\) In the execution of this trust, moreover, the United States was disabled from exceeding its constitutional powers, or from depriving the state of any prerogative reserved to

\(^{177}\) Id. at 414.

\(^{178}\) Id. at 410.

\(^{179}\) Id. at 416–17.

\(^{180}\) It may seem paradoxical that the Crown’s “trust” in submerged lands and fisheries required the protection of public access and the defeat of claims like that of Waddell’s lessee, whereas the state’s public “trust” in the same lands authorized private subdivision. Indeed, there were two dissenters, Justices Thompson and Baldwin, who disputed Chief Justice Taney’s reading of English precedents. “The true rule on the subject,” they explained, “is that prima facie a fishery in a navigable river is common, and he who sets up an exclusive right must show title by grant or prescription.” Id. at 424 (Thompson, J., dissenting). The Crown might grant private rights, but the burden of proof fell on the grantee to show express intent.

\(^{181}\) 44 U.S. (3 How.) 212 (1845).

\(^{182}\) Id. at 220–29; see notes 94–104 and accompanying text supra.
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it by the equal footing doctrine or the tenth amendment. Although the Constitution gives Congress preemptive authority to regulate navigation, Justice McKinley reasoned that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively." Noting the Martin Court's finding that the original states had treated the beds of navigable waters as theirs to keep or grant as an incident of sovereignty, Justice McKinley concluded that the United States could not constitutionally defeat this state right by granting away submerged lands during the period of its trusteeship.

Justice Field's 1891 opinion in Packer v. Bird implicitly extended Pollard beyond the state-cession area to lands that the United States had acquired by other means. Packer involved conflicting claims to an island in the Sacramento River in California. In the course of determining the validity of those claims, the Court held that the 1857 federal land grant that was the alleged basis of title in fact had conveyed none of the lands beneath the Sacramento River, as the portion of the river bordering the property was navigable.

The major issue addressed by the Court in Packer was whether Pollard, which previously had been applied only to tidelands, also applied to navigable rivers above the "ebb and flow" of the tide. "Navigable in fact" had been the test of federal jurisdiction in admiralty since Propeller Genessee Chief v. Fitzhugh (The Genessee Chief), and Justice Field reasoned that the scope of Pollard ought to be coextensive with the navigation power of the United States. The irony here should not be missed. The more extensive the federal navigation power, according to Justice Field's formula, the less extensive the federal interest in the public domain. The very waterways over which Congress enjoys preemptive power are those which vest automatically in the state upon admission.

Pollard was tested again within the year by two challenges to the power of the United States to have confirmed by patent, after California

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183. 44 U.S. (3 How.) at 228–29.
184. Id. at 230.
185. Id.
186. 137 U.S. 661 (1891).
187. See id. at 671. On its face, the Pollard rule was limited to new states carved out of the western lands claimed by the original members of the Union under colonial charters and patents but deeded to the United States by express terms of trust following the Revolution. Pollard, 44 U.S. (3 How.) at 228. See also Weber v. Board of State Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873) (an earlier opinion by Justice Field).
188. 137 U.S. at 672–73.
189. 53 U.S. (12 How.) 442, 454–56 (1851). See also The Steamer Daniel Ball v. United States (The Daniel Ball), 77 U.S. (10 Wall.) 557, 563 (1870).
190. 137 U.S. at 671.
statehood, Mexican land grants expressly conveying interests in San Francisco Bay tidelands. So soon after his sweeping extension of the Pollard doctrine in Packer, Justice Field reneged: "that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way."191 Thus, the United States could patent tidelands in the execution of its administrative "trust," under the Treaty of Guadalupe Hidalgo, to protect the property of former Mexican citizens.192 As explained by the Court, "[t]he duty of the government and its power in the execution of its treaty obligations . . . were superior to any subsequently acquired rights or claims of the State of California, or of individuals."193 This exception to the rule that tidelands vest automatically in new states was confirmed and expanded only months later in an opinion penned by Justice Lamar.194 Noting Justice Field's reliance on the United States' treaty promise "to protect all rights of property in that territory emanating from the Mexican government," Justice Lamar concluded that "[i]rrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same."195 Once one exception to Pollard had been recognized, the Supreme Court wasted no time finding others.

B. State Rights Crumble: Shively v. Bowlby

As the nineteenth century drew to a close, accumulated land withdrawals from new western states and public pressure for conservation and reclamation had created a federal public domain empire unlike anything Chief Justice Taney would ever have imagined or tolerated. If one thing was plain from Pollard v. Hagan, however, it was that the United States loses control of lands beneath navigable waters upon admission of the territory as a state. Now that federal policy was delaying statehood throughout the west by decades,196 the greatest danger to state rights was a federal grant prior to admission.

That problem was laid before the Supreme Court in bold relief in 1894. Shively v. Bowlby197 was a dispute over the tide flats of the Columbia

192. Id. at 667.
193. Id. at 671.
195. Id. at 183–84.
197. 152 U.S. 1 (1894).
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River at Astoria, Oregon. While Oregon was still a territory, the United States had patented lots along the shore extending by their terms through the tidelands. Upon admission, the new state deeded the lots to others, contending that the United States could not act during the period of its territorial "trust" to defeat the interest of the future state.

The author of the opinion was not Justice Field, but Justice Gray. It was apparent from the outset that a doctrinal turning point had been reached. The Court endorsed the view of the dissenters in Martin v. Waddell's Lessee as to the power of the Crown at common law to grant tidelands. It stated: "[A] grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention." This itself was not revolutionary. It was nothing more than what Pollard had found true of the practices of most of the states after independence. Where Shively really departed from Pollard was in locating this sovereign authority to grant submerged lands within the Constitution. The Pollard Court could find no constitutional foundation for federal ownership of tidelands and limited federal authority to the execution of treaties and compacts. Shively, however, referred to the property clause and the growing legal tradition, since American Insurance Co. v. 356 Bales of Cotton, of implying from it vast powers of federal governance.

Prior to the admission of a territory to statehood, while the territory remained property of the United States, the whole sovereign power of granting submerged lands remained federal. This disposal power did not flow from a trust for the benefit of the future state; therefore it could be used to accomplish an array of more remote public purposes. Never-

198. See generally note 180 supra (discussion of Martin dissent).
200. See text accompanying notes 99–103 supra.
202. The result of this legal tradition is reflected in the following statement by the Shively Court:

By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition.

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects of which the United States hold the Territory.

152 U.S. at 48 (citations omitted).
203. See note 202 supra.
theless, the Court warned in *Shively*, it had been the *policy* of the United States to forego the exercise of this power and to provide that submerged lands "shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States."\(^{204}\) This reformulation explained federal lands management practice since *Pollard* as the reflection of a discretionary practice that Congress might change, rather than as obedience to a constitutional limitation on federal authority. As for the case at hand, *Shively* was decided in favor of the state’s grantee after all: the federal grantee’s patent "contain[ed] nothing indicating any intention on the part of Congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers."\(^{205}\) The federal grantee presumably would have succeeded if his grant had been more explicit.

Having disposed of *Pollard*’s limitation of federal power to grant submerged lands prior to statehood, the next step was to reconsider federal power to retain submerged lands after statehood. Five years after *Shively*, the Court in *United States v. Rio Grande Dam & Irrigation Co.*\(^{206}\) upheld the power of the United States to enjoin a state government from authorizing diversions of water from a navigable stream. The Court was uncertain, however, whether this power flowed from federal regulatory preemption under the commerce clause or from federal ownership of navigable rivers under the property clause.\(^{207}\)

The confusion surrounding federal powers over waterbeds remained unresolved until 1935. In *Borax Consolidated Ltd. v. City of Los Angeles*,\(^{208}\) the corporate defendant traced its title to Los Angeles harbor tidelands to an 1881 post-statehood federal grant. The city based its claim to the tidelands on a subsequent grant from the state. Citing *Pollard*, the Supreme Court held unequivocally that the tidelands had passed to California upon its admission to the Union, hence the federal grant was void.\(^{209}\) The same year, however, the Court reaffirmed the United States’

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\(^{204}\) 152 U.S. at 50.

\(^{205}\) Id. at 51.

\(^{206}\) 174 U.S. 690 (1899).

\(^{207}\) The Court stated:

"[I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. . . . [T]he jurisdiction of the General Government over interstate commerce and its natural highways vest in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against state action."

Id. at 703 (emphasis added).

\(^{208}\) 296 U.S. 10 (1935).

\(^{209}\) Id. at 16.
authority to use public lands orders to withdraw the beds of non-navigable waterways indefinitely—for bird sanctuaries, in the particular case. 210

At last the Court’s various twists, turns, and doublings-back on the theme of Pollard had assumed some coherence. Prior to statehood, the United States holds title to the beds of navigable waters with the power, under the property clause, to dispose of these lands for legitimate public purposes. 211 Because the policy of Congress has been to avoid such grants, 212 claimants under federal instruments bear the burden of showing specific intent to convey more than just the fast lands. At statehood, the title to lands underlying navigable waters passes to the state, and is subject only to the paramount power of the United States to control such waters pursuant to the commerce clause. 213 After statehood, the United States may retain complete title to submerged lands not granted to the state at statehood, committed to a proper public purpose, 214 but may dispose of these retained lands only to the state. 215

III. TRIBAL INTERESTS IN SUBMERGED LANDS

A. From Winans to Brewer-Elliott

The foregoing discussions of tribal land tenure and title to the beds of navigable waterways come together in tribal/state disputes over the ownership of water, fisheries, and submerged lands. The case record is sporadic, is not entirely consistent, and is dominated by peculiar fact situations. It may, therefore, be appropriate to begin with a few general theoretical considerations as a frame of reference.

The threshold question in any contest over tribal interests in submerged lands should be whether the tribe claims as the original occupant or as the United States’ grantee. 216 By the rules of liberal construction, 217 a tribe claiming as the original occupant is entitled to a presumption against any implied loss of any part of its property, by treaty or by legislation. In other words, the state or private claimant must show where the United States expressly purchased or confiscated the right or interest at issue. Where the tribe asserts some kind of “recognition,” 218 moreover, its

211. Shively v. Bowlby, 152 U.S. 1, 48 (1894).
212. Id. at 48–50.
216. See part I.A. supra.
217. See generally part I.G. supra.
218. See generally part I.F. supra.
original interest in the property may be immune from unconsented federal takings and can pass to private parties only by express sale.

If the tribe claims by way of a grant from the United States, it still does not follow necessarily that the rule of *Pollard v. Hagan* and *Shively v. Bowlby*, that grants are presumed not to include the beds of navigable waters, applies. These cases involved rules for construing the validity and intent of federal grants to private persons, and thus do not apply to any trust created by treaty. As the Supreme Court of Iowa succinctly stated the problem a century ago in a case involving the reservation, by treaty, of riparian lands for individual Sac and Fox “half-breeds”:

> The grant to the half-breeds, was to them as persons, and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or states, and then the line would have been the *medium filum aquae*, as it is now between Iowa and Illinois.

If the grant of territory to a tribe, by treaty, is to them as a body politic in their collective and governmental capacity, it should be construed, like other intergovernmental territorial grants within the American federal system, to pass the “sovereign” control of submerged lands together with the enclosed fast lands. *Pollard* and *Shively* both recognized the principle that this incident of sovereignty passes to states automatically along with federal grants of territory within their borders—not because they are state governments, but because they are governments. The same principle should apply to grants to tribes.

Lastly, it will be recalled that both *Pollard* and *Shively* deemed the presumption against the inclusion of submerged lands in private grants to be fair because it had been, the Court believed, the rule in the colonists’ mother country. This reasoning invokes the policy of continuity of expectations in property law, but it is entirely inappropriate as applied to tribes. Certainly it makes no sense to apply a canon of construction to Indian treaties for no better reason than that non-Indians probably are familiar with it. To do so would violate the consistent tradition of our law since *Worcester v. Georgia* of referring the construction of Indian trea-

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220. 152 U.S. 1 (1894) (discussed in part II. B. supra).
ties to the expectations and understanding of the Indians, and not of the United States. With these concerns in mind, we may turn to the cases.

In United States v. Winans, the federal government, acting as "trustee" for the Yakima tribes, successfully enjoined non-Indians from erecting "fish wheels" on the Columbia River where they would interfere with tribal fishing. The tribe's treaty expressly reserved the right to fish "in common" with citizens, and the Supreme Court read this as a retained property right rather than as merely a right of access to or participation in the general fishery. Fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed," the Court observed. Hence, under the rules of liberal construction, the right to fish must be construed broadly to preserve it against injury or reduction. The Yakima interest in the treaty fishery was great enough to secure both access to the fish and a secure supply of fish to their territory—ownership of the fish in all but name.

Three years later in Winters v. United States the Court had occasion to determine whether an 1888 "agreement" between the United States and tribes settling on the Fort Belknap Reservation in Montana had granted or reserved tribal ownership of the waters flowing over their land. The Court again took the view that the water rights were essential and had been the tribe's to begin with, and therefore should be presumed to be the tribe's still. The Court stated:

"By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians," the Court continued. Not being expressly ceded by the tribe in its 1888 "agreement," the Court concluded that the waters had been retained for tribal use.

Both Winans and Winters involved tribal territories originally set apart

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225. 198 U.S. 371 (1905).
226. Id. at 381.
227. Id. at 381-82. Cf. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (allocates the opportunity to harvest fish at traditional tribal fishing grounds but stops short of saying that the tribes own a portion of the fish stocks or the waters in which they spawn).
228. 207 U.S. 564 (1908).
229. Id. at 576.
230. Id. at 576.
by treaties prior to statehood. Even after the rule of 

Shively, then, title to the riverbeds could not yet have vested in the state. The issue of riverbed title in a reservation created after statehood came before the Court in Donnelly v. United States. In Donnelly, a criminal prosecution, the issue was whether the situs was within the Hoopa Valley Reservation and therefore subject to federal rather than state jurisdiction. Donnelly’s crime occurred on the bank of the Klamath River below the high water mark, where the river passed through the reservation. The reservation had been created, not by treaty, but by an executive order more than forty years after California statehood withdrawing public lands on either side of the river. Since the river was non-navigable, however, there was no problem with vesting of state title as long as the United States retained technical title. According to the Court:

It seems to us clear that if the United States was the owner of the river bed, a reasonable construction of [the executive order] requires that the river be considered as included within the reservation. Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river. As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.

Donnelly followed Winans and Winters, then, to the extent of giving great weight to the economic importance of the watercourse to the tribe. Donnelly differed because the tribe exercised, at best, a late-created right to the use of the public domain rather than the kind of title or the equivalent of title that the tribes in Winans and Winters enjoyed in their unceded lands and waters.

The Court’s thinking crystallized in 1918 in Alaska Pacific Fisheries v. United States. As in Winans, the controversy surrounded non-Indians’ erection of a fish trap in waters claimed and fished by the tribe. The Metlakatla band had emigrated from British Columbia to southeastern Alaska in 1887 at the invitation of the United States, settling in the Annette Islands. An 1891 Act of Congress had withdrawn “the body of lands known as Annette Islands” from entry or sale “until otherwise provided by law” as a “reservation” for the Metlakatlans. Interior Department officials maintained that the withdrawal was meant to include the islands’ boundary waters and sub-tidal lands, and hence its tidal salmon fisheries.

231. 228 U.S. 243 (1913).
232. Id. at 259.
233. 248 U.S. 78 (1918).
234. Id. at 86–87.
Tribal Interests in Waterways

Following Winans, Winters and Donnelly, the Court looked to the tribe’s economy to determine what must have been intended:

The purpose of the Metlakahtlans, in going to the islands, was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of these vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.235

The Court concluded that ""[t]he Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location."

It was to be presumed, from the rules of liberal construction, that "Congress intended to conform its action to their situation and needs," and had meant the phrase "body of lands" to include both the uplands and "the intervening and surrounding waters."237

It was clear now that tribal lands set apart by treaty out of original territory or by withdrawals of the public domain would be presumed to include boundary and enclosed waters where essential to the furtherance of the tribe’s past and future economy. The result in Alaska Pacific Fisheries was followed in United States v. Romaine,238 a suit by the United States to quiet title to island tidelands within the Lummi Reservation against patentees of the State of Washington. The reservation had been established prior to statehood by an 1873 executive order implementing a treaty promise to "set apart" the island for Lummi use. The order expressly extended one of the island’s boundaries to the low tide mark. ""[I]t is not disputed that the government had the power to grant for Indian reservations or for other purposes lands to low-water mark,"239 the Ninth Circuit explained, obedient to Shively. And, as in Winans, ""[i]t is not to be supposed that in making the treaty the government intended to take from the Indians any of the rights they had theretofore enjoyed in the islands . . . .""240 From the evidence of the metes and bounds of the order and the Lummis’ historical condition as a fishing people, it was to be presumed that the 1873 withdrawal included all of the island’s tidelands.

Romaine actually quieted title to the Reservation’s boundary tidelands

235. Id. at 88.
236. Id. at 89.
237. Id.
238. 255 F. 253 (9th Cir. 1919).
239. Id. at 259.
240. Id. at 260.
in the United States for the use of the tribe under Congress’ explicitly temporary withdrawal. *Brewer-Elliott Oil & Gas Co. v. United States*241 involved submerged lands to which the tribe claimed *permanent* title under a federal grant. The dispute was over minerals, moreover, rather than a traditional subsistence resource. The Arkansas River bounded land originally purchased by the United States from the Osages, but subsequently patented in fee to the Cherokee Nation when it emigrated west of the Mississippi. The land was then resold to the United States by the Cherokees and in 1872 repatented in fee simple to the Osages. Language in the Cherokee and Osage patents carried the boundary of the reservation to “the main channel of the Arkansas River.”242 When several oil companies commenced state-licensed drilling in the riverbed, the United States, alleging standing as “trustee” for the Osages, sought an injunction. The state of Oklahoma intervened, claiming that title to the riverbed had passed to it automatically upon admission to the Union under the rule of *Pollard* and *Shively*.

There was no dispute in *Brewer-Elliott* that the governing transactions had been federal land grants rather than treaties ceding and reserving original tribal territory. Further, the Court rejected any argument but that the contested segment of the Arkansas River was *non-navigable*,243 taking the case out of the context of *Pollard* and *Shively*. The Supreme Court noted that previous federal decisions involving non-tribal grantees deferred to local law the construction of midstream boundaries on non-navigable rivers,244 but concluded that “the words of the grant expressly carries the title” of the Osages to midstream,245 leaving no room for interpretation. Furthermore, the Court stated, even if the grant had been ambiguous, the rules of liberal construction in federal Indian law, rather than state law, would be applied.246 In this respect, *Brewer-Elliott*, like *Donnelly*, was somewhat of a side-branch off the *Winans* and *Winters* line. The import of the Osages’ grant was plain, the land at issue was regranted in fee rather than unceded and, because the stream was non-navigable, there was no “trust” or policy in the state’s favor.

B. Holt State Bank’s *Imaginary Heresy*

Four years after *Brewer-Elliott*, the Supreme Court reconsidered tribal

244. *Id.* at 88–89. See also St. Paul & Pac. R.R. v. Schurmeier, 74 U.S. (7 Wall.) 272 (1869).
*Brewer-Elliott* remains the leading case on this point.
245. 260 U.S. at 87.
246. *Id.* at 83.
interests in navigable waterways in *United States v. Holt State Bank*. The value of the case as authority is marred, however, by the Court’s historical errors and by the uniqueness of the case’s facts. The controversy centered on Mud Lake in Minnesota, a navigable body of water within the area ceded to the United States by the Red Lake Band of Chippewas in 1889. Under the cession agreement the United States was to survey and sell the ceded tract for the Band’s benefit, which it undertook by patenting all of the dry land surrounding the lake. In 1912 the United States proceeded to drain the lake itself and to survey the bed with the intention of patenting additional lots. The Band, as patentee of several of the original lakeside lots, adversely claimed title to the drained bed of Mud Lake on the theory of accretion under Minnesota state law. Pivotal to the Band’s position was its argument that title to the bed of Mud Lake had passed automatically to the state in 1858, when Minnesota achieved statehood.

Relying on *Shively*, the Court framed the question as “whether the lands under the lake were disposed of by the United States before Minnesota became a state.” The Court chose not to consider whether the lake might have inured to Minnesota some time after statehood, such as when the Red Lake Band had ceded its interest in the surrounding area to the United States. The Court’s preoccupation with identifying the status of the lake prior to 1858 was where the trouble began.

Neither the upland nor the waters of the Red Lake Reservation had ever been confirmed, bounded, reserved, or granted expressly by treaty or by statute, although they remained unceded both before and for thirty years after Minnesota statehood. The flaw in the United States’ claim of title to the lakebed, and the reason it was defeated, then, was simply this absence of any form of federal acknowledgment of tribal proprietorship before 1858. *Holt*, therefore, presaged subsequent decisions of the Court that were to rely upon distinctions between compensable “recognized” tribal title and noncompensable claims by virtue of original occupation

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247. 270 U.S. 49 (1926).
248. *Id.* at 57 (emphasis added).
249. The Court could identify only two pre-statehood Chippewa treaties, made in 1854 and 1855. The Court, however, failed to make clear the fact that neither treaty had involved the Red Lake Band, which did not treat with the United States until 1863, at which time the Band ceded a large tract of northern Minnesota. As the Court observed correctly of this 1863 treaty, albeit citing erroneously the 1854 and 1855 treaties, “[t]here was no formal setting apart of what was not ceded, nor affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters.” *Id.* at 58 (footnote omitted). The Red Lake Band’s treaty was exceptional in this regard, as the Court commented: “Other reservations for particular bands [of Chippewas] were specially set apart, but those reservations . . . are not to be confused with the Red Lake Reservation . . . .” *Id.* at 58 n.1.
only.\textsuperscript{250} \textit{Holt} did not deny the right of a tribe to use the navigable lakes enclosed fully and exclusively within its reservation boundaries.\textsuperscript{251} \textit{Holt} merely denied the right of the United States, once the area had been ceded, to withhold the lakebeds of navigable lakes from the state. Hence, although the United States could have compensated the Red Lake Band for its cession of the lakebeds, it was powerless to resell these lakebed tracts to private parties in contravention to the interests of the state.\textsuperscript{252} In practical terms, then, \textit{Holt} held that the possession of lands beneath navigable waters passes automatically to the state when the tribe cedes them, so long as the United States did not vest \textit{its} interest in these submerged lands prior to statehood by confirming or recognizing tribal title.

In 1858 the Red Lake Band was without treaty relations with the United States and Mud Lake lay within unceded, original tribal territory. Under federal decisions then in force, Minnesota could acquire only the "naked fee" to the Band's territory, subject to the "Indian right of occupancy."\textsuperscript{253} Minnesota's fee would have been completely theoretical under the principles of \textit{Johnson v. M'Intosh},\textsuperscript{254} affording it no actual possessory interest in the tract until the tribe quit it voluntarily. If, indeed, the state had in 1858 acquired the "naked fee" not just to Mud Lake but to the entire reservation subject only to the right of tribal occupancy that ceased in 1889, \textit{Holt} was correct in its result but incorrect in its methodology. Title to the lakebed would then have been out of the United States' hands, not because of the federal government's failure to dispose of it before statehood, but because Minnesota's "naked title" ripened upon cession in 1889.

What accounts for the \textit{Holt} Court's preoccupation with the status of Mud Lake prior to statehood? Did it matter whether the lakebed had passed out of tribal hands before or after Minnesota's admission to the Union? In making this status the pivotal issue, the Court may have been trying to avoid the alternative problem of interpreting the 1889 Presidential agreement that had "ceded" the Reservation. This "cession" had been for the purpose of subdividing and selling the tract for the Band's benefit. Pursuant to its agreement, the United States had indeed sold part of the tract. But not until 1908 did Congress authorize the expenditure of federal funds to drain Mud Lake and subdivide and sell the reclaimed lands for the Band's benefit.\textsuperscript{255} In other words, there was no express con-

\textsuperscript{250} See generally notes 150 & 151 and accompanying text supra.
\textsuperscript{251} See 270 U.S. at 59.
\textsuperscript{252} The Court noted that, if title was confirmed in the United States, the holding would affect vast amounts of land underlying other navigable waters, as well. \textit{id.} at 58.
\textsuperscript{253} See generally part I.B. supra.
\textsuperscript{254} 21 U.S. (8 Wheat.) 543 (1823) (discussed in notes 52–57 and accompanying text supra).
\textsuperscript{255} Act of May 20, 1908, ch. 181, § 1, 35 Stat. 169.
gressional recognition of the Band’s interest in the lake until 1908. If the lake already had been ceded, the 1908 act authorizing the drainage might have been unconstitutional if interpreted to divest the state’s interest. But if the 1889 “cession” created a trust in the United States to manage and dispose of the land to the Band’s use, the Band may have retained a beneficial interest until the individual tracts were sold. Hence, Holt could have decided that no trust was created, or that the Band’s acquisition of submerged lands by accretion was not in conflict with the Band’s residual interest. Instead, it held that the United States’ interest terminated in 1858, sidestepping the trust issue.

C. Tribal Title to Watercourses After Holt: Sensibility Restored

Holt’s doctrinal insignificance was at once apparent to the courts and subsequent federal decisions returned to the straightforward paradigm established by Winans, Winters and Alaska Pacific Fisheries. At most, Holt left behind the requirement that there be some evidence of federal “recognition,” if not of tribal rights to the submerged lands in particular, at least of the adjacent or enclosing fast lands. In Montana Power Co. v. Rochester, the Ninth Circuit interpreted a pre-statehood treaty that had established a boundary of the Flathead Reservation bisecting Flathead Lake, a navigable body of water. The Reservation had been allotted in severalty, but never terminated. The individual allotment in question extended into the lake and enclosed a small island. The original Indian allottee had received his fee patent from the United States and, by mesne conveyances, the island had devolved to Rochester. Meanwhile the United States had licensed the power company to erect and operate a hydroelectric dam which caused periodic variations in the level of the lake, affecting improvements on Rochester’s island. The question, therefore, was whether the individual allotment was meant to include the land below the original high-water mark, as Rochester contended, or whether instead the submerged land had been retained by the United States in “trust” for the whole tribe, to be granted later to the operators of the dam.

“In the briefs there is considerable discussion whether, prior to the treaty, title to these lands was vested in the United States subject only to the Indian rights of occupancy, or whether the treaty merely confirmed in the Indians a title which they already had,” the Ninth Circuit wrote, “but we think the question is academic.”

Whether the ownership was originally in the Indians or in the United States,
it is certain that by the treaty the United States undertook to hold title to the reserved area . . . in trust for the confederated tribes. [T]he treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region.\textsuperscript{258}

Because of the lake’s economic significance as an Indian fishery, moreover, the court found it “inadmissible to suppose that the United States, having agreed to hold this area in trust for the exclusive use and benefit of the Indian tribes, intended to put the tribes at the mercy of the future state” by parting with the rights to the waters.\textsuperscript{259} Since the metes and bounds in the treaty indicated that half the lakebed originally had been reserved to the tribe, the question became whether the United States had intended to dispose of the tribe’s lakebed interest to individual tribal members through allotment. “The general rule . . . is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark,” the court observed,\textsuperscript{260} citing \textit{Shively}. The issue before the court, however, was not strictly one of a grant of federal lands, but rather of tribal lands. Since the tribe was, by the court’s assumption, a “communal” society, the court presumed that the tribe would have wished to retain collective ownership of the waters and fisheries in the lake.\textsuperscript{261} Based on this “special circumstance,” the court concluded that individual allotments probably had not intended to make the lakebed private property. Ironically, this holding meant that the United States retained “trust” title to grant later to a non-Indian business without tribal consent.

The Ninth Circuit again explored the uneven ground of tribal rights to submerged lands in \textit{Moore v. United States},\textsuperscript{262} a case on its facts much like \textit{Alaska Pacific Fisheries} and \textit{Romaine}. Before Washington became a state the United States had promised by treaty to set aside a tract of land “sufficient for their wants” for the “exclusive use” of the Quilleutes.\textsuperscript{263} Pursuant to this obligation, a subsequent executive order set apart a tract enclosing part of the Quilleute River and its tidal estuary. The Quilleutes had always been fishermen and still lived principally from the river and

\begin{itemize}
  \item \textsuperscript{258} \textit{Id.}
  \item \textsuperscript{259} \textit{Id.} at 192. Actually, however, the Flathead’s treaty had reserved only the “use and occupation” of the land—not, as the Ninth Circuit stated, the “exclusive” use and occupation. \textit{See} Treaty of July 16, 1855, art. 2. 12 Stat. 975.
  \item \textsuperscript{260} 127 F.2d at 192.
  \item \textsuperscript{261} \textit{Id.}
  \item \textsuperscript{262} 157 F.2d 760 (9th Cir. 1946).
  \item \textsuperscript{263} \textit{Id.} at 762. \textit{Moore} overruled \textit{Taylor v. United States}, 44 F.2d 531 (9th Cir. 1930), which had erroneously assumed that the Quilleute Reservation had not been established until after Washington’s statehood. \textit{Id.} at 764.
\end{itemize}

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ocean, leading to the inescapable conclusion that enclosure of the river and tidelands had been intentional and operated to secure title "in trust" for the tribe's use.264 Significantly, the court distinguished Holt as a case involving no evidence either of historical tribal use of the waters or of federal acknowledgment of the tribe's rights and interests in the waters,265 factors which should have distinguished Holt from Montana as well. The court was equally unimpressed by the argument that the United States' "trust" to protect the public's right of navigation would be violated by tribal ownership and exclusive fishery of the river, observing that free navigation would not be obstructed by the tribe's activities.266

Still another fishing case demonstrated the little weight that the Supreme Court itself accorded to its decision in Holt, and the extent to which it still considered Alaska Pacific Fisheries controlling. Like Alaska Pacific Fisheries, Hynes v. Grimes Packing Co.267 involved a conflict between Alaska native fishermen and a non-Indian fishing company. Acting under his general statutory land-withdrawal powers,268 the Secretary of the Interior had added the tidelands to fast lands already reserved for Karluk Native Village, thereby deliberately giving the village an exclusive salmon fishery of immense commercial value. Not citing, but almost certainly thinking of, Martin v. Waddell's Lessee,269 the Court indicated that "a statute that authorizes permanent disposition of federal property would be most strictly construed to avoid inclusion of fisheries by implication,"270 and that "[i]t would take specific and unambiguous legislation" to sever fisheries from Alaska permanently.271 Nevertheless, the Court found that the intent of the Secretary was clear, all the more so in view of the history and habits of Alaska Natives.272 In Montana, the history and habits of the Crows would be virtually ignored in the Court's rush to follow Holt.273

The Hynes Court, however, distinguished carefully between an exclusive fishery and ownership of the tidelands. It noted that the fishery in question was not a treaty reservation, but rather had been made under a general authority to make "temporary" withdrawals "until revoked" by the President or Congress.274 Based on its previous decisions, the Court

264. Moore, 157 F.2d at 764.
265. Id. at 765.
266. Id. at 765.
270. 337 U.S. at 104.
271. Id. at 105.
272. See id. at 106 n.26, 110–14, 116.
273. See part IV. B. infra.
274. 337 U.S. at 101.
concluded that "[a]n Indian Reservation created by Executive Order of
the President conveys no right of use or occupancy to the beneficiaries
beyond the pleasure of Congress or the President."275 Consequently,
"[w]hen Congress intends to delegate power to turn over lands to the Indi-
ans permanently, one would expect to and doubtless would find definite
indications of such a purpose."276 Hence, the Court found that Karluk
Native Village had the right to exclude competing fisheries for the time
being, but no "title"—this because the tidelands were held explicitly
under a temporary administrative order, not retained by treaty or act out
of the tribe's original territory.

An interesting counterpoint to these fishing cases was the Ninth Cir-
cuit's 1963 decision in Skokomish Indian Tribe v. France,277 an action by
the tribe itself to quiet title in boundary tidelands. In a pre-statehood
treaty, the United States had agreed to reserve land for this tribe at the
head of Hood Canal in Puget Sound, within the area ceded. This land was
set aside by executive order, but only after statehood. The Ninth Circuit
distinguished Moore and Alaska Pacific Fisheries on the basis that the
historical evidence indicated that the reservation "was not intended to
support these Indians,"278 since the tidelands actually at issue were
rocky, barren, and unproductive.279 If nothing else, Skokomish should
have served to remind tribes that the underlying rationale of most sub-
merged-lands cases since United States v. Winans had been a presumed
intent that the reservation grant would provide for the tribe's economic
needs, as demonstrated by the tribe's past and future economy. The law,
in general, remained one of "liberal construction," but a tribe easily
could lose on the facts.

D. Choctaw Nation v. Oklahoma: Liberal Construction Triumphant

In 1963, the "Winters doctrine" of implying reservations of water
rights to riparian tribal lands280 was resoundingly affirmed in Arizona v.
California.281 In 1970, the Supreme Court vigorously renewed and
strengthened the Winans and Winters line of decisions on tribal rights to
submerged lands in Choctaw Nation v. Oklahoma.282 In Choctaw Nation
the Court did not skirt the issue of tribal title to the land itself, as had most

275. Id. at 103.
276. Id. at 104.
277. 320 F.2d 205 (9th Cir. 1963).
278. Id. at 212.
279. See id. at 209–11.
280. See generally notes 228–230 and accompanying text supra.
of the Court's previous opinions. Like Brewer-Elliott, the case involved mining in the bed of the Arkansas River where it formed the eastern boundary of nineteenth century treaty grants to the Cherokee and Choctaw Nations. The tribe asserted "title to the bed of the Arkansas River by treaty and patent from the United States." The sole issue thus raised by the case, according to Justice Marshall, was "whether the treaty grants from the United States conveyed title to the bed of the Arkansas River" as alleged.

Whether the United States had conveyed title to the riverbed would necessarily depend upon federal intent, Justice Marshall explained. Where not expressly stated, this federal intent would be inferred from the treaties, with the treaties construed in tribes' favor and as they would have understood them. Applying this standard to the facts at hand, Justice Marshall found it to be a "natural inference . . . that all the land within [the treaties'] metes and bounds was conveyed, including the banks and bed of rivers." He explained that since the metes and bounds of the grant ran to the middle of the Arkansas River, it consequently was reasonable to infer that half the bed was included. So much already had been said in Brewer-Elliott fifty years earlier. But Justice Marshall also noted that the treaty fixed a boundary between the United States and the Choctaw Nation, suggesting that the applicable rule in the absence of the express mid-channel language of the grant would nevertheless have been medium filum aquae, the traditional international law of boundaries between states.

The express inclusion of half the bed in the grant established prima facie the United States' intention to vest title in the Choctaws. No discussion of the tribe's past or future economy was necessary or undertaken, because the claimed waters lay within the Choctaws' metes and bounds. But, lest there be any confusion with the state rights rule of Pollard and Shively, Justice Marshall commented that the treaties granting the Choctaws their trans-Mississippi lands also had promised them the right of perpetual self-government, subject only to federal legislative preemption, and had further promised that the granted territory would never be

283. Id. at 627.
284. Id. at 628.
285. Id. at 633.
286. Id. at 631.
287. Id. at 634.
288. See text accompanying note 245 supra.
289. 397 U.S. at 632 n.8.
290. Id. (citing Haight v. City of Keokuk, 4 Iowa 199 (1857)). See also note 221 and accompanying text supra (discussion of Haight v. City of Keokuk).
291. See generally part II.B. supra.
included in a state or territory. 292 Tribal title to the riverbed, according to Justice Marshall, certainly was consistent with this "virtually complete sovereignty over their new lands." 293 Indeed, it was "only by the purest of legal fictions that there [could] be found even a semblance of an understanding . . . that the United States retained title in order to grant it to some future State." 294 The grant was not only explicit, but harmonious with the apparent plan to perpetuate Choctaw self-government indefinitely.

*Choctaw Nation* left the courts somewhat more sensitive to the importance of metes and bounds in construing federal intent. *United States v. Pollman,* 295 a 1973 Montana district court opinion, explained *Holt* as applicable only in the absence of an express reservation by treaty or legislation. Where the waters claimed by a tribe lay within boundaries expressly fixed by treaty, tribal title was to be presumed, 296 as in *Choctaw Nation.* Similarly, in *United States v. Bouchard,* 297 a Wisconsin district court rejected tribal claims of title to lakebeds on the grounds that the enclosing reservations had been ceded prior to statehood and only returned to tribal possession, if at all, by federal action after statehood. As in *Holt,* the tribe's cession was deemed to have passed title to the state rather than to the United States, and under the fifth amendment that title could not be divested subsequently. 298 Nevertheless, the district court considered *Choctaw Nation* controlling on the issue of treaty interpretation. Rejecting the argument that it should use *Holt* as a guide to interpretation, the court stated: "[T]he *Holt* standard is drawn from *Shively,* . . . a case involving a grant of property rights to a private person, and the standard is incompatible with long established and well recognized rules of construction for Indian treaties." 299

For once, the law was clear, albeit complicated by the complex facts of each case. Or so it seemed.

292. 397 U.S. at 635. See also id. at 637–39 (Douglas, J., concurring).
293. Id. at 635.
294. Id. The Court did not acknowledge the paradox that this very promise, which appeared to so compel the finding of intent to convey the riverbed, was broken by the United States when Congress organized the Oklahoma Territory and offered it admission to the Union. *See Act of June 16, 1906,* ch. 3335, 34 Stat. 267.
296. Id. at 998.
298. 464 F. Supp. at 1340.
299. Id. at 1336.
IV. CONTRARY JURISPRUDENCE AT WORK: MONTANA V. UNITED STATES

A. Asking the Wrong Question

The basic flaw in the Supreme Court’s treatment of Montana v. United States is contained in Justice Stewart’s opening statement of the issue presented for review:

The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union.

Without discussion or authority, the Court merely assumed at the outset that the Crow Reservation existed solely by grant, rather than by being retained and confirmed out of original tribal territory. It is difficult to justify Justice Stewart’s position. The Crows had occupied the disputed area long before the United States existed. At the time of their 1868 treaty, moreover, the Crows had a right under federal decisions then in force to remain in possession with or without the approval of the United States. Why, then, did the Court construe the 1868 treaty language “reserving” this land as being a grant? In 1978, in Oliphant v. Suquamish Indian Tribe, the Court had broken with the rules of liberal construction by presuming that tribes lack power to punish non-Indians’ crimes unless such jurisdiction has been granted expressly by the United States. This reversal of the established canons of construction was repeated in 1980 in Washington v. Confederated Tribes, a case involving tribal taxation of non-Indians. The Court appears so taken with the innovation of resolving ambiguities against tribes that it was applied without hesitation or de-

301. Id. at 1250–51 (emphasis added). All parties apparently assumed that the rule of Shively v. Bowlby, 152 U.S. 1 (1894) (discussed in notes 197–205 and accompanying text supra), was applicable, and failed to contest the issue whether the 1868 treaty had “granted” or “reserved” the Crow’s Territory. In conceding the applicability of the Shively “presumption,” however, the United States suggested that “the force of the presumption varies according to the character of the claimant . . . .” Brief for the United States at 13.
302. See Montana, 101 U.S. at 1249.
305. Id. at 208.
liberation to the real estate problem in *Montana*. But the Court did not admit it was changing the law. Instead, it concealed the change in its statement of the "facts." In non-Indian contract law the usual and fair assumption is that rights not specifically sold are intended to be reserved by the seller. Describing the Crows as the "grantees" in 1868, as if this were a matter of fact, the Court subtly suggests to those uninitiated in Indian law that construing the treaty against the Crows' claims is only just and reasonable.

**B. Selective Citation: Lionizing Holt**

In disposing of the Crows' claims to the riverbed, the Court cited only three of its own decisions on the subject: *Alaska Pacific Fisheries v. United States*, *United States v. Holt State Bank*, and *Chocktaw Nation v. Oklahoma*. Both *Alaska Pacific Fisheries* and *Chocktaw Nation* had upheld tribal title. *Holt* had found title in the state, and that was the decision Justice Stewart followed. Of course, it was not as simple as that. Justice Stewart relied heavily on *Holt*, in part because he misunderstood public domain law, and in part because he misinterpreted the facts and reasoning in *Holt* itself.

Justice Stewart began his inquiry with an analysis of the general power of the United States to dispose of submerged lands to individuals prior to statehood. Relying on *Martin v. Waddell's Lessee* and *Pollard v. Hagan*, he stated, "[a]s a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States." *Congress may sometimes convey lands below the high water mark of a navigable river," he conceded. "But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government," he reasoned that a court "must, therefore, begin with a strong presumption against convey-

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308. *See id. at 1252-53, 1253 n.5. A similar narrow view of the relevant case law concerning tribal rights to submerged lands was taken by Judge Sneed in dissent in United States v. Aranson, No. 77-2295 (9th Cir. Mar. 30, 1981) (opinion withdrawn and rebriefing ordered Apr. 17, 1981). In his dissent, Judge Sneed cited only two cases on the subject, United States v. Holt State Bank, 270 U.S. 49 (1926), and Chocktaw Nation v. Oklahoma, 397 U.S. 620 (1970) and—like Justice Stewart in *Montana*—considered *Holt* to be the controlling decision. Slip op. at 1036.
309. 248 U.S. 78 (1918) (discussed in notes 233-237 and accompanying text *supra*).
310. 270 U.S. 49 (1926) (discussed in part III.B, *supra*).
313. 44 U.S. (3 How.) 212 (1845) (discussed in notes 181–185 and accompanying text *supra*).
314. 101 S. Ct. at 1251.
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ance [of such property] by the United States. Nowhere did Justice Stewart acknowledge that Indian tribes are governments, rather than individuals or private organizations. His own reasoning suggests that tribes, as governments, are outside of the rule of Pollard and Shively v. Bowlby.

Nor did Justice Stewart admit that the Shively rule had never been applied to defeat an Indian tribe’s claim to the ownership or use of navigable waters and their beds. His reliance on Holt to the contrary was error. To begin with, he described Holt as a case in which the Court “applied these principles to reject an Indian tribe’s claim of title to the bed of a navigable lake.” This, of course, is incorrect. In Holt, the Red Lake Band had ceded the area in question and the contest was over whether the cession perfected title to the submerged lands in the state or in the United States. The United States had argued that the lakebed was part of an Indian reservation when Wisconsin was admitted to the Union, hence the “naked fee” underneath the Indians’ occupancy had remained federal. The Court in Holt, however, was persuaded that Chippewa ownership of the lake never was “recognized” before statehood, hence, the “naked fee” to the accreted lakeshore passed automatically to the new state.

Under the “naked fee” concept of Fletcher v. Peck, Johnson v. M’Intosh and Mitchel v. United States, the Court was right. The state had acquired the “naked fee” to the lake upon statehood, as a concomitant of equal footing. But the consummation of its interest awaited the extinction of the Indian estate by cession. The state had no right to bring an ejectment action against the tribe, and, until the cession, it could convey to its citizens only the “naked fee.” Holt, therefore, was not inconsistent with prior and subsequent Supreme Court decisions affirming tribal title to submerged lands. Applied in the Crow context, Holt should mean simply that, should the Crows ever cede their reservation, full title to the riverbed would vest automatically in the State of Montana.

Justice Stewart apparently also failed to read the Holt Court’s cautious comment that “other reservations . . . specially set apart” for different tribes were not to be confused with the reservation at issue. In other

315. Id. (citations omitted).
316. 152 U.S. 1 (1894) (discussed in notes 197–205 and accompanying text supra).
317. 101 S. Ct. at 1251.
318. 10 U.S. (6 Cranch) 87 (1810) (discussed in notes 46–51 and accompanying text supra).
319. 21 U.S. (8 Wheat.) 543 (1823) (discussed in notes 52–57 and accompanying text supra).
321. Holt, 270 U.S. at 58 n.1. Justice Stewart’s confusion may be attributed in part to the briefs. The State of Montana discussed Holt as if the Red Lake Band had entered into treaties with the United States prior to Minnesota statehood, making it a case more like the Crows’. See Brief for the Petitioners at 22. Neither the Crows nor the United States pointed out that the pre-statehood treaties cited by Montana were made with bands other than the Red Lake Band. See Brief for the Crow Tribe at 12;
words, the *Holt* decision was limited to lands claimed by tribes but never recognized by the United States. There was no possible argument in *Montana* that the Crow reservation had lacked federal recognition prior to statehood, for it had been expressly confirmed to the Crows in their 1868 treaty. Furthermore, the riverbed in controversy lies within the metes and bounds of the treaty reservation, and one line of the boundary runs up the mid-channel of another river, the Yellowstone, exactly like the boundary adjudicated in *Choctaw Nation*. On the face of the matter, therefore, there appears no reason that *Holt*, rather than *Choctaw Nation*, should have been followed.

C. More Footnote Jurisprudence

In a recent article we criticized the Court for concealing its pivotal reasoning in copious footnotes. Justice Stewart certainly is guilty of this practice in *Montana v. United States*. Having elevated *Holt*, by misstating its facts and holding, from peripheral status as an early but specialized decision to that of a dispositive precedent, Justice Stewart had to deal with the embarrassment of the Court’s rejection of *Holt* a decade earlier in *Choctaw Nation*. Rather than openly overrule *Choctaw Nation* and the dozen or so decisions on which it was based, Stewart buried his discussion of it in a footnote. Even worse is the material falsity of every statement in the Court’s footnote.

According to this footnote, *Choctaw Nation* was a “singular exception” to “the established line of cases” on the subject of tribal title to submerged lands, and was “based on very peculiar circumstances not presented in” the Crow litigation. The composition of the “established line of cases” that Justice Stewart refers to here is baffling. The Court had ruled on similar issues eight times previously; only in *Holt* had title or possession gone to the state. In five of these decisions the Court expressly chose to follow the rules of liberal construction rather than the rule of *Pollard* and *Shively* presuming against the grant of submerged lands.

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Brief for the United States at 20–22. Indeed, the United States took the position that the Red Lake Band had treated with the United States prior to statehood, but that none of the earlier treaties had recognized the Band’s title to aboriginal lands. Brief for the United States at 20–22.

323. Id.
324. Barsh & Henderson, supra note 10, at 626.
325. 101 S. Ct. at 1253 n.5.
326. Id.
In two decisions the Court did not refer specifically to the rules of liberal construction but gave great deference to the tribe’s economy as evidence of federal and tribal intent when the reservation was established. Only one prior decision applied Shively instead: Holt.

Even supposing that Choctaw Nation was the exceptional case, how was it distinguishable from the facts presented in Montana? Justice Stewart points to the Choctaws’ treaties, which promised them that “no part of the land granted to them ever shall be embraced in any Territory or State,” and argues that “the Choctaw court relied on these circumstances . . . and placed special emphasis on the government’s promise that the reserved lands would never become part of any State.” This does not seem a fair characterization of Justice Marshall’s reasoning in Choctaw Nation, which relied on the metes and bounds description of the reservation to establish a prima facie case, and described the treaty’s other terms as supportive, rather than controlling. The reader of Montana is left wondering how the Crows possibly could have known in 1868 that rivers expressly enclosed within their territory had somehow passed to the state for their failure to use a ritual form of words. This is exactly the kind of problem the rules of liberal construction were intended to avoid.

Indeed, there is no reason to concede that the Crows lacked the kind of territorial sovereignty enjoyed by the Choctaws. Justice Stewart stated that “[n]either the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow Treaties . . . .” What, then, did the Crows intend by reserving “the absolute and undisturbed use and occupation” of all the territory within their metes and bounds? It is difficult to conceive how the Crows could have been more explicit, or could have imagined that state ownership of rivers flowing through their country was consistent with their “absolute” control. Justice Stewart is quick to tell us that “such phrases in the 1868 treaty . . . whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries.”

329. 101 S. Ct. at 1253 n.5.
330. Id.
331. Id.
333. 101 S. Ct. at 1253. Justice Stewart’s discussion of the meaning of “absolute” bears an eerie resemblance to the State of Montana’s brief. See Brief for the Petitioners at 19. The conventional 19th century definition of “absolute” was “not limited.” See AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 6 (Webster 1855). The current definition of “absolute” as a legal term of art
Is the Court saying, then, that an "absolute" right to a tract of land is less than "exclusive"? This mincing of words is reminiscent of the Court's comment in Oliphant v. Suquamish Indian Tribe\textsuperscript{334} that express federal legislation merely forms the "backdrop" for its judicial construction. Misplaced somewhere in Justice Stewart's concatenation of linguistic non sequiturs are the traditional canons of construction. Worcester v. Georgia\textsuperscript{335} established the standard of reading ambiguities in tribes' favor. The Court in Montana read express language favoring the tribe in the state's favor. Construing the plain import of a word like "absolute" to mean "shared" does little to enhance the Court's reputation for sound logic.

The only apparent factual basis for Justice Stewart's conclusion that the Crows' "absolute" use is less than "exclusive" was the concession of the United States, appearing as the Crow Tribe's "trustee," that it asserts a navigation easement on the Big Horn River.\textsuperscript{336} The irony of this particular twist can scarcely be imagined by those unfamiliar with Indian affairs litigation. The United States, advocating the Crows' "absolute" proprietorship—a right confirmed by the United States in its treaty—conceded that the Crows' rights are less than "absolute" in order to protect its own, inconsistent claims. In other words, the United States protected its own interests by refusing to argue that the "absolute" rights it promised the Crows really were "absolute" after all.

Justice Stewart also considered it significant that the Choctaws had received their lands in fee simple from the United States.\textsuperscript{337} In fact, no better argument for the Crows could have been made. Since the Choctaws held their land under a federal patent, there was at least some rational basis for construing the scope of their rights in accordance with federal public domain law, rather than in accordance with Indian treaty law. The Choctaw Nation Court nevertheless applied the rules of liberal construction applicable to Indian treaties to the federal patents. On the other hand, the Montana Court, faced with a reservation of unceded tribal territory wherein the rules applicable to Indian treaties would be expected to apply, applied federal patent and public domain law. In this sense, both

\textsuperscript{335} 31 U.S. (6 Pet.) 350 (1832) (discussed in notes 158-160 and accompanying text supra).
\textsuperscript{336} 101 S. Ct. at 1253.
\textsuperscript{337} Id. at 1253 n.5.
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Choctaw Nation and Montana were decided the wrong way, with the Court in the latter case compounding rather than correcting its own former error.

The final irony cannot be discovered from the Court’s opinion itself, but must be found in the Constitution of the State of Montana. This declares that “[a]ll provisions of the enabling act of Congress . . . including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect . . .”338 Although the Pollard Court had suggested that a broad disclaimer of unappropriated lands would be unconstitutional,339 the Court has nevertheless on occasion enforced disclaimers of state interest in Indian lands as evidence of federal intent, with state acquiescence, to secure tribal territory from injury or encroachment.340 Hence, not only should the Crows have the “absolute use” of their country, but the adverse claimant may be constitutionally incompetent to assert its claims, as well.

D. The Irrebuttable Rebuttable Presumption

Notwithstanding all of these impediments opposing Justice Stewart’s choice of Shively as the rule governing the decision, the Crows ended up having to try to defeat the Shively presumption against the inclusion of submerged lands in their “grant” from the United States.341 The Shively presumption is supposed to be rebuttable; the Court never has declared otherwise. In Montana, however, the presumption is so strong that one wonders whether the Court currently shares the pre-Shively state rights fervor of the Taney bench.342 Although Article II of the Crows’ treaty declares that “no persons . . . shall ever be permitted to pass over, settle upon, or reside in the territory described” by the metes and bounds enclosing the riverbed,343 this was not deemed strong enough to overcome the presumption against the sovereign’s conveyance of the riverbed.344 Instead, this seemingly clear and absolute language merely “reserve[d]
in a general way’” 345 the Crows’ territory, Justice Stewart explained, quoting from Holt. But Holt was based on a finding that there was no description or reservation of the tribe’s territory at all. 346

What, then, would rebut the Shively presumption according to Justice Stewart? Only an “express reference to the riverbed.” 347 This statement overrules, sub silentio, every one of the Court’s previous decisions on the subject, from United States v. Winans 348 to Choctaw Nation, for in none of those cases were the submerged lands expressly named in the conveyance or treaty, although in all but one case they were deemed to be included. When Indian treaties were negotiated a century ago there was no question that under decisions like Mitchel v. United States 349 a metes and bounds description was sufficient to vest all territorial rights in the tribe. Since that was the practice at the time, it is not surprising that Indian treaties do not commonly identify enclosed waters. If it stands, the rule enunciated by Justice Stewart in Montana would work a retroactive confiscation of most tribes’ submerged reservation lands.

If blame for the Crows’ defeat in Montana must be spread, we should not forget their “trustee,” the United States. Inexplicably, the United States grounded the Crow claim on the assertion of fishing rights, 350 an economic justification for Crow use and possession of the riverbed that the Court found incredible. “As the record in this case shows,” Justice Stewart explained, “at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.” 351 Nor had the tribe improved and developed the Big Horn’s fishery potential in recent years. 352 As a result, the Crows’ case did not have the compelling facts, such as those present in Alaska Pacific Fisheries, United States v. Romaine, 353 or Moore v. United States, 354 to suggest that inclusion of fisheries and the waters to support them must have been contemplated by the instrument creating the reservation.

Was the United States’ reliance in its arguments upon the economic value of Crow fisheries oversight, stupidity, or strategy? An argument

345. Id. (quoting United States v. Holt State Bank, 270 U.S. 49, 58 (1926)).
347. 101 S. Ct. at 1252.
350. 101 S. Ct. at 1250.
351. Id. at 1253.
352. See id. at 1249–50.
353. 255 F. 2d 760 (9th Cir. 1919) (discussed in notes 238–240 and accompanying text supra).
354. 157 F.2d 760 (9th Cir. 1946) (discussed in notes 262–266 and accompanying text supra).
could be made that the government was overconfident in such claims as a result of its successful litigation of fishing rights on behalf of tribes in the Pacific Northwest since 1970. Its perception of treaty fishing rights as central to the determinations in *Montana v. United States* was particularly ill-conceived, since there were no supportive historical facts to speak of, and no evidence of a serious development interest on the part of the tribe. Not only was the fishing claim in the Crow context too narrow and inappropriate to support tribal title to the riverbed, but its use in *Montana* created bad law that could affect the claims of tribes that actually do depend on fishing for their livelihood. Based on *Montana's* weak facts, the Court has given us a holding that tends to raise the burden of proof for tribes asserting interests in waters and fisheries generally.

In effect, then, if not by design, the Justice Department may be destroying tribal rights in the very act of asserting them. Rights that Congress has not seen fit to condemn by overt and public legislation, the executive can abolish through clumsy litigation. A cynic might be tempted to conclude that the current policy of the federal government is, "if you can't lick 'em, join 'em." Joining with tribes in their assertions of rights and powers, then assuming the initiative from tribal officials grateful for the opportunity to pass off the costs of litigation to the government, and then scuttling those tribal rights in court, may be the most insidious way yet devised of eroding American tribalism.

From the outset, the litigation in *Montana* was colored by the United States' appearance as the Crows' "trustee" and attorney. The federal lawyers' task was to persuade the courts that Congress had intended, in 1868, to secure the Crows' preexisting rights to the Big Horn River. At the same time, however, they were scrupulous not to concede anything that might have diminished the regulatory or proprietary interests of the United States. If the river were original tribal territory reserved by treaty, then the United States might have no enforceable interest in it without Crow consent. To protect the federal interests to navigation and water rights in the river—interests adverse to the tribes—the United States' representatives allowed that the Crows might have lost some rights, such as the right to regulate navigation, merely as a result of their condition as Indians. Hence the Crows' "trustee" actually went into this case support-

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ing the notion of Oliphant v. Suquamish Indian Tribe\textsuperscript{356} that certain kinds of tribal rights are lost by implication of federal silence, and can be regained only by express legislation. This behavior should offer tribes fair warning against relying on the United States to represent their property interests in court in the future.

\section*{V. CONCLUSIONS: BAD FACTS, BAD LAW}

\begin{quote}
The Law is the true embodiment  
Of everything that's excellent.  
It has no kind of fault or flaw.  
And I, my Lords, embody the Law.\textsuperscript{357}
\end{quote}

Many of the tribal nations of the high plains had societies of “contrar-ies” whose medicine consisted of doing everything backwards. The Supreme Court’s use of Montana v. United States to change established precedents and decisions is a like kind of legal contrariness. Cases in point were tossed aside as “peculiar,” and peculiar cases were applauded as leading. Words were construed against their common meanings, and facts that should have strengthened the Crows’ position were held against them. We have suggested elsewhere that the Court has avoided laying down general principles of Indian law in recent years, preferring to retain unfettered flexibility to treat cases individually and inconsistently.\textsuperscript{358} In Oliphant v. Suquamish Indian Tribe,\textsuperscript{359} the Court went so far as to characterize the black-letter law as merely “backdrop” for its own case-by-case perambulations.\textsuperscript{360} In Montana, the Court takes the matter one step further, juggling its own prior decisions without regard for their holdings.

Future tribal litigants may succeed in distinguishing Montana on the basis that the Crows showed no specific current economic interest, and no historical reliance on the Big Horn River fishery.\textsuperscript{361} Nevertheless, the

\begin{notes}
\item[357] W. GILBERT \& A. SULLIVAN, IOLANTHE, Act I (the Lord Chancellor’s entrance), reprinted in \textit{THE COMPLETE PLAYS OF GILBERT AND SULLIVAN} 245 (Modern Library ed.).
\item[358] R. BARSH \& J. HENDERSON, \textit{supra} note 65, at 137–47.
\item[360] Id. at 206.
\item[361] In at least one district court case concerning Indian title to submerged lands decided since Montana, the tribal litigants were able to distinguish Montana on the basis of their current economic interest in and historical reliance on the waters in question. Payalup Tribe v. Port of Tacoma, 8 \textit{INDIAN L. REP.} 3079 (Am. Ind. L. Tr. Prog.) (W.D. Wash. July 24, 1981). In Payalup Tribe the court cited Montana for the proposition that “[t]he importance of fishing to the diet and way of life of an Indian tribe is among the circumstances which can . . . support a finding that the bed of a river
\end{notes}
Montana Court's practice of ignoring the rules of liberal construction and of shifting to tribes the burden of proving the existence of rights or powers can evolve into a dangerous legacy. When the treaties were made, this burden of proof lay upon those challenging tribal interests. Treaties negotiated under this assumption will not contain the specificity necessary to withstand the Court's new test. In an age when the official policy on Capitol Hill is tribal self-determination, economic development and self-sufficiency, the contrary-minded Supreme Court is zealously, albeit by implication and degrees, moving in the opposite direction.

was included within an Indian reservation," and based its ruling that the riverbed in question was so included upon the finding that "the Puyallup Indians centered their lives in and around the Puyallup River." 8 INDIAN L. REP. at 3080.