

TRIBAL LAND RIGHTS, THE FEDERAL GOVERNMENT, AND STATES

RIGHTS: FROM THE MARSHALL TO THE REHNQUIST COURT



October 18th, 2001, Cœur d'Alene, Idaho

Gene Straughan, Lewis-Clark State College 792-2821

Pacific Northwest Political Science Association Conference

In principle, the constitutional commitment to respecting individual rights is a fundamental principle of the United States. The protection of life, liberty, and property was a paramount concern of early Americans and is an expected right of contemporary Americans. Equal concern and respect for persons is a necessary condition of a free democratic society. The people must be free to pursue their ways of life, make choices about the good life, and use and enjoy their property. Yet historical practice teaches that Americans are prone to intolerance and persecution in the name of democracy, religion, and capitalism among other things. American history is replete with instances of a politically powerful White culture and the accompanying fallout of government hostility toward minority groups, and especially indigenous people. This conflict has been particularly acute within the area of property rights. European and American notions of manifest destiny, westward expansion, and individual acquisition of lands have repeatedly collided with the communal traditions of indigenous people to control their lands according their cultural ways of life. These diverse views of the meaning and use of land, water, and resources have competed for favorable treatment from the American political system. The stakes have been significant because the titleholder to lands and waterways enjoys cultural, political, and economic benefits. Ownership encompasses a right to control the use and enjoyment of the property, including the exclusive authority to regulate the jurisdiction and to generate revenues by allowing commercial, industrial, or recreational access. Land and waterways further provide humans with a significant link to the natural world. As a result of the high stakes of property rights and competing perspectives of land use, there has been considerable litigation over land and water interests. Such disputes have involved a classic political struggle, pitting the property and sovereignty rights of Native American tribes against the sovereign powers of the state governments and often even the federal government.

Since time immemorial, the relationship to land has proven to be a divisive one between Native Americans, Europeans, and later the people of the United States. The competing cultural perspectives about the meaning and use of property have created protracted political conflicts. Historically, the Native American tribes considered the natural world to be “Mother Earth.” Its land, water, and resources possessed “a sacred primacy.” It could neither be held individually nor subject to individual commercial

transactions. Even today, the Indian tribes share similar attitudes about the “sacred primacy” of the land despite the great cultural diversity among them. They believe that humans have a spiritual relation to the land. It is to be treated with the utmost respect and is owned by no one. In the words of Chief Frank Fools Crow, a Lakota medicine man, “We have one law...to live on this earth because we have respect for all living things. That means we cannot harm the earth because we have respect for the place of those things in the world...Heart, body, mind and soul all together with the world: that is the Indian way of live. You see, these hills are our church; the rivers and the wind, and the blossoms and the living things—that is our Bible. Nature is God, God is nature.”¹ In contrast, American colonists celebrated the individual right to property and the individual acquisition of land. Early Americans believed that land, water, and resources were God’s gift to them and subject to their dominion. Today, the western culture of the United States often treats land as real estate, a capitalist commodity and a source of individual status and wealth. These early and modern-day perceptions of land, coupled with white ethnocentrism toward the tribes, have often led American political institutions to deny the rights of Indians to control their lands according to their cultural traditions. Such political practices have provided fertile soil for recurring litigation between Native Americans and government at the federal and state levels.

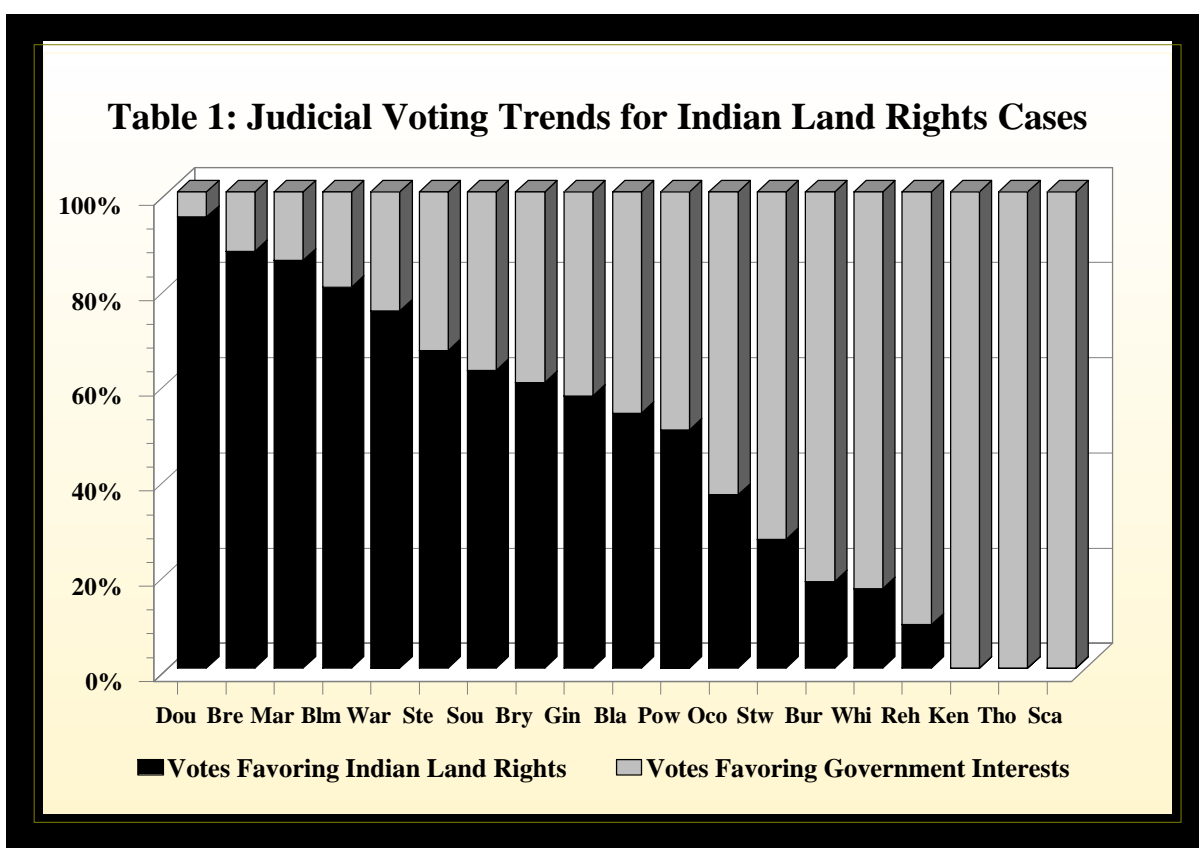
The Supreme Court and Indian Land Rights

The American story of property relations between the tribes, federal government and states has been told to a large degree by the United States Supreme Court. With increasing frequency, the justices have been asked to discern the boundaries between tribal rights, federal interests, and states rights. Such situations have been a pervasive aspect of the judicial landscape. Since the adoption of the Constitution, the Court has considered the merits of about 150 cases dealing with the property rights of Native Americans. Throughout these cases the justices have struggled to establish a coherent jurisprudence demarcating the relationship between tribal rights, federal interests, and states rights. The justices have regularly appealed to the text, intent, and precedent of constitutional, treaty, and statutory provisions. Their written opinions have attempted to justify their decisions through reasoning based on

textual, historical, and doctrinal analysis. To some extent the judicial reliance on the same legal criteria has confined the interpretive approaches adopted by the justices. But far from neatly disposing of Indian property cases, these guidelines have proven to be flexible enough to enable the justices to embrace different interpretations and reach opposite conclusions. Judicial interpretation is not a science, but applied legal and political theory because the terms of legal provisions often have an opaque texture with a certain incompleteness for dictating future outcomes. As such, the justices cannot be expected to magically set aside their life experiences, political attitudes, and judicial roles when they don the robes of justice. Indeed the language and intent of the Constitution, treaties, and statutes have largely remained the same. Yet the meaning attributed to them has changed as the Court has adjusted to the political attitudes of new justices and the evolving standards of American democracy. Plus the justices have made decisions that sometimes distinguish, erode, and overrule prior cases. Not surprisingly, the justices have interpreted constitutional, treaty, and statutory ambiguities to perpetuate their political attitudes about sovereignty, property rights, and the role of judicial review.

In attempting to resolve such controversies, the Supreme Court has entertained competing theories of the land relationship. Some justices have adopted a position of *tribal sovereignty and property rights*, interpreting constitutional, treaty, and statutory provisions as usually protecting against the government regulation of lands. Justices Douglas, Brennan, Marshall, Blackmun, Warren, Stevens, Souter, and others have voted to overturn most government efforts to control Indian lands (see table 1). Under this view the Court has emphasized how the rights of aboriginal people, sovereignty of tribes, and treaty obligations of the federal government establish a strong presumption in favor of Indian control of lands and waterways. Other justices have taken a position of *government sovereignty and property rights*, interpreting constitutional, treaty, and statutory provisions as usually permitting the government regulation of lands. Justices Stewart, Burger, White, Rehnquist, Kennedy, Thomas, Scalia, and others have voted to uphold most government efforts to control Indian lands (see table 1). Under this view the Court has stressed how the discovery doctrine, federal plenary powers, equal footing doctrine, and sovereign immunity establish a presumption in favor of federal and state government control of lands and waterways.

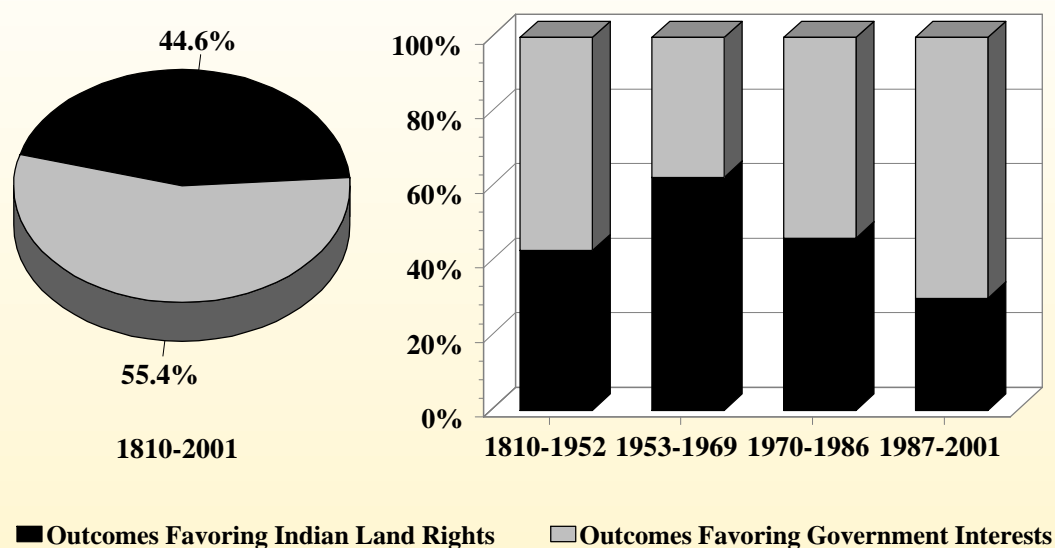
Further affecting case outcomes are the varying levels of support for these different positions. There are many subtle nuances to the actual positions adopted by the justices. Some of them have over time become more or less committed to their initial position of sovereignty and property rights. Equally important, a few justices have assumed a more centrist position. The swing voting of Justices Black, Powell and O'Connor suggests that they have been more sensitive to text, intent, precedent, case facts, and judicial compromise. At some risk of oversimplification, the Supreme Court has often been divided into two or three judicial groups with cases being decided by narrow margins and hair-splitting logic.



Reflecting the makeup of the majority, the Supreme Court has wavered between these competing theories of sovereignty and property interests. The justices have been sharply divided despite their appeal to the same text, intent, and precedent of legal provisions. The underlying reason is that case outcomes have been driven by the justices' attitudes toward sovereignty, property rights, and judicial review within the confines of case facts and legal doctrines. Indeed the competing judicial views can be

placed on an ideological continuum, depending on whether they provide greater deference to governmental regulation of lands (a conservative attitude) or greater protection for Indian ownership of lands (a liberal attitude). During different periods of the Court, the justices have promoted their theories of sovereignty and property rights, charting a more liberal or conservative path (see table 2). Few Indian land cases were decided until the early part of the nineteenth century. Initially, the Marshall Court (1801-35) created the discovery doctrine and characterized the property rights of Indians as merely one of occupancy, establishing the superiority of federal authority over state and tribal sovereignty. From the 1850s to the 1920s, the justices further established the equal footing of the states over tribal lands unless Congress explicitly said otherwise. Not until the 1930s was the Court willing to provide any meaningful protection to Native American rights. Gradually, the justices began to treat tribal sovereignty and property rights as a preferred position. The Warren Court (1953-69) ruled in favor of Indian rights at a rate of 63%. But reflecting the Nixon, Reagan, and Bush appointments, the Supreme Court since the mid-1970s has given greater latitude to government control of Indian lands. The preference for tribal sovereignty and land rights declined with the Burger Court (1979-86) supporting Indian claims 45% of the time and the Rehnquist Court (1986-00) dipping to an unprecedented low rate of only 30%. In a series of cases, a conservative group of justices have become increasingly deferential toward government efforts to regulate and control Native American lands.

Table 2: Judicial Outcome Trends for Indian Land Rights Cases



The Marshall Court and the Discovery Doctrine

Beginning with *Fletcher v. Peck* (1810), the Supreme Court narrowly defined the sovereignty and property rights of Native Americans. The case involved fraudulent land sales by speculators who had bribed the Georgia Legislature to sell them 35 million acres for one and half cents per acre without the lands being properly transferred from the tribes by treaty. Even though the Legislature later revoked the sales, the lands had been reconveyed to other buyers, including Peck who had sold them to Fletcher. Chief Justice Marshall held that the Georgia act rescinding the state sale of lands violated the Contract Clause of the Constitution. He also rejected the notion that Indians could hold absolute legal title to the land because according to him they “merely roamed over and hunted on the land.” He characterized their property rights of the tribes as one of “Indian title” or “mere occupancy” which is “certainly to be respected by all courts” until extinguished by legitimate tribal consent.² Chief Justice John Marshall justified his exceedingly narrow conception of Indian title solely on the basis of the European doctrine of discovery. It was a diplomatic policy

used by European nations to govern their relations with each other within North and South America. The discovery doctrine was designed to avoid jurisdictional conflict between overlapping colonial settlements by dictating that the first explorer to discover an area obtained the preemptive right over later arrivals to acquire land from a willing Indian tribe. Then the Chief Justice turned to the question of what land rights the state of Georgia held under the law. He held that the Indian right of occupancy “is not such as to be absolutely repugnant to seisin in fee on the part of the state.”³ His novel notion of dual title suggested that tribal land could simultaneously be land in which Indians held a right of occupancy and the states held a significant legal interest, including the right to hold and transfer title. Chief Justice Marshall concluded that the state of Georgia, as successor to the English colony of Georgia, had obtained fee simple title and therefore could grant conveyances to the lands but could not remove the tribes.

Only Justice William Johnson disagreed with the majority’s exceedingly narrow characterization of the sovereignty and land rights of Native Americans. He believed the majority had misinterpreted the law of property and misunderstood the meaning of tribal sovereignty. Justice Johnson argued that the “national fires” of the Cherokee Tribes had not been extinguished and they still retained “the absolute proprietorship of their soil.”⁴ He further observed that “innumerable treaties” formed with the “Indian tribes acknowledge them to be an independent people, and the uniform practice of acknowledging their right to soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right to soil.”⁵ Justice Johnson heavily criticized the novel concept of dual title. He asked rhetorically “can then, one nation be said to be seized of a fee-simple in lands, the right of soil of which is another nation?” He argued that the interests of a discovering nation in Indians lands is preemptive and “nothing more than what was assumed at the first settlement of the country, a right of conquest or of purchase,” amounting “only to an exclusion of all competitors from their markets.” The fee simple interest in Indian lands remained with the tribes as the absolute proprietors of their soil. Justice Johnson rejected outright the notion that this preemptive discovery right could be granted to a state. He concluded that Georgia

“ceded to the United States, by the Constitution, both the power of preemption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.”⁶ His separate opinion—marked as neither a concurring nor dissenting opinion—was remarkable because of his defense of tribal property rights and because the justices experienced considerable pressure from Chief Justice Marshall to present a unanimous decision.

But the concerns of Justice Johnson seemed to fall on deaf ears. In *Johnson v. McIntosh* (1823), the Marshall Court reaffirmed the *Fletcher* principle of dual title and the doctrine of discovery. At issue were two seemingly legitimate, but vastly different claims to the same tracts of land. The plaintiff, Johnson, claimed ownership as a result of his 1773 and 1777 purchases from the Piankeshaw Indians, who were in rightful possession of the land they sold. The defendant, McIntosh, asserted title to the parcels following his receipt of a U.S. patent obtained after the Tribe ceded the lands to the federal government. Further complicating the case was the passage of the Trade and Intercourse Act (1790) in which Congress provided that non-Indians could not acquire lands from Indians except by treaty entered pursuant to the federal Constitution. The legislation provided a measure of protection for existing Indian landholdings, but made no attempt to characterize the scope of the property interest. It was left to the Marshall Court to determine the title by which Indian tribes held land and whether Indian tribes could convey title without the approval of the federal government. The Chief Justice explored at length the legal relationship between European colonizers, the United States government, and aboriginal tribes. He seemed to acknowledge the inherent property rights of Native American tribes: “At the time of the discovery of the continent of North America by the Europeans, the whole of the territory was held, occupied, and possessed in full sovereignty, by various independent tribes or nations of Indians, who were the absolute owners and proprietors of the soil; and who neither acknowledged nor owned any allegiance or obedience to any European sovereign or state whatsoever.”⁷ Chief Justice Marshall concluded that the only legal methods for removing lands from the dominion of the Indians were consent or conquest. Short of one of these legal actions, the property remained within the hands of the Indian tribes.

The Chief Justice then held that Indian tribes were incapable of conveying their lands directly to others, even before the passage of the Trade and Intercourse Act. He explained how the doctrine of discovery had conferred upon the European sovereign a title good against other nations. And the United States government acquired that title as a result of American independence from Great Britain. The Court also held that the discovery doctrine authorized the United States to convey lands and waterways owned by the tribes, but the grantee took title subject to the Indian right of occupancy. Chief Justice Marshall explained that the aboriginal tribes “are 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; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.” The discovery therefore gave the discoverer the “exclusive right to appropriate the lands occupied by the Indians,” leading to “considerable impairment” of the property rights of original inhabitants. For Chief Justice Marshall, the discovery doctrine allowed the Indian tribes to enjoy the inherent right to occupy and use their lands. This right of occupancy could only be extinguished by federal policies of conquest or consent, but not by the states without violating the providence of the federal government.

Fletcher and *McIntosh* firmly implanted the doctrine of discovery within the landscape of property relations between the tribes, states, and federal government. The Marshall Court granted simultaneous but incomplete interests—the tribes enjoyed the right of occupancy, the United States possessed the power to regulate tribal land, and the states held fee simple title to a lot of tribal land. The characterization of Indian property rights as occupancy was based on ethnocentric and false assumptions about the culture of Native Americans. Perhaps the Supreme Court Reporter captured such racial biases best in the introduction to *Fletcher*: “What is Indian title? It is mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is not to be transferred but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.”⁸ Another problem was that the discovery doctrine lacked legitimacy

because there was no international agreement officially establishing the discovery doctrine as governing legal relations between European, American, and Native American nations. “It was an alien European theory,” explains Jill Norgren, “that was forced upon indigenous people. At a minimum, the doctrine limited the right of tribes to negotiate freely with the government of its choosing. Over time, the doctrine came to express the view that by their very arrival Europeans had gained certain land rights despite the presence of the original Indian occupants.”⁹ The law of discovery gave the new American nation the significant advantage of legitimizing its appetite for the acquisition of lands. Later, the Marshall Court shifted the emphasis from conquest to consent as the preferred method of extinguishments. In *Cherokee Nation v. Georgia* (1831), the Chief Justice described “the tribes as domestic dependent nations. They occupy a territory to which we assert a title independent of their will. They are a people in a state of pupilage,” using their land until extinguished by voluntary cession.

Liberal Construction and Tribal Land Rights

Toward the end of the nineteenth century, the Supreme Court started to become more sympathetic to the sovereignty and property rights of Native Americans. Several decisions reflected a growing judicial concern for construing constitutional, treaty, and statutory provisions to the advantage of tribal interests. Many justices began to fashion rules of construction sympathetic to the Indians out of concern for counterbalancing their unequal bargaining position during the negotiations process and the failure of the federal government to live up to its tribal obligations. Federal treaties, statutes, and other provisions were liberally interpreted in ways that were understood by the tribal leaders who participated in their negotiations with ambiguities being resolved in favor of the interests of Indians. Even the Marshall Court had alluded to the disadvantage at which English legal language placed the tribes. In *Worcester v. Georgia* (1832), the Chief Justice conceded that “there is reason for supposing that the Cherokees were not very critical judges of the language from the fact that everyone makes his mark; no chief was capable of signing his name. It is probable the treaty was not interpreted by them. It is reasonable to suppose that the Indians, who could not write, and most probably could not read, were not critical

judges of the language.”¹⁰ The concurring opinion of Justice McLean was even more sympathetic to Native Americans. He wrote that “the language used in treaties should never be construed to their prejudice. How the words of a treaty were understood by this unlettered people, rather than their critical meaning should form the rule of construction.”¹¹ Such concerns about the need for a liberal construction rule resonated more with the justices during the late 1800s.

Beginning with *Jones v. Meehan* (1899), the Fuller Court established a strong judicial commitment to construing treaty provisions to the benefit of Indian tribes. The case involved an 1863 treaty with the Chickasaw Indians, which set aside 640 acres near the mouth of Thief River in Minnesota for the elder Chief Moose Dung. Upon his death, the land passed to the younger Moose Dung, who later leased part of the land to Jones. Meanwhile a congressional resolution of 1894 and subsequent actions by the Department of Interior granted title to Meehan. He filed suit to quiet title against Jones in a strip of land ten feet wide along the westerly shore of Red Lake River. Speaking for the Court, Justice Gray reaffirmed prior cases describing the right of Indian tribes to their lands as only one of possession or occupancy. He explained that the ultimate title in fee to aboriginal lands resided within the United States. But Justice Gray held that “a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States.”¹² He then decided that:

In construing any treaty between the United States and an Indian Tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language. The Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers but in the sense in which they would naturally be understood by the Indians.¹³

Despite the ethnocentric tone of tribal inferiority, the Fuller Court adopted the liberal construction rule for Indian treaties. The terms of federal treaties are to be construed according to the understandings of Native Americans because of the disadvantage the English language and treaty-making process places them. Indeed Justice Gray held that “a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States.” He found that a liberal construction of the treaty provisions revealed an intention by the United States and an understanding by the tribe of conveying an alienable title in fee to Chief Dung. Justice Gray held that the disposition of such land is controlled by the laws and customs of the tribe, not the laws of Minnesota or the United States. In a critical tone, the Fuller Court pointed out that “the construction of treaties is the peculiar providence of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under the treaty or affect titles already granted by the treaty itself.”¹⁴

The liberal judicial construction rule of *Meehan* was reaffirmed throughout the early part of the twentieth century. In *Winters v. United States (1908)*, the Fuller Court confronted the question of whether federal agreements with Native Americans were to be construed like treaties to benefit tribal interests. At issue were the water rights of Indian tribes on the Fort Belknap Reservation in Montana. An 1888 agreement created the reservation out of a larger area previously set aside for the tribes. It described one boundary of the reservation as being within the middle of the Milk River, but failed to explicitly assign rights relating to water use. White settlers later built dams, diverted the river, and interfered with agricultural practices of the Indians. The United States brought suit on behalf of the Indians. Both parties argued that water was necessary for farming. Faced with contradictory interpretations of the agreement, the Court elected to construe the provisions in the best interests of the Indians. “By rule of interpretation of Indian agreements and treaties,” reasoned Justice McKenna, “ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.

On account of their relations to the Government, 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 Government.”¹⁵ Justice McKenna then held that the 1888 agreement reserved the lands, and by necessary implication, the water rights for the Indians. It was unreasonable to assume that the Indians would reserve lands for farming purposes without also reserving the water to make such uses possible. He also held that the reservation and its implied reservation of water was unaffected by the admission of Montana into the Union “upon an equal footing with the original States.” Justice McKenna then concluded that “the power of the Government to reserve the waters and exempt them from appropriation under state laws is not denied and could not be.”¹⁶

In *United States v. Holt Bank* (1926), however, the Supreme Court seemed to deviate from the liberal construction of Native American treaties. Justice Devanter denied the Chippewa Tribe’s claims to lakebed lands despite the existence of treaties recognizing their property rights.¹⁷ At issue was 5,000 acres of what was formerly a body of water known as Mud Lake in Minnesota. The lake was part of the Red Lake Indian Reservation, which was established by treaties for the Chippewa Tribe prior to Minnesota becoming a state in 1858. In an 1889 treaty, the Tribe relinquished to the federal government a sizable portion of the reservation, including Mud Lake. The land around the lake was sold to settlers to compensate the Tribe. Much later, the lake was drained because of a ditch constructed by the State of Minnesota. Pursuant to the 1889 agreement, the federal government surveyed the exposed bed lands to dispose of them for the benefit of the Chippewas. The United States initiated a quiet title action against Holt Bank and other parties on behalf of the tribe. Surprisingly, the Court embraced the presumption against favoring the sovereignty and property rights of Indian tribes:

Lands underlying navigable waters within a State belong to the States in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the State, has granted rights in lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the States and with foreign nations, or carrying out other public purposes appropriate to the objects

for which the territory was held, such rights are not cut off by the subsequent creation of the State, but remain unimpaired, and the rights which otherwise would pass to the State in virtue of its admission into the Union are restricted or qualified accordingly.¹⁸

Justice Devanter further pointed out that the United States “has adhered to the policy of regarding lands under navigable waters...as held for the ultimate benefit of future States,” except “when impelled to particular disposals by international duty or public exigency.”¹⁹ What followed for the majority was “that disposals by the United States during the territorial period are not lightly to be inferred and should not be regarded as intended unless intention was definitely declared or otherwise made very plain.” Then Justice Devanter inquired into whether the lands under Mud Lake had been disposed of by the federal government before Minnesota became a state. He emphasized that through a series of treaties the Chippewas ceded to the United States their aboriginal right of occupancy to the submerged lands. Plus, the federal treaties neither contained an affirmative declaration of the Tribe’s property interests nor attempted to exclude others from using the waters within the reservation. Justice Devanter concluded that the treaties merely reserved in general the continued occupation of Indians and what remained of their territory, while holding the bed lands for the benefit of Minnesota.

The effect of *Holt Bank* was to call into question the presumption of tribal rights over states rights with regard to territorial lands and underlying navigable waters. The justices seemed only willing to permit the equal footing doctrine and presumption of state control of lands to be overridden in exceptional circumstances where the intent of the law was “definitely declared or made very plain” to carry out an “international duty” or confront a “public exigency.” The justices ignored precedent recognizing that textual ambiguities in Indian treaties and agreements should be interpreted to favor the purpose of the reservation and interests of the tribes. Indeed the Court failed to explain why the presumption should favor the states as opposed to the tribes, whose aboriginal rights and treaty rights predate the admission of the states. But *Holt Bank* turned out to be a judicial anomaly. Throughout the early part of the twentieth century, the justices reaffirmed their commitment to the presumption that reservation lands and waterways were owned by the tribe unless by law expressly excluded from the grant of lands. In the *United State v. Shoshone Tribe*

(1938), the Hughes Court held that the right to timber and minerals within the Wind River Reservation belonged to the tribe despite the absence of any language guaranteeing such rights.²⁰ An 1868 treaty created a reservation of 44,672,000 acres for the Shoshone Tribe in Colorado, Utah, Idaho, and Wyoming. In 1878, the federal government took 2,343,540 acres. Later the Shoshones sought just compensation for the taking of their lands and natural resources, but the federal government denied their rights of ownership to timber and minerals. Justice Pierce Butler reminded the federal government that “in treaties made the United States seeks no advantage for itself; friendly, dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly but are to be construed in the sense in which naturally the Indians would understand them.”²¹ Justice Butler went on to hold that the Indian’s right to control their lands has belonged to them “as undisturbed possessors of the soil since time immemorial.” It “is incapable of alienation” and “as securely safeguarded as is fee simple absolute title.”²²

For the next forty years, the justices continued to apply the liberal construction rule to treaties, agreements, and statutes. Perhaps the leading case reaffirming this rule is *Menominee Tribe v. United States* (1968). An 1854 treaty created the Wolf River Reservation for the Menominee Tribe to be held as Indian lands are held. One hundred years later, Congress passed a Termination Act (1954) ending the special relationship between the Menominee Tribe and the United States. It provided that “all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.” The Termination Act failed to mention what became of the tribe’s hunting and fishing rights. Wisconsin argued that the statute extinguished such treaty rights and subjected the Menominees who hunted and fished on the former reservation to state licensing laws. Speaking for Justices Brennan, Fortas, Warren, and Harlan, Justice Douglas held that the tribe’s hunting and fishing rights under the treaty were not abrogated by Public Law 280. He pointed out that the Termination Act provided that “nothing in this section...shall deprive any Indian or any Indian tribe, band, or community of any right, privilege or immunity

afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulations thereof.”²³ Justice Douglas also stressed that the continued preservation of treaty rights were supported by legislative intent; namely the “remarks of the legislator chiefly responsible for guiding the Termination Act to enactment, Senator Watkins, who stated that it in no way violates any treaty obligation with this tribe.”²⁴ The Court declined to construe the Public Law 280 as a backhanded way of abrogating tribal treaty rights. It concluded that the hunting and fishing rights preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954.

Justice Stewart wrote a dissenting opinion and was joined by Justices White and Black. He criticized the majority for ignoring the literal meaning of the language of the Termination Act. The dissent argued that “the statute is plain on its face: after termination the Menominees are fully subject to state laws just as other citizens are, and no exception is made for hunting and fishing laws.”²⁵ Justice Stewart also drew from legislative intent, arguing that nothing in the congressional record “contains any indication that Congress intended to say anything other than what the unqualified words of the statute express. In fact, two bills which would have explicitly preserved hunting and fishing rights were rejected in favor of the bill ultimately adopted.” He argued that the Termination Act by its very terms provides that “all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe.” In tone of judicial restraint, the dissent concluded that “the Court today holds that the Termination Act does not mean what it says. The Court’s reasons for reaching this remarkable result is that it finds another statute which has nothing to do with this case.” No doubt the majority went to considerable lengths to broadly construe the continued preservation of tribal hunting and fishing rights. The effect of *Menominee* was to create a presumption that the abrogation of treaty rights require an explicit congressional statement. The concluding remarks of the majority also suggested that abrogation of treaty rights may give rise to a claim of compensation. “It is difficult,” observed Justice Douglas, “to believe that Congress without explicit statement would subject the United States to a claim for compensation by destroying property rights conferred by treaty.”²⁶ In *Menominee*, the

Warren Court made clear that congressional power to abrogate a treaty does not end the federal obligation to compensate for the destruction of rights on reservation lands.

A more recent case reaffirming the judicial preference for broadly protecting the land rights of Native Americans is *Choctaw Nation v. Oklahoma* (1970). It concerned the Arkansas River, which flowed through the Choctaw and Cherokee reservations as established under the 1830 Treaty of Dancing Rabbit Creek and the 1835 Treaty of New Echota. The tribes sought damages totaling \$786,642 derived from sand, gravel, oil, and gas leases granted by the state of Oklahoma along the riverbeds of the reservation. Writing for the majority, Justice Marshall held that the liberal canons of treaty construction controlled the disposition of the case and not the equal footing doctrine. He found that “the Indian tribes were granted fee simple title to the vast tract of land through which the Arkansas River winds its course. The natural inference from those grants is that all the land within the metes and bounds was conveyed, including the banks and beds of the rivers.”²⁷ Justice Marshall concluded that in many respects the Indians were promised virtually complete sovereignty over their new lands because the treaties provided that “no part of the land granted to them shall ever be embraced in any Territory or State.” But Justice White, along with Justices Black and Chief Justice Burger, dissented on the grounds that the riverbed was reserved for the state of Oklahoma. He argued that “there is no express reference to the river bed and the policy of the United States was not to convey lands underlying such waters to the tribes. Justice White went even further contending that “the former Indian territory is not now either occupied or owned solely by the Indians, but it widely held by diverse peoples and interests of the state of Oklahoma.”²⁸ He scolded the majority for failing to follow the equal footing doctrine and its presumption of state control of waterways absent a clear statement to the contrary. The dissenting and majority opinions reflected a growing judicial division over the line between tribal rights and state sovereignty.

Emergence of Judicial Deference to States Rights

After the 1970s, the Supreme Court began to actively chip away at the judicial preference for preserving the property rights of Native Americans. A conservative

group of justices began to carve out exceptions to the liberal treaty construction rule and firmly implant the equal footing doctrine. In *Montana v. United States* (1981), the Burger Court took a bold step toward elevating the sovereignty and property rights of the states. The case arose when the Crow Indian Tribe sought to prohibit hunting and fishing within its reservation by non-tribal members. The Tribe claimed that the right to regulate such activities on the reservation based in part on its ownership of the bed of the Big Horn River. The state of Montana argued that title to the riverbed passed to the state upon its 1889 admission into the Union under the equal footing doctrine. On behalf of the Tribe, the United States brought suit against the Montana to quiet title to the Big Horn River and surrounding bedlands. The federal government based the Tribe's claim of ownership on 1851 and 1868 Treaties of Fort Laramie. The first treaty recognized approximately 38.5 million acres of land as Crow Territory. Article 5 of the 1851 treaty specifically reserved for the Crows their hunting and fishing rights on the land. The second treaty created an 8 million acre reservation for the Crows through which flows the Big Horn River. The 1868 treaty implicitly secured hunting and fishing rights for the Tribe by prohibiting non-Indians from residing on or passing through the reservation. The issue was whether the federal government had conveyed ownership of the riverbed to the Crow Tribe by the Treaties of Fort Laramie. Justice Stewart wrote the majority opinion and was joined by Justices Rehnquist, Burger, White, Powell, and Stevens. He held that the presumption of state sovereignty over submerged lands takes priority over the traditional policy of liberal treaty construction

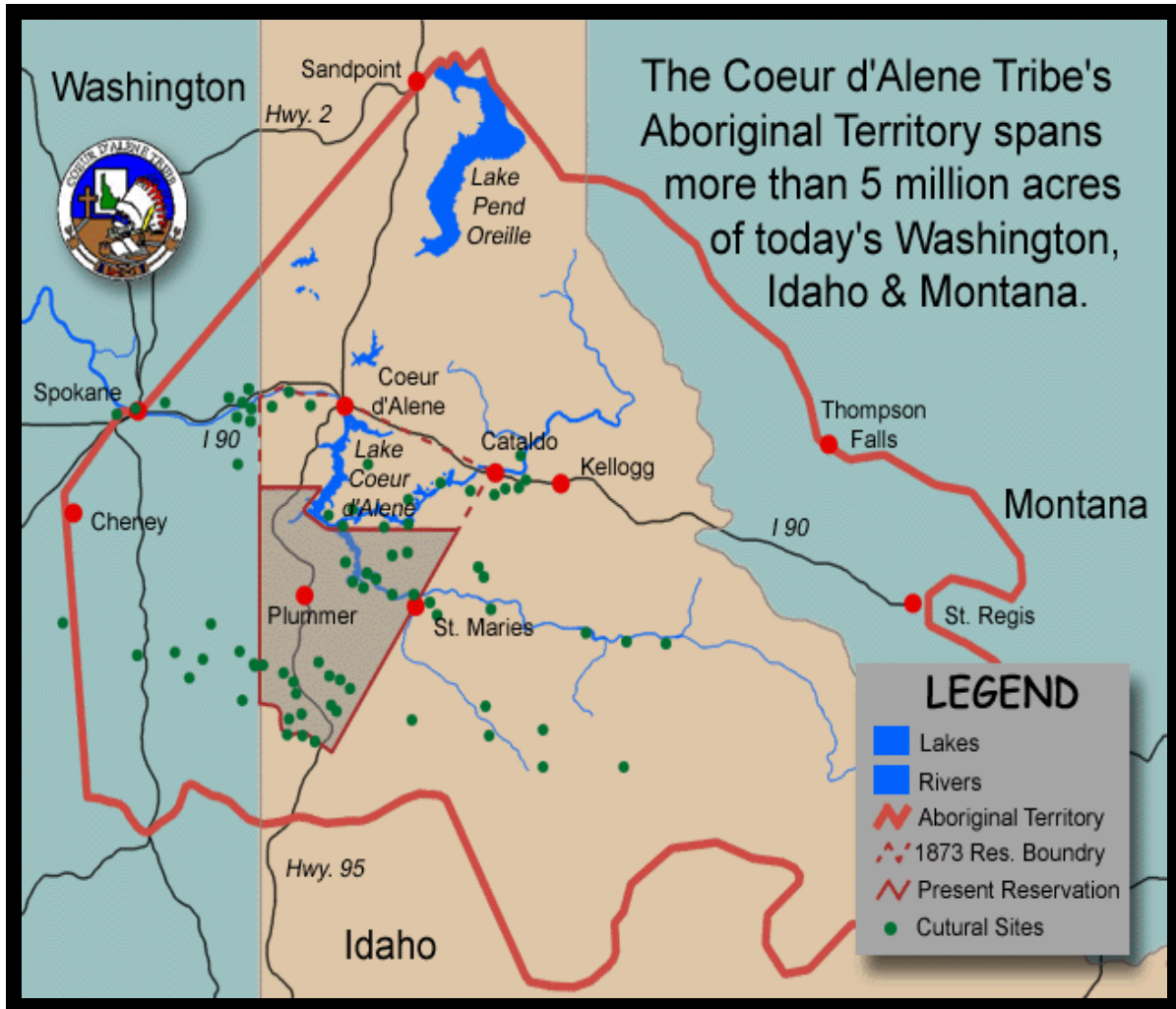
The majority opinion recognized only two indicators of congressional intent to convey land and thereby rebut the presumption of state sovereignty. Where the treaty expressly recognized tribal ownership of a riverbed, the congressional intent is obvious and the conveyance will be upheld. Even where the treaty language is not sufficiently clear, the congressional intent to convey bedlands may be indicated by the circumstances surrounding the treaty. Justice Stewart conceded that where there exists a "public exigency," requiring Congress to deviate from its policy under the equal footing doctrine, intent to convey is sufficiently clear. He recognized two public exigencies that could operate within tribal bedlands cases. Where an Indian tribe is

dependent on the river for its diet or way of life, the presumption of state ownership could be defeated. The presumption could likewise be defeated when the specific circumstances surrounding the signing of the Indian treaty indicate that the federal government was attempting to placate a dangerously unhappy tribe, in assuming that no reserved land would ever be embraced within a state or territory. The “public exigency” in such cases will be referred to as the “national peace.” It was the national peace exigency that allowed the majority to avoid expressly overruling the *Choctaw Nation* decision, while at the same time rejecting its legal premise that canons of treaty construction control the outcome of tribal bedlands claims. Justice Stewart concluded that title to the bed of the Big Horn River passed to Montana upon admission into the Union and the Crow lacked the power to regulate fishing and hunting by non-Indians.

Justice Blackmun wrote a dissenting opinion, which was joined by Justices Brennan and Marshall. He argued that the majority ignored long-standing canons of treaty construction by inventing a presumption of state sovereignty over bedlands in tribal land cases. Regardless of the intentions of the federal government, wrote the dissent, ownership of a riverbed should depend on the rights of Indians and the tribal understanding of relevant treaty language. Justice Blackmun also argued that the Tribe should have prevailed under the majority’s own rule because of there was a clear intention on the part of Congress to convey the bedlands. He described *Montana* as indistinguishable from *Choctaw Nation* because the same exigencies which led to the Treaty of New Echota also inspired the Treaties of Fort Laramie. The dissenters were also disturbed how the majority had abruptly changed the law. In a broad stroke of judicial activism, the Burger Court established the priority of the equal footing doctrine over the canons of liberal treaty construction. In conveyances of lands to Indian tribes under treaties, executive orders, and congressional statutes, the equal footing doctrine now created a presumption against conveyance of lands lying beneath the high-water mark of navigable waters. The United States holds the underlying beds of navigable waters in trust for future states. Any prior conveyance of such lands by the federal government is not to be lightly inferred, and can only be accomplished in furtherance of some public purpose. The fact that the bed of a navigable water lies

within the metes and bounds of an Indian reservation is no longer a sufficient indication of congressional intent to convey the waterways absent some independent compelling evidence. *Montana* significantly undermines the property rights of Native Americans and the traditional trust relationship between the federal government and Indian tribes with its attendant canons of liberal treaty and statutory construction.

In recent years, the Rehnquist Court has provided a mix bag tribal land rights decisions. A prime example is the controversy involving the Coeur d'Alene Tribe and the state of Idaho. The tribe once inhabited territory spanning more than 5 million acres of parts of what is now Washington and Idaho. Under an 1846 treaty with Great Britain, the United States acquired title to the region of Lake Coeur d'Alene. In 1872 the Coeur d'Alene Indian Tribe sent a request for a land charter to the Commissioner of Indian Affairs. It included a large portion of the lake and its waterways. Congress authorized a commission to negotiate with the Tribe. In 1873, the tribe agreed to relinquish for compensation all claims to aboriginal lands outside of the bounds of a reservation including parts of Lake Coeur d'Alene and its surrounding rivers. While awaiting congressional approval of the agreement, President Grant issued an 1873 executive order creating a reservation for the Tribe and setting the northern boundary directly across the lake. An 1883 federal government survey fixed the reservation area at 598,500 acres and identified the inclusion of submerged lands. Between 1885 and 1888, the Tribe faced increasing pressures from white settlers to the reservation. The tribe continued to contact the Commissioner for approval of the 1873 executive order, generating another series of negotiations between Congress and the Tribe. The result was another federal agreement similar to the first one, which also required legislative approval. While this 1887 agreement was pending before the Congress, the Senate came under public pressure to release a portion of the Coeur d'Alene lands. Congress asked the Tribe to release the portions of the reservation that were not "agriculturally useful." In a final 1889 agreement, the Tribe agreed to give up the northern portion of the lake, but still kept the southern area and its surrounding rivers referred to as the submerged lands. Congress formally approved the 1887 and 1889 agreements, but not until 1891 which was one year after the admission of the state of Idaho into the Union.



More than one hundred years later, the Coeur d'Alene Tribe filed suit against the state of Idaho to establish their right to the exclusive control of lands underlying portions of Lake Coeur d'Alene and the St. Joe River. Idaho claimed that the lake and river fell in its borders at the time when Idaho became a state. In *Idaho v. Coeur d'Alene Tribe* (1997), the Rehnquist Court held that the tribe's claim against the state was barred by the Eleventh Amendment. Justice Kennedy wrote the majority opinion and was joined by Justices O'Connor, Rehnquist, Scalia, and Thomas. Writing for the majority, Justice Kennedy described the Eleventh Amendment as "measure enacting a sovereign immunity from suit rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction."²⁹ He outright denied the applicability of *Ex parte Young* in which federal courts may exercise jurisdiction over state officials

alleged to be violating federal law on the theory that their conduct stripped them of their official or representative character. Such actions have evolved into a grant of federal judicial power to entertain actions seeking prospective injunctive relief. Justice Kennedy stressed that permitting *Young* to encompass all claims in which prospective declaratory and injunctive relief is sought against state officials would “undermine the principle...that Eleventh Amendment immunity represents a real limitation on a federal court’s federal question jurisdiction.” In a section of his opinion joined only by Chief Justice Rehnquist, Justice Kennedy maintained that *Ex parte Young* grants the federal courts the discretion to decide whether to allow an action to proceed. He narrowly interpreted precedent as providing only two instances in which *Young* has been applied: first when no available state forum exists; and second when a claim turned on the interpretation of federal law. Justice Kennedy argued that *Young* takes on “special significance” when there is no available state forum, but that when one exists, federal courts must recognize that “States have real and vital interests in preferring their own forum in suits brought against them.” He conceded that *Young* generally allows a claim for prospective injunctive relief, but deciding whether the presumption for federal jurisdiction is controlling requires a “case-by-case approach.”

Once more writing for the majority, Justice Kennedy determined that the tribe’s suit was barred by the Eleventh Amendment. He acknowledged that the tribe’s suit could be categorized as one seeking prospective injunctive relief, but found its claim to be the “functional equivalent of a quiet title action which implicates special sovereignty interests.” Justice Kennedy concluded that “the dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts.” Justice O’Connor provided the swing vote, concurring in part and in the judgment. She agreed that the tribe’s claim was the functional equivalent of an action to quiet title to the submerged lands. But she wrote separately to dispute Justice Kennedy’s reformulation of the *Young* doctrine into a case-specific analysis. She found that in prior cases (*Lee and Tindal*) “the Court made clear that the suits could proceed against officials because no judgment would bind the States.” She also drew a sharp distinction between possession of the property

and title to the property. Concerned about states rights, Justice O'Connor argued that a successful action by the Coeur d'Alene Tribe would transfer title to submerged lands which are intimately tied to state sovereignty and implicate the Eleventh Amendment.

Justice Souter dissented and was joined by Justices Breyer, Ginsburg, and Stevens. He argued that the federal courts have an obligation to exercise jurisdiction where there are claims seeking prospective relief to prevent state officials from violating federal law. "Congress has implemented the Constitution's grant of federal question jurisdiction by authorizing federal courts to enforce rights arising under the Constitution and federal law." He also found the tribe's claim to "fall squarely within the *Young* Doctrine" because the action was "no more (or less) against the State than any of the claims brought in our prior cases applying *Young*." The dissent pointed out that *Young* has been construed to apply to cases that burden a state's treasury, citing *Lee and Treasure Salvors* as indistinguishable from the case at hand because both rulings implicated a government claim of title to property. Justice Souter stressed that the effect of the majority and concurring opinions is to deprive tribes "with federally derived property rights" of access to federal forums. "While there is great satisfaction that Justice O'Connor's view is the controlling one," lamented the dissent, "the effect of the opinions is to redefine and reduce the substance of federal subject-matter jurisdiction to vindicate federal rights." Justice Souter argued that federal jurisdiction turns on the responsibility of federal courts to enforce what is supposed to be controlling federal law. "The *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." He concluded that the Coeur d'Alene case satisfied *Young* because the Tribe is seeking prospective (declaratory and injunctive) relief to prevent Idaho from regulating Indian land protected under federal law.

The Coeur d'Alene decision constitutes another effort of the Rehnquist Court to extend the reach of state sovereign immunity. By circumscribing *Young's* reach, the majority disregarded the common law heritage of sovereign immunity. Until *Coeur d'Alene*, the *Young* doctrine and the common law of liability for state officers from

which *Young* emerged encompassed a broad range of suits affecting the use and enjoyment of property. In *Lee*, *Tindal*, and *Treasure Salvors*, the Supreme Court not only adjudicated the merits of the plaintiff's claim of title to disputed property, but also effectively divested the government and its officers of the authority to hold the property at issue—a result no different from that sought by the Coeur d'Alenes. Of course, the Coeur d'Alene Tribe's claim can be factually distinguished from *Lee* and *Tindal* only because the disputed property involved submerged lands and the suit threatened the general regulatory authority of the state. But such a narrow distinction is insignificant. It is difficult to understand how submerged lands implicate state sovereign power any more than the economic regulatory authority at issue in *Young* or the federal officials' right to occupy the Arlington Cemetery at issue in *Lee*. Equally important, the Coeur d'Alene case removes an entire category of claims from the protective reach of federal law. By depriving the Indian tribes of access to the federal courts, the Court jeopardizes the role that the *Young* doctrine plays by scrutinizing state officer actions for violations of federal laws. Now to protect a federally derived claim to tribal lands, the Indians must pursue their claims in state court or petition the United States to sue on their behalf. The first option hinges on the sovereign immunity of state statutes while the second depends on the presidential grace of the federal government, neither of which have been historically very supportive of tribal claims.

Fortunately for the Couer d'Alene Tribe, the United States government took up the invitation of the Rehnquist Court and filed a quiet title action against the state of Idaho. Of course the tribe still had to confront a conservative group of justices and the heavy weight of the *Montana* precedent and other recent decisions. In *Idaho v. United States (2001)*, the Rehnquist Court was sharply divided over the merits of whether the Couer d'Alene Tribe or the State of Idaho owned the submerged lands. Justice Souter wrote the majority opinion and was joined by Justices Stevens, Bryer, Ginsberg, and O'Connor. He held that the United States government possessed title in trust for the tribe to the submerged lands. The majority conceded that there is a strong presumption in favor of a state's title to land under navigable waters. Justice Souter explained that the two-step test asks whether Congress intended to include submerged lands in the

federal reservation and, if so, whether Congress intended to defeat the future's state title to those lands. He applied the test and concluded that "Congress undertook to negotiate with the tribe for reduction within the territory of the Executive Order with full knowledge that the new reservation included submerged lands."³⁰ Congress was aware that the submerged lands were included within the executive order and clearly intended to redefine the area of the reservation in exchange for the guarantee that the tribe would retain the southern parts of the lake and submerged lands. Chief Justice Rehnquist dissented and was joined by Justices Scalia, Kennedy, and Thomas. He argued that the ownership of land under navigable waters is an incident of sovereignty for the states. The Chief Justice scolded the majority for using an executive order to determine whether there was congressional intent to divest a newly admitted state of its sovereign interests in submerged lands. The dissenters concluded that "if Congress meant to grant any interest in Lake Coeur d'Alene, it was more likely a right to fish and travel the waters rather than withholding for the Tribe's benefit perpetual title."³¹

During the past two decades, the Supreme Court has become less sympathetic to the property and sovereignty rights of Native Americans. A conservative group of justices have interpreted the equal footing and sovereign immunity doctrines in ways that protect the state's interests in tribal lands. Table 3 presents a scale of the voting patterns for the ten Indian land rights cases decided between 1986 and 2001. The Rehnquist Court ruled in favor of Indian property and sovereignty rights at a low rate of 30%. Its decisions have ranged from barring tribal suits against the states under the Eleventh Amendment (*Coeur d'Alene/Blatchford*) to refusing to recognize the hunting and fishing rights of tribes under federal treaties (*Bendale/Bourland*). John LaVelle has observed that "this striking trend of anti-tribal adjudication by the Rehnquist Court has engendered great consternation and dismay among tribal leaders and Indian law scholars. These observers discern in the Court's disregard of long-standing legal principles protective of Tribes' most elemental rights a return to federal policy themes dominant during the devastating termination era of the 1950s."³² Indeed the Rehnquist Court has actively attempted to displace the sovereignty of tribes and liberal treaty construction rule with a judicially innovative states rights approach, which threatens

the aboriginal rights of Native Americans. To be sure, the conservative efforts of the Rehnquist right have been in some cases stalled by the votes of Souter, Bryer, Stevens, and Ginsberg. But until recently, the tribes often prevailed in disputes against the states because of a judicial commitment to taking seriously the federal protections of tribal sovereignty embedded within federal treaties, statutes, and the Constitution.

<p>Table 3: Scale of Tribal Land Rights Decisions for the Rehnquist Court (1986-2001)</p>	<p>B M B S B S G O W T K S R V E L A R O R T I C H H E C E O R A R E U E E N O I O N A H T R C S N T Y V S N T M N L N E O K H N E E E B N E A E I Q S R M A A R R N U O S D A U S U L N S R R Y I N L G S T T/G</p>												
<p>Bendale v. Yakima Nation A (89) Minnesota v. Chippewa (99) Idaho v. United States (01) Idaho v. Coeur d'Alene Tribe (97) Blatchford v. Noatak Village (91) Bendale v. Yakima Nation B (89) South Dakota v. Bourland (93) Hagen v. State of Utah (94) Alaska v. Venetie Tribe (98) South Dakota v. Sioux (98)</p> <p>Tribe Land Rights Outcomes = 30% Governmental Regulations = 70%</p>	<p>T T T - - T - T G - G G G 5/4 0 - - - T T T T T - G G G G 5/4 0 - - - T T T T T - G G G G 5/4 0 - - - T T T T G - G G G G 4/5 0 T T - g - T - G G - G G G 3/6 1 T T T - - G - G G - G G G 3/6 0 T - - T - G - G G G G G G 2/7 0 T - - T - G G G - G G G G 2/7 0 - - - G G G G G - G G G G 0/9 0 - - - G G G G G - G G G G 0/9 0</p> <p><u>5</u> <u>3</u> <u>2</u> <u>5</u> <u>3</u> <u>5</u> <u>3</u> <u>3</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>28</u>=31% 0 0 0 3 2 5 3 7 4 7 10 10 10 61=69%</p>												
<p>T: vote protecting tribal land rights G: vote favoring government policy *: current nonparticipating justices ?: no opinion about the case merits T or G: wrote the majority decision t or g: an inconsistent or errant vote</p>	<p>REPRODUCIBILITY</p> <p>1 CR = 1 - --- = .99 72</p>						<p>SCALABILITY</p> <p>1 CS = 1 - --- = .96 26</p>						

-
- ¹ See Peter Matthiessen, *In the Spirit of Crazy Horse* (New York: Viking Press, 1983), pp. 518-520.
- ² *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-143 (1810).
- ³ *Ibid.*, pp. 143-144.
- ⁴ *Ibid.*, p. 146.
- ⁵ *Ibid.*, p. 147.
- ⁶ *Ibid.*
- ⁷ *Johnson v. M'Intosh*, 21 U.S. (8Wheat.) 543 (1823).
- ⁸ *Ibid.*, p. 121.
- ⁹ Jill Norgren, *The Cherokee Cases* (New York: McGraw-Hill Publishing, 1996), p. 101.
- ¹⁰ *Worcester v. Georgia*, 6 Peters 551, 552 (1832).
- ¹¹ *Ibid.*, pp. 582.
- ¹² *Jones v. Meehan*, 175 U.S. 1, (1899).
- ¹³ *Ibid.*, pp. 10-11.
- ¹⁴ *Ibid.*, p. 32. See also, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).
- ¹⁵ *Winters v. United States*, 207 U.S. 564 (1908).
- ¹⁶ *Ibid.*, 577-578.
- ¹⁷ *United States v. Holt Bank*, 270 U.S. 49 (1926).
- ¹⁸ *Ibid.*, pp. 54-55.
- ¹⁹ *Ibid.*, pp. 55-56.
- ²⁰ *United States v. Shoshone Tribe*, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed.2d 1213 (1938). See also *United States v. Creek Nation*, 295 U.S. 103 (1935).
- ²¹ *Ibid.*, p. 116.
- ²² *Ibid.*, pp. 117-118.
- ²³ *Menominee Tribe v. United States*, 391 U.S. 404, 410 (1968).
- ²⁴ *Ibid.*, p. 412.
- ²⁵ *Ibid.*, p. 415.
- ²⁶ *Ibid.*, p. 413.
- ²⁷ *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).
- ²⁸ *Ibid.*, p. 653.
- ²⁹ *Idaho v. Coeur d'Alene Tribe*, 117 S.Ct. 2028 (1997).
- ³⁰ *Idaho v. United States*, 533 U.S. 111, 150 L.Ed.2d 326 (2001).
- ³¹ *Ibid.*, p. 121.
- ³² John LaVelle, "Sanctioning a Tyranny: The Diminishment of Ex Part Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe," 31 *Ariz. St. L.J.* 787 (1999). See also Robert Clinton, "The Dormant Indian Commerce Clause," 27 *Conn. L. Rev.* 1055 (1995).