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TREATIES OF CONQUEST: PROPERTY RIGHTS, INDIAN TREATIES, AND THE TREATY OF GUADALUPE HIDALGO
CHRISTINE A. KLEIN*

I. INTRODUCTION

All animals are equal
But some animals are more equal than others.

George Orwell

The modern discourse concerning property rights has deep historical roots, for property has long been the object of heated passion, war, and conquest. Under our national lore, it is common knowledge that the United States acquired from Native American tribes some two million square miles of territory by conquest and by purchase. Not as common is the knowledge that the United States conquered Mexico in 1848 and took over half its then-existing territory. The states of California, Nevada, and Utah, as well as portions of Colorado, New Mexico, Arizona, and Wyoming were carved out of that 529,000 square mile cession by the Republic of Mexico. In some areas of the southwestern United States, the conquests overlapped. There, Indian lands were conquered sequentially by Spain, Mexico, and the United States. As the United States Supreme Court acknowledged in retrospect, "[t]hat there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied."*

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1. GEORGE ORWELL, ANIMAL FARM 123 (The New American Library 1956).
4. Bowden, supra note 3, at 468-70.
In both cases, the territorial acquisitions were sealed by solemn and idealistic treaties that belied the harsh realities of conquest. In exchange for the transfer of land and sovereignty by Mexico, the United States promised in the Treaty of Guadalupe Hidalgo that it would “inviolably respect” the established private property rights of Mexican citizens in the conquered territory and provide them with “guaranties equally ample as if the same belonged to the citizens of the United States.”\footnote{7} Indian tribes, in turn, relinquished large tracts of land in exchange for financial compensation\footnote{8} and treaty guarantees that smaller “reservations” of land would be maintained as homelands for the tribes.\footnote{9} But, as this article will show, all treaty promises are not equal. As Orwell reminds us, context and interpretation cannot be ignored.

This article traces the historical and legal currents that affected the implementation of the treaty guarantees contained in the Indian and Mexican treaties. In general, the treaty-based property rights of Native Americans have been given an extra measure of protection not applicable to property in the former Mexican territory. This extra protection has evolved, for the most part, from Chief Justice Marshall’s conception of Indian tribes as dependent sovereigns entitled to the guardianship of the United States.\footnote{10} That trust duty has spawned a number of other legal protections, including the canons of construction,\footnote{11} the federal obligation to provide compensation for the taking of certain treaty-protected lands,\footnote{12} and—perhaps most importantly—a prohibition against the transfer of Indian tribal lands to non-Indians without federal approval.\footnote{13}

Hispanic lands, in contrast, represent more “garden variety” property rights, freely transferable to non-Hispanics and not subject to any particular federal oversight. The beneficiaries of the Treaty of Guadalupe

\footnote{7. Treaty of Peace, Friendship, Limits and Settlement, February 2, 1848, U.S.-Mex., art. VIII, 9 Stat. 922, 929 [hereinafter Treaty of Guadalupe Hidalgo.] “In the said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected.” \textit{Id.} International law, too, suggests that private property rights should remain intact following a conquest. See, e.g., Ely v. United States, 171 U.S. 220, 223 (1898) (“In harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles.”); Strother v. Lucas, 37 U.S. (12 Pet.) 410, 438 (1838) (“A cession of territory is never understood to be a cession of the property of the inhabitants. The king cedes only that which belongs to him; lands he had previously granted, were not his to cede.”) (citation omitted)).

\footnote{8. See infra part II.A.}

\footnote{9. An 1828 treaty with the Cherokee Nation, for example, guaranteed that Indians who relinquished lands in the eastern United States and migrated westward would be there given, a permanent home, . . . which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines . . . of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State . . . . Treaty with the Cherokees West of the Mississippi, May 6, 1828, 7 Stat. 311, Preamble (\textit{quoted in Felix S. Cohen, Handbook of Federal Indian Law} 80 (1982 ed.) [hereinafter COHEN]).}

\footnote{10. See infra part III.A.}

\footnote{11. See infra part IV.B.2.}

\footnote{12. See infra note 80.}

\footnote{13. See infra part VII.B.}
TREATIES OF CONQUEST

Hidalgo, moreover, are simply individual members of Hispanic communities, rather than a collective unit to which sovereign status has been attributed. Overall, however, this observation that Native American treaty rights were given special protection must be tempered by the realization that both groups of conquered peoples were subjected to numerous violations of their treaty rights. Indian lands were vulnerable to many of the same corrosive forces that affected Mexican property rights. Legal commentators have tended to study conquests in isolation from one another. After the first American conquest—involving Indian lands—Chief Justice Marshall announced that the relationship between the federal government and Indian tribes is unique. The profession has taken that statement to heart, declining to consult Indian law as even a rough guide for the resolution of conflicts originating in subsequent conquests. Scholars in other fields, however, have begun to see value in a more comprehensive approach toward conquest. For example, one historian calls for studies in “comparative conquests” to “help knit the fragmented history of the planet back together.”

This article is an attempt to answer that call from a legal perspective. A secondary goal is to provide an extensive analysis of selected legal topics involving the treaty-based land rights of former Mexican citizens in the conquered territory. Such scholarship is in its infancy, particularly when compared to the wealth of the existing literature on Indian treaty rights. Finally, this comparison of treaty-based property rights is offered to illuminate the choices that were made by the Supreme Court and Congress by juxtaposing two sets of answers to a similar set of problems. The contrast will show the country at both its best and its worst. Armed with such knowledge, hopefully, the nation will live up to its highest potential in future treaty-based conflicts.

14. For a discussion of the non-enforcement of Indian treaties, including instances of non-ratification, bribery, abrogation, and breach, see Cohen, supra note 9, at 63-64.
15. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831). See also Cherokee Nation discussion, infra part III.A.
16. One commentator writes that, “[p]recise analogies to Indian law within the domestic law of the United States are risky. Don’t try. Indian tribes are not ‘like’ Puerto Rico, or the District of Columbia, or Guam, or Alaska before it became a state, or Lithuania, or Kuwait, or France, or Grenada.” Robert Laurence, A Quincentennial Essay on Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307, 311 (1992).
19. Indian law scholar Felix Cohen asserts that “juxtapositions can teach us about our national character.” Cohen, supra note 9, at 49-50 (advocating the study of Indian law from a broad-based historical perspective).
20. Treaty conflicts are not simply a relic of the past, but have left “a legacy of bitterness” under which neither Hispanics nor Native Americans have “given up the struggle to reclaim the land they believe is rightfully theirs.” See LAND, WATER AND CULTURE, supra note 18, at 4; Robert J. Rosenbaum & Robert W. Larson, Mexican Resistance to the Expropriation of Grant Lands in New Mexico, in LAND, WATER AND CULTURE, supra note 18, at 269; Robert V. Urias, Comment,
Part II of this article establishes the historical and legal background relevant to an understanding of Indian treaties and of the Treaty of Guadalupe Hidalgo. Part III discusses the legal theory primarily responsible for the divergent legal status of Indian and former Mexican lands: the federal trust duty toward Native American tribes. The following four sections examine in detail the legal implementation of treaty guarantees with respect to private property rights. Part IV analyzes the diminishment of treaty promises by subsequent federal legislation. The Treaty of Guadalupe Hidalgo was not regarded by the United States Supreme Court as self-executing. Therefore, the passage of increasingly rigid implementing legislation lead to the dilution of treaty guarantees. The promises made in Indian treaties experienced a similar weakening under the plenary power doctrine and through statutory abrogation of treaties. Those forces were counteracted to some extent, however, by judicially-created canons of construction that promoted the interpretation of treaties in the Indians’ favor. Parts V and VI consider the degree to which communal ownership of land and watercourses, respectively, was recognized by the United States. In general, common tribal ownership of uplands, but not submerged lands, was protected by treaty. The situation was reversed, however, with respect to the territory acquired under the Treaty of Guadalupe Hidalgo. Finally, part VII studies the extent to which the federal government protects treaty lands from state and private interference. Under the federal trust duty, Indian lands received considerable insulation from outside forces. A much more limited degree of protection was afforded former Mexican lands.

II. HISTORICAL AND LEGAL BACKGROUND OF THE TREATIES

Despite the fundamental similarity of conquest, the ultimate fate of Mexican and Native American property rights was influenced by a host of circumstances.


of circumstances unique to each group. This section will examine the historical and legal backdrop against which treaty promises must be measured.

A. Treaties with Native American Tribes

Over five hundred years ago when European explorers first "discovered" the New World, they found a land that had been occupied by aboriginal peoples since "time immemorial." In its struggle to define the parameters of these native land rights, the United States Supreme Court formulated a policy that is a striking mix of pragmatism, racism, and idealism.

In 1823 when the Court squarely addressed the nature of Indian title in Johnson v. M'Intosh, European colonization of the Americas had been underway for more than three hundred years. The Court recognized the practical need to incorporate "the actual state of things" into the law—that is, to provide a legal justification for past and future acquisition of tribal lands. At issue in Johnson was the title to property in the Northwest Territory, claimed by the plaintiffs by virtue of direct purchase from the Piankeshaw Indians. The tribe had also ceded that same property to the federal government, which had subsequently issued a patent to the defendant. In upholding the defendant's title over that of the plaintiffs, the Marshall Court drew upon the medieval doctrine of discovery and articulated two important principles that have remained fundamental concepts of federal Indian law to this day.

First, the Court incorporated the discovery doctrine into domestic law. By virtue of a long-standing agreement among European nations, said the Court, "discovery gave title to the [European] government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." Chief Justice Marshall gave his imprimatur to this discovery doctrine, even though he questioned whether the theory might be simply an extravagant pretension:

22. 21 U.S. (8 Wheat.) 543 (1823).
23. See, e.g., Cohen, supra note 9, at 74-78 (describing early acquisition of tribal lands and asserting that "[b]y the year 1800 the rapid growth of the nation had created a demand for territorial expansion, which required the extinguishment of native title.").
27. Johnson, 21 U.S. at 573. The Marshall formulation of the discovery doctrine may not be entirely consistent with medieval philosophy. As espoused by prominent medieval thinkers such as Francisco de Victoria, the theory provided originally that discovery conveyed title to vacant property only. Cohen, supra note 9, at 50-51 (citing NYS, INTRODUCTION TO F. VICTORIA, DE INDIS ET DE IVRE BELL REFLECTIONES (J. Bate trans., Carnegie Institution 1917) (1557)).
Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it?  

In overcoming his own doubts, Justice Marshall relied upon established custom to support the acquisition of territory by discovery. As a consequence of this exclusive right of the discovering sovereign to extinguish native title, any conveyance by the tribes to individuals or to states without federal approval was void. Second, the Court derived the principle that Indian title was less than full fee simple ownership, an interest described as a "right of occupancy" subject to the "ultimate dominion" of the federal government.

Justice Marshall’s discourse, although eloquent and politically expedient, sanctioned the conquest of Indian lands. The view that a tribe’s right to its homeland constituted less than full fee simple title was rooted in a Eurocentric view of the inferiority of the Indian people, the idea that the character and religion of [the Indians] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy." The comments of one of Marshall’s colleagues, Justice Story, demonstrate the racist underpinnings of the discovery doctrine: “As infidels, heathens, and savages, [the Indian natives] were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations. The territory over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals." At the same time, however, Johnson and the cases that follow it challenged the nation to adopt an idealistic vision of Indian tribes as

30. Justice Marshall wrote, However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.
31. Johnson, 21 U.S. at 574 (“[Tribal] power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”).
32. Id. The tribes’ interest in their native lands is generally called “aboriginal Indian title,” “original Indian title,” or “Indian title.” See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) (holding that tribe’s aboriginal entitlement to occupancy was not a property right, but a usufructuary privilege terminable at congress’ discretion); Cohen, Original Indian Title, supra note 2, at 28.
34. Johnson, 21 U.S. at 572-73.
35. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 152, at 106 (5th ed. 1891).
semi-autonomous governments subject to federal, but not state, control. Although adoption of that vision may have been but a small victory for the Indian people, it has led to the practice of acquiring Indian lands through purchase rather than conquest. Through almost four hundred treaties, the United States has purchased over two million square miles of land from Indian tribes at an estimated cost of at least eight hundred million dollars. In exchange for this cession of territory, treaties reserve smaller tracts of property for exclusive tribal occupancy. In 1871, Congress ended the practice of treaty-making with Indian tribes. Thereafter, compacts between Indian people and the federal government took the form of agreements, executive orders, and statutes—"treaty substitutes" subject to the same special interpretative rules applied to treaties. After aboriginal title has been recognized by treaty or other agreement, Indian property rights may not be extinguished without compensation. Although tribes may have been formidable negotiating partners for some early treaties, in subsequent agreements the parties’ bargaining positions were vastly unequal and overreaching was common. In part to ameliorate the harshness of treaty negotiation, the Supreme Court has developed a number of doctrines for the implementation of treaties in a manner favorable to the tribes.

B. The Treaty of Guadalupe Hidalgo

Justice Marshall’s decision in Johnson v. M’Intosh—while clearly paving the way for American expansionism under the rule of law—was not without a certain amount of moral anguish and a disclaimer of judicial authority to re-direct the course of the nation. Just twenty years later,
however, the country was emboldened by a new sense of purpose, relatively untroubled by moral doubts. As journalist John O'Sullivan wrote in 1845 concerning the nation's westward expansion,

Away, away with all these cobweb tissues of rights of discovery, exploration, settlement, contiguity, etc. . . . The American claim is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federative self-government entrusted to us. It is a right such as that of the tree to the space of air and earth suitable for the full expansion of its principle and destiny of growth. 46

Prompted by this spirit of "manifest destiny," the United States declared war against Mexico on May 13, 1846, seeking to acquire the territories of California and New Mexico and to settle the boundaries of Texas. 47 At the war's conclusion in 1848, the Treaty of Guadalupe Hidalgo required Mexico to cede nearly half its territory to its northern neighbor. 48 The United States thus acquired over 529,000 square miles of land for the sum of fifteen million dollars. 49 The treaty has been criticized as "one of the harshest in modern history." 50

The final text of the treaty touches but briefly upon the subject of Mexican private property rights. 51 Article VIII promises to respect such rights, even when the landowner is absent:

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States . . . shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds where they please . . . .

46. WHITE, supra note 2, at 73.
47. RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO, A LEGACY OF CONFLICT 16-17 (1990) [hereinafter GRISWOLD]. See generally HAROLD HONGU KOH, THE NATIONAL SECURITY CONSTITUTION, SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 84 (1990). Professor Koh describes President Polk's presidency—during which the Mexican War occurred—as "an almost frantic period of territorial conquest" during which the national territory was increased by nearly fifty percent. Id.
48. See VICTOR WESTPHALL, MERCEDES REALES: HISPANIC LAND GRANTS OF THE UPPER RIO GRAND REGION 74 (1st ed. 1983). The United States also assumed over $3.2 million in claims against Mexico. Id. See also Bowden, supra note 3, at 468-70.
50. Malcolm Ebright, New Mexican Land Grants: The Legal Background, in LAND, WATER AND CULTURE, supra note 18, at 28 (quoting LUIS G. ZORRILLA, 1 HISTORIA DE LAS RELACIONES ENTRE MÉXICO Y LOS ESTADOS UNIDOS DE AMÉRICA 218 (1965)) (treaty was imposed on Mexico, not fairly negotiated). See also GRISWOLD, supra note 47, at 15 (quoting HUBERT HOWE BANCROFT, HISTORY OF MEXICO, 1824-1861 (1885)) (stating that the peace secured by the Treaty of Guadalupe Hidalgo "was nothing better than barefaced robbery").
51. For a discussion of proposed article X, see infra note 204 and accompanying text.
In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States.  

In addition, Article IX of the treaty guaranteed that Mexicans present in the territory would be "maintained and protected in the free enjoyment of their liberty and property" while awaiting American citizenship. Disagreement over the meaning of those promises has fostered over a century of litigation and legislation. In large measure, the courts deferred to the perceived intention of Congress with respect to the implementation of Article VIII, an intent that received an increasingly strict interpretation over time. Congress, for its part, regarded the treaty as not self-executing and established a number of mechanisms for the confirmation of Mexican property rights. Under each, the burden of proof was placed upon the Mexican landowner to demonstrate the legitimacy of his or her claim under Spanish and Mexican law. As a result of these and numerous other factors, a substantial portion of Mexican land claims were not recognized by the United States.

Article VIII committed the United States to the difficult enterprise of determining the legality of title to millions of acres, claimed under hundreds of land grants made by the Spanish and Mexican governments over a span of some 150 years. It is one thing to promise to respect those property rights; it is quite another to determine, acre-by-acre, the precise dimensions of that promise. As Justice Brewer noted in frustration:

> Few cases presented to this court are more perplexing than those involving Mexican grants. The changes in the governing power as well as in the form of government were so frequent, there is so much indefiniteness and lack of precision in the language of the statutes and ordinances, and the modes of procedure were in so many respects essentially different from those to which we are accustomed, that it is often quite difficult to determine whether an alleged grant was made by officers who, at the time, were authorized to act for the

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52. Treaty of Guadalupe Hidalgo, supra note 7, at art. VIII (emphasis added).
53. Id. For the citizenship options conferred by the treaty, see infra notes 103-106 and accompanying text.
54. See infra part IV.A.
55. See infra part IV.A.
56. See infra part IV.A.
57. See infra part IV.A.
58. The first recorded Spanish land grants in New Mexico date from 1693. See generally Westphall, supra note 48, at 17. One author has calculated that were 303 Spanish and Mexican land grants in the southwestern United States, involving a territory of over 35 million acres. Bowden, supra note 3, at 472.
government, and was consummated according to the forms of procedure then recognized as essential.59

The problem of distinguishing private Mexican property rights from the new addition to the United States public domain was exacerbated by the two nations' widely-divergent perceptions of property rights. In the conquered territory, titles were derived from land grants issued by the Mexican government and by Spain, its predecessor.60 Those grants—made to both individuals and to groups of settlers—were designed to reward military service and to encourage the settlement of new territories, securing them against Indian invasion and the colonization efforts of other nations.61 Through the implementation of the Treaty of Guadalupe Hidalgo, the United States' conception of individual, freely-alienable property rights was imposed upon a land-dependent culture in which common land ownership was vitally important to community's continued survival.62

The United States' westward expansion, then, affected the property of both Native American tribes and Hispanic communities. Despite that basic similarity, the courts have adopted a noticeably different legal approach toward the two groups. The next section will explore the fundamental point of divergence: the assumption of a federal trust duty toward the Indian tribes.

III. A UNIQUE OBLIGATION TOWARD INDIAN TRIBES:
THE FEDERAL TRUST DUTY

The expansionist efforts of the nineteenth century resulted in the presence of several conquered peoples within the United States. The Indian tribes—unlike any other ethnic group within the nation—had no possibility of retreat to an external "homeland" as their land base in the United States was reduced. The United States recognized tribal sovereignty to a limited extent63 and acknowledged a duty to protect the "domestic dependent nations" within its borders.64 The Mexican people, in contrast, retained a sovereign homeland despite the fact that the northern half of their nation had been severed from the rest of the country. As a result, the Hispanic communities remaining within the United States' new borders had neither sovereign nor protected status under their new government.

60. Spain claimed what is now the southwestern United States until 1821, when Mexico gained its independence. WHITE, supra note 2, at 3-4, 37-39.
61. LAND, WATER AND CULTURE, supra note 18, at 3.
62. Id. at 8-10. See also G. Emlen Hall, Land Litigation and the Idea of New Mexico Progress, in SPANISH AND MEXICAN LAND GRANTS AND THE LAW 48 (Malcolm Ebright ed., 1989) (discussing the "fundamentally different conceptions of real property" held by Anglos and Hispanos).
63. See United States v. Wheeler, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.").
64. This duty arose, in part, from "the tribes' limited inherent sovereignty and their corresponding dependency on the United States for protection." CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 4 (1993) [hereinafter DESKBOOK].
A. The Status of Indian Tribes as Wards of the Nation

In theory, Indian treaty rights merit special federal protection, expressed in terms of the United States' "trust duty" toward its Indian "wards": 65 In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. 66

In practice, the trust duty has been a double-edged sword. As explained in this section, although it has spawned numerous doctrines favorable to Indian tribes, the trust theory is also a doctrine rooted in prejudice that has been used to justify the sweeping exercise of federal authority over tribal affairs.

The origin of the federal trust duty has been traced generally to the opinion of Chief Justice Marshall in Cherokee Nation v. Georgia. 67 In Cherokee Nation, the Cherokees sought an injunction to restrain the State of Georgia from enforcing its laws within Cherokee territory. 68 The Court held that it lacked jurisdiction over the lawsuit because the Cherokee Nation was not a "foreign state" within the meaning of Article III, Section 2 of the Constitution. 69 Rather, asserted Justice Marshall, Indian tribes might better be described as "domestic dependent nations" occupying a territory conquered by the United States. 70 Justice Marshall emphasized that the association between the federal government and Indian tribes is sui generis, a relation that "resembles that of a ward to his guardian" 71 and one that is marked by several "peculiar and cardinal distinctions." 72 The tribes were described as conquered states within the boundaries of the United States. 73 Despite that fact, said Marshall, the Indian nations owe an allegiance to the United States and look to it for protection. 74

65. See generally Wilkinson & Volkman, Indian Treaty Abrogation, supra note 6, at 620-23.
66. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Historical evidence suggests that a similar guardianship was probably extended over the Indians by the governments of Spain and Mexico. See United States v. Candelaria, 271 U.S. 432, 442 (1926).
67. 30 U.S. (5 Pet.) 1 (1831). Marshall's statements in Cherokee Nation "implied that [federal power over tribes] . . . should be limited by a correlative duty akin to the fiduciary duty that a guardian owes a ward." Collins, supra note 2, at 259.
68. Cherokee Nation, 30 U.S. at 1.
69. Id. at 15-17. The Supreme Court has original jurisdiction over, inter alia, "controversies . . . between a State, . . . and foreign States . . . ." U.S. Const. art. III, § 2, cl. 1.
70. Cherokee Nation, 30 U.S. at 16.
71. Id. at 17.
72. Id. at 16.
73. Id. at 17 ("They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.").
74. Id. at 17 ("They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.").
The trust status has been both a blessing and a detriment to Native Americans. It has served as the conceptual basis for doctrines such as the canons of construction, under which Indian treaties are to be construed "in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people.'" It has protected Indian lands from loss due to the overreaching of the states and of non-Indian individuals by forbidding the conveyance of Indian lands without federal approval. Moreover, dependent status has been the basis for tribal exemption from the payment of certain state and federal property and income taxes. In addition, the federal government must provide a measure of protection to Indian property. Finally, where the federal government has breached its trust duty to the tribes, monetary damages and injunctive or declaratory relief are available.

The price for such protection has been dear. The tribes' dependent status is frequently premised upon a negative and degrading stereotype of Native Americans. In 1877, for example, the Supreme Court justified the federal trust obligation by its perception that "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."

75. See generally Robert N. Clinton, Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law, 46 Ark. L. Rev. 77, 129-34 (1993) (advocating the establishment of a "decolonized" Federal Indian law that retains those elements of the trusteeship justifying federal protection and redress for past harms, and that jettisons those aspects of the doctrine that justify the exercise of plenary federal authority over Indian tribes).
77. The Supreme Court has recognized that "[b]ecause of the local ill feeling, the people of the States where [Indian tribes] are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375, 384 (1886). See infra part VII.B (discussing the nonintercourse statutes).
78. See generally Collins, supra note 2, § 57.11(b)(1), at 298. Exemption from taxation is also based upon the tribes' inherent sovereign status as political bodies pre-dating the existence of the United States. Id.
79. See, e.g., Navajo Tribe of Indians v. United States, 364 F.2d 320, 322-23 (Ct. Cl. 1966) (under the facts of the case, the Department of the Interior was obligated to safeguard tribal property, with federal conduct judged under "the most exacting fiduciary standards").

Before 1946, the passage of a special congressional act was necessary to waive the federal government's sovereign immunity and to provide jurisdiction for Indian claims against the federal government. Getches, Wilkinson, & Williams, supra, at 311. With the passage of the Indian Claims Commission Act of 1946 (ICCA), 25 U.S.C. §§ 70-70v, specific legislative enactments were no longer necessary. Id. The ICCA offered only financial compensation, and not the return of tribal lands. Rosenthal, supra, at xi-xii. But see Linda S. Parker, Native American Estate, The Struggle over Indian and Hawaiian Lands 138-67 (1989) (describing tribes' limited success in rebuilding their land base through legislation, executive order, and judicial action).
Furthermore, by the late nineteenth century the idea of a federal obligation to protect Indian tribes had evolved into a plenary federal authority quite intrusive into the realm of Indian affairs. The Court made that subtle transition from protection to power, explaining that "[f]rom [the tribes'] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power." That plenary authority has been relied upon to justify the violation of treaties or other agreements with the Indian tribes, with the Court presuming that Congress' actions have been consistent with perfect "good faith" toward the tribes. Finally, citizenship was not extended generally to the Indian people until 1924, a delay partially attributable to the perception that Indians were weak and incapable of shouldering the responsibilities of citizenship. The trust duty has not been applied consistently to all Native Americans. In those territories previously governed by Mexico and Spain, for example, the courts have been unwilling, at times, to rigorously safeguard tribal rights.

B. The Uncertain Status of the Pueblo Indians

Despite the articulation of a legal framework for the special protection of Native Americans, it was not clear to what extent that protection applied to Indians in the territory acquired from Mexico. The case of the Pueblo Indians illustrates the fickle nature of a legal system premised upon racial stereotypes and the high psychological toll exacted for legal protection. In New Mexico, a portion of the territory ceded to the United States by Mexico had been occupied for centuries by Pueblo settlements. The Pueblos were sedentary communities, with established governments, irrigation systems, and patterns of community life, but exhibited also certain characteristics typical of Indians. As a result, the Court had great difficulty in determining whether or not the Pueblos were "Indians." If they were, then the federal trust duty would apply and any occupation of Pueblo lands without federal approval would be invalid. Conversely, if the Pueblos were not Indians, then they had the same rights as any other landowner to sell their property, including a vulnerability to the sharp-dealing of others.

82. United States v. Kagama, 118 U.S. 375, 384 (1886). See also infra part IV.B.1.
85. The grant of citizenship to Indians was facilitated by decisions such as United States v. Nice, 241 U.S. 591, 598 (1916) (holding that wardship and citizenship were not mutually exclusive conditions).
86. See infra parts III.B (concerning Pueblo Indians) and IV.A.2.c (concerning land claims in California).
87. See Cohen, supra note 9, at 93.
88. Id.
89. See, e.g., United States v. Joseph, 94 U.S. 614 (1876). See also supra part III.A (discussing the federal trust duty).
In 1869, the New Mexico territorial court determined that the Pueblo communities were not entitled to protection under statutes applicable to Indians.\(^9\) That holding was premised upon the court's perception that the Pueblos did not fit its negative image of Indian people and its consequent refusal to assent to "the transfer of eight thousand of the most honest, industrious, and law-abiding citizens of New Mexico to the provisions of a code of laws made for savages ..." \(^9\) The Pueblos' status as non-Indians was confirmed by the Supreme Court in *United States v. Joseph*.\(^9\) As a result of those decisions, "inhabitants of that territory [New Mexico]—and members of the bar who advised them—generally believed that the Pueblo Indians had the same unrestricted power to dispose of their lands as non-Indians whose title had originated in Spanish grants." \(^9\)

After New Mexico became a state in 1912, the Supreme Court changed course, holding in *United States v. Sandoval*\(^9\) that Congress had authority to prohibit the introduction of intoxicating liquors into Pueblo lands under its constitutional power to regulate commerce with the Indian tribes. In so doing, the Court implied that the Pueblos were indeed Indians subject to the federal guardianship. Again, the decision was rooted in racism:

> The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people.\(^9\)

The *Sandoval* decision cast doubt upon numerous non-Indian land rights within the exterior boundaries of the Pueblos, including Hispanic communities that had been established for generations.\(^9\)

The Court's indecision spanned nearly half a century, leaving uncertain the status of both Pueblo and Hispanic settlements.\(^9\) As stated by one

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90. United States v. Lucero, 1 N.M. 422, 440 (1869). See also United States v. Mares, 88 P. 1128 (N.M. 1907).
91. Lucero, 1 N.M. at 438.
92. 94 U.S. 614, 617 (1876). Joseph held that the Pueblos were not an "Indian tribe" entitled to protection under the Nonintercourse Act (discussed in *infra* part VII.B). Id. at 617.
94. 231 U.S. 28 (1913).
95. Id. at 39. The issue of whether the Pueblos were Indians within the meaning of the Nonintercourse Act was not confronted squarely until 1926. See United States v. Candelaria, 271 U.S. 432, 441-42 (1926) (holding that Pueblos are Indians for purposes of the Nonintercourse Act).
96. See Mountain States, 472 U.S. at 243. In reliance on the Joseph decision, "3,000 non-Indians had acquired putative ownership of parcels of real estate located inside the boundaries of the Pueblo land grants." Id. See generally G. Emlen Hall, The Pueblo Grant Labyrinth, in *LAND, WATER, AND CULTURE*, supra note 18, at 69, 98 (describing Hispanic settlements within Pueblo territory dating back to 1693).
97. Under the Spanish and Mexican governments, too, the status of Pueblo lands was ambiguous. See *LAND, WATER AND CULTURE*, supra note 18, at 69-71.
commentator, that ambiguity "has left New Mexico's two oldest, poorest, and most vulnerable populations—Pueblo Indians and Hispanos—pitted against one another in a never-ending battle for the extraordinarily pinched natural resources of what one Spanish priest correctly called 'this miserable kingdom.'" Finally, through the Pueblo Lands Act of 1924, Congress enacted a political compromise designed to provide a final resolution of the status of Pueblo lands. The Act provided, inter alia, for the establishment of a Pueblo Lands Board to resolve conflicting claims to Pueblo lands and for the award of compensation for the extinguishment of any Pueblo land rights. Although the Act established prospectively that Pueblo lands could not be acquired without federal approval, it also recognized non-Indian title gained previously through adverse possession by occupation initiated prior to certain specified dates. Thus, the Pueblo Indians gained belated and imperfect protection of their lands, but only after enduring the degradation of a stereotypical definition of "Indian." C. The Status of Former Mexican Citizens in the Conquered Territory

Under article VIII of the Treaty of Guadalupe Hidalgo, Mexicans in the ceded territory had the option of retaining their Mexican citizenship or of becoming citizens of the United States. Those who followed the latter course of action, probably a majority of the territory's occupants, found themselves in a particularly vulnerable situation. Because they were no longer citizens of Mexico, that government owed them no duty of protection. At the same time, the federal government of the United States extended no special guardianship to help its new citizens adjust to life under an unfamiliar political regime. While they were awaiting American citizenship, former Mexican citizens' rights and property were insecure and subject to discriminatory attack. During the California gold rush of the mid-nineteenth century, for example, the fear that "foreigners"—many of whom were native to California—would monopolize gold profits prompted violence, harassment, and vigilantism against those of Mexican

98. Id. at 71. Hall describes the harsh, arid land of New Mexico as "resource-poor, scenery-rich." Id. at 69.
100. Id. §§ 2, 6, 43 Stat. at 637.
101. Id. §§ 4, 17, 43 Stat. at 641-642.
102. Through the mechanism established by the Pueblo Lands Act, about 80% of non-Indian claims within the Pueblos, involving some 50,000 acres, were approved. LAND, WATER, AND CULTURE supra note 18, at 120-21.
103. Act of Feb. 2, 1848, 9 Stat. 922, 929. Mexicans who remained in the ceded territory without declaring within one year their intention to remain Mexican citizens were presumed to have elected to become citizens of the United States. Id.
104. See GRISWOLD, supra note 47, at 63-66.
105. Although litigants have argued that the Treaty of Guadalupe Hidalgo created a federal trust duty akin to the guardianship extended over Native American tribes, at least one lower court has rejected that argument. See, e.g., Havasupai Tribe v. United States, 752 F. Supp. 1471, 1488 (D. Ariz. 1990) (treaty of Guadalupe Hidalgo creates no specific fiduciary duty owed by the federal government).
Unlike the case with Indian lands where the Indian Claims Commission was created to remedy treaty violations, the United States has never established an Hispanic Claims Commission to allow former Mexican citizens and their descendants to seek compensation for the wrongful taking of Hispanic property. At the same time, it is unlikely that even meritorious claims could prevail under existing federal legislation due to strict statutes of limitation. In *Alliance of Descendants of Texas Land Grants v. United States*, for example, the court acknowledged that the descendants of land grant owners may well have possessed actionable claims against the United States for the taking of approximately twelve million acres of land in southern Texas. Nevertheless, those claims were barred by the six year statute of limitations applicable to the Court of Federal Claims.

In sum, although both the Indian and Mexican people were conquered by the United States, only the former received special legal protection from their new government or compensation for the wrongful taking of property. In part, perhaps this disparate treatment was a political response to the dual status of the Hispanics as both conquistadors and a conquered people. As one historian has explained, “beginning the story of Occupied America . . . in 1848, with the [Treaty of Guadalupe Hidalgo] fudged a vital fact: the Hispanic presence in the Southwest was itself a product of conquest, just as much as the American presence was. The Pueblo Indians found themselves living in Occupied America long before the Hispanics did.” This equitable context against which Hispanic and Indian property rights are asserted is relevant insofar as it influences the

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106. *Griswold*, *supra* note 47, at 67-69. The Mexican government did intercede on behalf of its former citizens, but its efforts were generally unsuccessful. *Id.* One historian notes the irony of the prejudice against Mexicans within the United States: “It is surely one of the greater paradoxes of our time that a large group of these people [Mexicans and Mexican-Americans], so intimately tied to the history of North America, should be known to us under the label ‘aliens.’” *Limerick*, *supra* note 17, at 254-58. Professor Limerick asks provocatively, “Is today's Mexican immigrant an illegitimate intruder into territory that was for two and a half centuries a part of Mexico, before conquest made it American?” *Id.*

107. See *supra* note 80.


110. *Id.* at 839.

111. *Id.* at 841.

112. *Limerick*, *supra* note 17, at 255.
national political will and lobbying forces in support of the protection of conquered peoples within the United States.\textsuperscript{113}

IV. THE DIMINISHMENT OF TREATY PROMISES BY SUBSEQUENT FEDERAL LEGISLATION

Despite the timeless rhetoric invoked by many treaties, the promises they contain are often ephemeral.\textsuperscript{114} Frequently, Congress has minimized or superseded treaty pledges by later-enacted statutes. The courts have supported this practice under several legal theories, recognizing generally the equality of treaty and federal statute and favoring the later in time in cases of conflict.\textsuperscript{115} Although the underlying international obligation remains intact and redressable through diplomatic channels, such treaties would no longer create duties under domestic law enforceable in the courts of the nation.\textsuperscript{116}

The equality of treaty and statute in domestic law has devalued the property rights protections contained in the Treaty of Guadalupe Hidalgo and in Indian treaties. In the former case, the property provisions are not regarded as “self-executing,” and therefore do not take effect until Congress has passed implementing legislation.\textsuperscript{117} With respect to Indian treaties, property guarantees have been “abrogated” frequently by subsequent inconsistent legislation.\textsuperscript{118}

A. Federal Legislation and the Treaty of Guadalupe Hidalgo

The Treaty of Guadalupe Hidalgo guaranteed that private property rights would be “inviolably respected” and that the inhabitants of the conquered territory would be “maintained and protected in the free enjoyment of their liberty and property . . . .”\textsuperscript{119} The Supreme Court expressed its confidence that the United States would live up to those solemn promises:

[The United States] have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded.\textsuperscript{120}

\textsuperscript{113} See, e.g., LAND, WATER AND CULTURE, supra note 20, at 313, 345 (discussing the history of land and water rights in northern New Mexico and concluding that “[i]t is therefore no mere coincidence that while an Anglo lobby stepped forth to advocate the Indian land cause [in Taos], none did so for the Hispano”).

\textsuperscript{114} See, e.g., Treaty with the Cherokees, May 6, 1828, Preamble, 7 Stat. 311 (establishing a “permanent home” for the Cherokee Nation and guaranteeing that it will remain theirs “forever”).

\textsuperscript{115} See LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 156-57, 163-64 (1972) [hereinafter FOREIGN AFFAIRS]. Professor Henkin argues that such equality was not inevitable and cannot be supported on the basis of Article VI of the Constitution. Id.

\textsuperscript{116} 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. b (1986).

\textsuperscript{117} See infra part IV.A.

\textsuperscript{118} See infra part IV.B.

\textsuperscript{119} Treaty of Guadalupe Hidalgo, supra note 7, at arts. VIII, IX.

\textsuperscript{120} United States v. Auguisola, 68 U.S. (1 Wall.) 352, 358-59 (1863) (affirming confirmation of Mexican land grant in California).
Despite such generous pronouncements, many property rights arising under Spanish and Mexican land grants were not recognized by the United States. In California, approximately twenty-seven percent of land grant claims were rejected; in the territory of New Mexico, some seventy-six percent of such claims were rejected.\textsuperscript{121}

These land loss statistics can be attributed, in significant part, to the fact that the Treaty of Guadalupe Hidalgo was not regarded as self-executing.\textsuperscript{122} As a result, Mexican property rights were not ratified by the treaty itself but had to await congressional action for their confirmation. Thus, the implementing legislation and not the treaty became effectively the "law of the land."\textsuperscript{123} That legislation, in turn, required Mexican landowners to assume the burden of proving the validity of their titles and to negotiate a maze of legal requirements implemented by a system and in a language that were foreign to them.\textsuperscript{124} Even confirmed land grants, moreover, were subsequently lost due to the enormous costs of litigation.\textsuperscript{125}

As this section will discuss, courts virtually ignored the language of the treaty in their adjudication of Hispanic land claims. Instead, judicial interpretation focused almost exclusively upon the treaty's implementing legislation—statutes that received an increasingly strict interpretation over time.\textsuperscript{126} The tone of morality and judicial activism relatively common in early Indian treaty cases\textsuperscript{127} was gradually replaced by an amoral pragmatism and by consistent deference to the perceived intent of Congress.

1. The Theory of Self-Executing Treaties

Although the United States Constitution provides that treaties are "the supreme law of the land," a like status has been assigned to federal statutes.\textsuperscript{128} In an effort to establish a hierarchy among the various types of federal law, the Supreme Court has created the doctrine of the self-

\textsuperscript{121} Bowden, \textit{supra} note 3, at 472, 497.
\textsuperscript{122} Land claims were also lost due to fraud, ambiguous boundary descriptions, and size limitations imposed by the laws of Spain and Mexico. \textit{See generally} \textit{Land, Water, and Culture, \textit{supra} note 18, at 30-31; Victor Westphall, Fraud and Implications of Fraud in the Land Grants of New Mexico, 49 N.M. Hist. Rev. 189, 214 (1974) (arguing that exaggerated land grant claims involved greed rather than fraud, and concluding that "the greater crime was the apathy of Congress in allowing grants to remain for so long in an unsettled condition"); Clark Knowlton, Causes of Land Loss Among the Spanish Americans of Northern New Mexico, 1 \textit{Rocky Mt. Soc. Sci. J.} 201 (Apr. 1964).}
\textsuperscript{123} \textit{See Henkin, \textit{supra} note 115, at 157.}
\textsuperscript{124} \textit{See, e.g., Whitney v. United States, 167 U.S. 529, 547 (1897) (claimants must prove validity of alleged grant by a fair preponderance of the evidence).}
\textsuperscript{125} \textit{Griswold, \textit{supra} note 47, at 73-74, (citing Teschemacher v. Thompson, 18 Cal. 11 (1861) (asserting that land owners in California had been forced to dispose of their property at half its value to pay legal expenses); Bowden, \textit{supra} note 3, at 509-10 (describing plight of the descendants of land grantees, in which the cost of perfecting the title to their lands would in many cases exceed its fair market value).}
\textsuperscript{126} \textit{See infra} parts IV.A.2 and IV.A.3.
\textsuperscript{127} \textit{See infra} part IV.B.
\textsuperscript{128} "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." \textit{U.S. Const. art. VI, cl. 2.}
executing treaty. The principle was first enunciated in 1829 by Chief Justice Marshall in *Foster v. Neilson*. Under that doctrine and contrary to the practice of other western nations, the United States recognizes that treaties can be effective and binding upon domestic courts without legislative implementation.

In *Foster*, plaintiffs claimed land in West Florida (now Louisiana) under a grant from the King of Spain made prior to the transfer of that territory to the United States. The 1819 Treaty of Cession warranted that all Spanish land grants made prior to a specified date "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty." That provision, said the Court in denying plaintiffs' right to the property, was merely a promise of future action by the legislature, and not a present rule for the Court. Despite its determination that the treaty in issue was not effective without subsequent legislation, however, the Court recognized the theoretical possibility under United States law of a self-executing treaty:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Four years later, in *United States v. Percheman*, Justice Marshall changed his position and held that the 1819 treaty with Spain was in fact self-executing. That reversal was based upon new evidence demonstrating that the Spanish version of the treaty should have been translated

129. 27 U.S. (2 Pet.) 253, 314 (1829).
130. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 73 (1988) (stating that the concept of the self-executing treaty is a significant contribution made by the United States to international law); HENKIN, supra note 115, at 156 n.94 (discussing the role of treaties in western parliamentary systems); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (1986) (few states other than the United States recognize a distinction between self- and non-self-executing treaties).
132. *Id.* (emphasis added).
133. *Id.* at 314-15.
134. *Id.*
135. 32 U.S. (7 Pet.) 51 (1833).
as land grants "shall remain ratified," rather than "shall be ratified." 3

As Foster and Percheman illustrate, the classification of treaties as either self-executing or non-self-executing is an inexact science. In the absence of specific guidance, policy considerations can play an influential role in a court's determination. 3 In elevating specific legislative procedures over the general property guarantees of the Treaty of Guadalupe Hidalgo, courts were swayed by a desire to separate Hispanic property from the public domain as quickly as possible in order to facilitate westward expansion. 138 Ironically, then, the theoretical framework of self-executing treaties emerged first in a Spanish land grant case. The theory was not applied in that case, however, nor in numerous cases construing Spanish and Mexican land grants under the subsequent Treaty of Guadalupe Hidalgo.

2. Land Claims in California: Distinguishing Perfect from Imperfect Title

The land claims process in California illustrates clearly the disparity between generous treaty promises and stinting statutory implementation. There, the treaty's promise of indefinite protection was reduced by statute to a period of merely two years. Under the California Land Settlement Act of 1851, 139 "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" 140 was required to submit such claim for adjudication before a special three-person commission. 141 That provision was broadly construed, with "each and every person" encompassing Hispanic land grantees, 142 Indian tribes, 143 and the State of California itself. Failure to present a claim within two years after the Act's passage would result in a harsh penalty—the claimed property would be deemed to belong to the public domain of the United States. 145 The accelerated claims adjudication mandated by the Act can be attributed, in part, to the discovery of gold in California and the resultant pressure by gold prospectors to open lands to mining exploration. 146 Out of the 813 claims presented,

136. Id. at 69 (emphasis added).
137. Recognizing this ambiguity, in some cases the Senate has stated specifically its intent as to whether or not a particular treaty is self-executing. See Lori Fisler Damrosch, The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties, 67 CHI.-KENT L. REV. 515, 516-17 (1991).
140. Id. § 8 (emphais added).
141. Id. § 1.
142. See infra part IV.A.2.b.
143. See infra part IV.A.2.c.
144. See infra part VI.A.
145. Id. at § 13 ("That . . . all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States.").
the California commission confirmed title to 604 of them, involving some nine million acres of property.\textsuperscript{147}

\textbf{a. Decisions of the California Supreme Court}

The Act's two-year limitation period, requiring the forfeiture of lands not presented promptly for adjudication, created a potential conflict with the treaty guarantee of inviolable respect for property rights. The state supreme court, however, minimized such conflict through a restrictive interpretation of the Act under which only imperfect titles required adjudication before the land claims commission. In \textit{Minturn v. Brower},\textsuperscript{148} the California Supreme Court held that a land grant from the Mexican government—complete and perfect under the terms of Mexican law—was not subject to forfeiture for failure to present the grant for adjudication before the land claims commission. In reaching that decision, the court distinguished between perfect and imperfect land titles. The Treaty of Guadalupe Hidalgo was construed as self-executing such that perfect grants "stood confirmed by the treaty acting at the time of its creation, \textit{eo instanti}, directly upon the subject" and need not be presented to the land claims commission for confirmation.\textsuperscript{149} Imperfect or inchoate grants, in contrast, required confirmation by the new government.\textsuperscript{150} Although the United States acquired the Mexican territory "charged with the duty of carrying out in good faith the obligations of the former Government," it could justly "prescribe the proceeding necessary to accomplish the duty which devolved upon it to invest the grantee with a perfect title."\textsuperscript{151}

Until 1889, the California Supreme Court exempted perfect land grants from the Act's adjudication requirement.\textsuperscript{152} Such accommodation of statute and treaty comported with the United States Supreme Court's general admonition early in that century that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."\textsuperscript{153} It was also consistent with previous land grant decisions under earlier treaties in which the United States Supreme Court stated that under the law of nations, perfect titles were "in intrinsically valid . . . and . . . they need[ed] no sanction from the legislative or judicial departments of this country."\textsuperscript{154}

\textsuperscript{147} Griswold, \textit{supra} note 47, at 73-74. All decisions of the commission could be appealed to federal district court and, thereafter, to the United States Supreme Court. Act of March 3, 1851, ch. 41, §§ 9-10, 9 Stat. 631, 633. In their determinations, courts were to be guided by the treaty, international law, principles of equity, and the laws, usages, and customs of Spain and Mexico. \textit{Id.} at § 11.

\textsuperscript{148} 24 Cal. 644, 662-63 (1864).

\textsuperscript{149} \textit{Id.} at 663, 672.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} See Botiller v. Dominguez, 16 P. 241 (1887), rev'd, 130 U.S. 238 (1889).

\textsuperscript{153} Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (interpreting federal statute in a manner that avoids conflict with international law principles).

\textsuperscript{154} United States v. Wiggins, 39 U.S. (14 Pet.) 334, 350 (1840) (construing 1819 treaty under which Spain ceded Florida to the United States). \textit{See also} United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (perfect titles are protected by the law of nations and are not subject to investigation and confirmation by United States government); United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832) (same).
b. Botiller v. Dominguez

The issue decided in Minturn first reached the United States Supreme Court in the 1889 case of Botiller v. Dominguez. In Botiller, a Mexican land grantee brought an action in ejectment to recover possession of the grant from settlers claiming title under the United States' homestead laws. The plaintiff's land grant was undisputedly complete and perfect under the laws of Mexico, but had not been presented to the land claims commission for confirmation. In reversing the decision of the California Supreme Court, the United States Supreme Court held "that no title to land in California, dependent upon Spanish or Mexican land grants can be of any validity" unless presented to and confirmed by the board of land commissioners within the time prescribed by statute. In so holding, the Court invalidated a perfect title that had been granted by Mexico twenty years previously.

Botiller is an important case, documenting the Court's emerging pragmatism and increased willingness to defer to Congress in matters involving Spanish and Mexican land grants. Half a century earlier, Chief Justice Marshall had considered a similar statute governing land claims in the Florida territory acquired from Spain in 1819. That legislation, similar to the Act at issue in Botiller, established a commission for the settlement of land claims in Florida and provided that all claims not filed with the commissioners within one year were void. Justice Marshall stated that "[i]t is impossible to suppose, that Congress intended to forfeit real titles, not exhibited to their commissioners within so short a period." He supported that position with a strained interpretation of the statute such that "[t]he provision, that claims not filed with the commissioners [within one year] should be void, can mean only that they should be held so by the commissioners, and not allowed by them. Their power should not extend to claims filed afterwards."

The Botiller Court, in contrast, clearly believed that Congress intended to forfeit real titles not presented to the California commission within two years. Its reasoning was influenced heavily by practical concerns created by the discovery of gold in California. The resulting "rush of emigration almost unparalleled in history" created a pressing need to
distinguish private lands from those belonging to the government. The 1851 statute, said the Court, was well tailored to accomplish that purpose provided that it was applied to all Hispanic land claims—perfect and inchoate, legal and equitable. An expansive application of the statute, reasoned the Court, would avoid past difficulties encountered by the United States under cessions of territory in Florida and Louisiana, where attempts to distinguish private lands from the public domain "failed for want of a clear, satisfactory and simple mode of doing it, by bringing all the parties before a tribunal essentially judicial in its character, whose decisions should be final without further reference to Congress."

In rejecting plaintiff’s argument that the California statute was invalid because it conflicted with the Treaty of Guadalupe Hidalgo, the Court considered neither the language of the treaty, nor whether a conflict actually existed, nor possible statutory interpretations that would avoid such a conflict. Instead, the Court simply read the statute literally and placed all responsibility for the consequences upon Congress:

[S]o far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard.

In retrospect, Botiller marked the decline of judicial activism for the protection of Spanish and Mexican land grants.

c. Indian Land Claims in California

The Botiller rationale was applied specifically to Native Americans in Barker v. Harvey, despite a contrary strain of law supporting a protective federal guardianship over Indian tribes. In Barker, plaintiffs claiming land under a confirmed Mexican grant brought a quiet title action against

164. Botiller, 130 U.S. at 244. "It is . . . clear that the main purpose of the [California] statute was to separate and distinguish the lands which the United States owned as property, which could be sold to others, . . . from those lands which belonged, either equitably or legally, to private parties under a claim of right derived from the Spanish or Mexican governments." Id. at 249.
165. Id. at 249.
166. Id. at 251-52.
167. Id. at 247.
168. See also Florida ex rel. Mitchell v. Furman, 180 U.S. 402 (1901) (holding that a Florida statute, like that of California, applied to all claims, whether perfect or imperfect); Thompson v. Los Angeles Farming & Mill Co., 180 U.S. 72 (1901) (California Act was intended to provide repose to property titles in addition to fulfilling treaty obligations to individuals).
Mission Indians claiming a right of permanent occupancy to the same lands. The United States Supreme Court affirmed the state court’s confirmation of title in the plaintiffs, finding that plaintiffs’ title was unencumbered by any right of the Indians. The Court’s holding was influenced strongly by the specific factual circumstances of that case, under which admissible evidence suggested that the Indians had abandoned their occupancy of the claimed territory. In broader language, however, the Court indicated that the Indian right of occupancy should be considered as a “right or title derived from the . . . Mexican government” even though such right may antedate the establishment of the Mexican government. Therefore, under the California Act, the Indians’ right of occupancy was deemed abandoned for failure to present it to the land claims commission for adjudication. In declining to take special action to protect its Indian wards, the Court described the federal trust duty as political in nature.

Although the Barker decision was the subject of future challenge, it remained a viable precedent for the invalidation of Indian claims not presented to the California commission. In United States v. Title Ins. & Trust Co., the Court declined an invitation to overrule Barker because of the unsettling effect it would have upon property titles in California:

The question whether that decision [Barker] shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California . . . . In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision . . . . It has become a rule of property, and to disturb it now would be fraught with many injurious results.

That solicitude for the security of land titles apparently did not extend to Native American property. In a casual aside, the Court remarked, “[b]esides, . . . the scattered Mission Indians have adjusted their situation

170. Barker, 181 U.S. at 482.
171. Id. at 499.
172. The California land act required that “each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners” for adjudication.” § 8, 9 Stat. at 632 (emphasis added). All such claims not presented to the commission within two years would be “deemed, held, and considered as part of the public domain of the United States . . . .” § 13, 9 Stat. at 633.
173. The Court stated, “[i]f these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration . . . .” Barker, 181 U.S. at 491.
174. “It is undoubtedly true that . . . this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had.” Id. at 492.
175. 265 U.S. 472 (1924).
176. Id. at 486.
to it [the United States’ denial of their claim to the occupancy and use of the disputed lands] in several instances.’’

3. Land Claims in the New Mexico Territory

California land decisions established the relative superiority of federal legislation over the Treaty of Guadalupe Hidalgo in the domestic courts of the nation. The extension of this principle to land claims in New Mexico—under an even stricter set of statutory directives than those established for California—served to weaken further the property guarantees contained in the treaty. In particular, New Mexico land decisions engaged in an increasingly technical interpretation of Mexican law. Under that view, numerous grants were rejected as incomplete or imperfect and community land grants were stripped of their common lands.

In 1854, Congress created the office of the surveyor general to settle the status of Spanish and Mexican land grants in the Territory of New Mexico, which included most of the present-day southwest, excluding California. The surveyor general was directed to investigate land claims and to issue recommendations to Congress whether to confirm or reject such claims. Until Congress took final action, the land remained withheld from sale. Unlike California, where the discovery of gold served as a catalyst for the prompt resolution of land claims, resource-poor New Mexico was unable to command the full attention of Congress. The time and finances of the surveyor general, for instance, were vastly inadequate for this task of determining title to some fifteen million square miles of territory. Moreover, congressional action upon the surveyor general’s recommendations was notoriously slow. By 1880, for example, Congress had resolved only 150 of the one thousand recommendations made by the surveyor general. By 1890, some 116 grants were still

177. Id. See also Chunie v. Ringrose, 788 F.2d 638, 644 (9th Cir. 1986) (holding that the Chumash Indians had lost their right to California islands for failure to assert claims in the California land confirmation proceedings).
178. See infra notes 201-207 and accompanying text.
179. See infra part V.B.
180. See Act of July 22, 1854, ch. 103, 10 Stat. 308.
181. New Mexico was the oldest province on the northern border of the Spanish empire in the Americas. WESTPHALL, supra note 48, at 7. See also D. COLE, HANDBOOK OF AMERICAN HISTORY 121 (1968).
182. § 8, 10 Stat. at 309.
183. Id.
184. See WESTPHALL, supra note 48, at 87.
185. See GRISWOLD, supra note 47, at 77; WESTPHALL, supra note 48, at 86 (describing the “impossible task” of the surveyor general and arguing that Congress was “entirely unreasonable to expect one man on a part-time basis to cope with the extremely difficult land grant problem in New Mexico”).
186. GRISWOLD, supra note 47, at 78. Congress was reluctant to act due to the complexity of land grant issues, the large size of many land grants claimed in New Mexico, and a pervasive feeling that many unsettled land claims were fraudulent. See Michael J. Rock, The Change in Tenure New Mexico Supreme Court Decisions Have Effected Upon the Common Lands of Community Land Grants in New Mexico, 13 Soc. Sci. J. 53, 55 (1976).
As a result of this congressional inattention, many titles remained uncertain during the thirty-six years that the surveyor general system remained in existence. In 1891, Congress established the Court of Private Land Claims to resolve the backlog of pending claims. The court was authorized to determine the validity of title and the boundaries of any lands claimed under a Spanish or Mexican grant in the territories of New Mexico, Arizona, and Utah and in the states of Nevada, Colorado, and Wyoming. Appeals from the land claims court were to be heard by the United States Supreme Court. In their decisions, both lower and appellate courts were to be guided by the treaty, international law, and the laws and ordinances of Mexico. Unlike the California Act, however, equity and the usages and customs of the Spanish and Mexican government were not listed specifically as sources of law, an omission that contributed to a restrictive interpretation of grants generally and also to the loss of the common lands of community grants. As a result, the court refused to confirm land grants where the letter of the Mexican law had not been observed, even if customary practices had been followed. Simultaneously, the court avoided responsibility for the rejection of numerous land grants. As the Governor of New Mexico stated in 1903:

Many grants, made perhaps a century before the Court of Private Land Claims] was established, had existed with titles undisputed by the people and by the Government under which they were granted, and in strict equity were justly entitled to be held good, but had to be rejected by the court, which required proof of strict legal authority in the granting powers, and a rigid compliance with the law in the form and manner of its execution.

Another dissimilarity between the two acts concerns the treatment of perfect land claims. The California statute was silent in that regard,

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187. Ebright, supra note 50, at 41 (describing the "complete breakdown of the surveyor general system").
188. Westphall, supra note 48, at 87.
190. §§ 6-7, 26 Stat. at 856-57.
191. § 9, 26 Stat. at 858.
192. § 7, 26 Stat. at 857.
193. Id. See infra part V.B.
194. Earlier land grant decisions had recognized that precise compliance with the law was not always possible under frontier conditions. See United States v. Sutherland, 60 U.S. (19 How.) 363 (1856) (confirming land grant even though neither boundary nor quantity was defined specifically, and placing imprecise observance of the law into historical perspective); United States v. Arredondo, 31 U.S. (6 Pet.) 691, 714-15 (1832) (construing 1819 treaty with Spain and presuming congress intended for courts to consider Mexican custom and usage, equal with written law, in their decisions); John R. Van Ness, Spanish American vs. Anglo American Land Tenure and the Study of Economic Change in New Mexico, 13 Soc. Sci. J. 45, 48 (1976): [T]he exigencies of the harsh frontier environment during the eighteenth and early nineteenth centuries and the understandably limited capabilities of the small political and judicial administration in New Mexico made it impractical, if not impossible, to abide by the letter of the law.
fostering uncertainty and litigation.\textsuperscript{196} The 1891 Act—reversing the course taken by the Supreme Court in Botiller\textsuperscript{197}—made clear that persons "claiming lands... under a title derived from the Spanish or Mexican Government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply... for a confirmation of such title."\textsuperscript{198} Such perfect title, however, remained vulnerable until judicially confirmed, during which time the United States could convey the property to another claimant.\textsuperscript{199} In such cases, the first conveyance remained valid and the Hispanic claimant could petition for financial compensation for the reasonable value of the lands.\textsuperscript{200}

Claims "not already complete and perfect"—that is, those land grants that required additional action by the Spanish or Mexican governments before good title could be conveyed—were also given strict treatment.\textsuperscript{201} Although the Act gave the Court of Private Land Claims jurisdiction over imperfect land grants, all such claims were "deemed... to be abandoned and shall be forever barred" unless presented for adjudication within two years.\textsuperscript{202} Even timely claims, moreover, were subject to numerous technical objections and to the Supreme Court's narrow interpretation of the jurisdiction conferred by the Act. Those limitations were derived from the Act's admonition that:

No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States...

No... grant... to acquire land made upon any condition... either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such... grant...\textsuperscript{203}

\textsuperscript{196} See supra part IV.A.2.
\textsuperscript{197} See supra part IV.A.2.b.
\textsuperscript{198} § 8, 26 Stat. at 857. See Ainsa v. New Mex. & Ariz. R.R., 175 U.S. 76, 90 (1899) ("A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the position of one under the peculiar acts of Congress in relation to California... ").
\textsuperscript{199} See infra part VII.A.1.; United States v. Martinez, 184 U.S. 441 (1902) (recognizing validity of title granted by the United States to third parties before filing of petition for land grant confirmation).
\textsuperscript{200} § 14, 26 Stat. at 861.
\textsuperscript{201} See § 6, 26 Stat. at 856.
\textsuperscript{202} § 12, 26 Stat. at 859.
\textsuperscript{203} § 13, cl. 1, 8, 26 Stat. at 860.
That provision effectively vitiates any hope that the new government would assume responsibility for the perfection of land grants not completed by the former government. In the original text of the treaty, Article X would have protected explicitly such inchoate titles, providing additional time for their perfection under the new government. As a condition of treaty ratification, however, the United States deleted Article X.204

The legislature, then, gave with one hand and took away with another. That is, although the 1891 act conferred jurisdiction over inchoate claims, it was a jurisdiction almost swallowed by restrictions. The Court interpreted that legislative schizophrenia in a manner that made it virtually impossible for a claimant to obtain confirmation of an incomplete land grant. For example, the Court routinely disclaimed jurisdiction to confirm land grants where conditions precedent or subsequent had not been performed by the time the Mexican territory was ceded to the United States.205 Similarly, petitions were denied on the basis that the granting official lacked authority to make valid land grants, even though that official may have customarily exercised such power.206 Likewise, land grants were not confirmed for failure to comply with numerous technicalities found to be part of Spanish and Mexican law during the relevant time period.207 In many instances, however, the determination of the

204. See Griswold, supra note 47, at 45-49, Appendix I; Interstate Land Co. v. Maxwell Land Grant Co., 139 U.S. 569, 588-90 (1891) (construing elimination of article X as express refusal to recognize imperfect land titles).

205. See United States v. Sandoval, 167 U.S. 278, 294 (1897) (holding that Court of Private Land Claims lacks jurisdiction to confirm grant of a specific quantity of land within described outboundary, where smaller tract had not been specifically located); Ainsa v. United States, 161 U.S. 208, 234 (1896); Interstate Land Co. v. Maxwell Land Co., 139 U.S. 569, 580-82, 587-88 (1891) (instruments of title under which Mexican government “assigned” and “granted” a 60 million acre tract of land to contractor do not constitute a complete land grant where contractor failed to satisfy condition requiring the establishment of a colony thereon). Compare United States v. Fremont, 59 U.S. (18 How.) 30, 39 (1856) (in litigation under California Act, Court finds that conditions subsequent “by the treaty, ceased to have any binding force; and, therefore, they were struck from the grant as being no necessary part thereof”).

206. See United States v. Elder, 177 U.S. 104 (1900) (holding that Mexican prefect and justice of the peace were not authorized to make land grants, even though those officials apparently assumed they had such authority); Hayes v. United States, 170 U.S. 637, 643-48 (1898) (declining to confirm grant made 70 years previous where the granting authority—the territorial government of New Mexico—was found to be without authority to make land grants); Crespin v. United States, 168 U.S. 208 (1897) (finding that prefect lacked authority to make land grants, even though similar grants may have been confirmed by congress or have received the approval of the Mexican authorities). Cf. United States v. Peralta, 60 U.S. 343 (1856) (under California Act, Court presumes Spanish official was duly authorized to make land grants); Fremont v. United States, 58 U.S. (17 How.) 541, 561-62 (1854) (under California Act, where official apparently deemed himself authorized to dispense with the usual conditions for land grants, Court presumes that the power he exercised was lawful).

207. See Elder, 177 U.S. at 109 (land grant rejected where mere approval by the Mexican territorial governor of grant petition, coupled with action of the legislative body, was insufficient to establish validity of title under Mexican law); Bergere v. United States, 168 U.S. 66, 73 (1897) (land grant rejected as imperfect where petitioner failed to prove that Mexican governor had given final approval to grant, even though lower official had made report and delivered possession of land 4 years previous). Cf. United States v. Sutherland, 60 U.S. (1 Wall) 363, 365 (1856) (in litigation under California Act, the Court has no discretion to “defeat just claims . . . by stringent technical rules of construction”); United States v. Auguisola, 68 U.S. 352, 358 (1863) (under the California Act, rights of grantees are not dependent upon “the nicest observance of every legal formality”).
TREATIES OF CONQUEST

substantive content of those laws was based upon a compilation and translation prepared under the authority of Matthew Reynolds, the chief litigator for the United States in opposing petitions presented to the Court of Private Land Claims. Despite that potential conflict of interest, Reynolds’ compilation remained a primary reference source for the Court.

The Court’s narrow interpretation of its authority under the 1891 act represents a departure from an earlier judicial willingness to complete claims under the new government. In an appeal from the California Land Claims Commission, for example, the Court asserted that the Treaty of Guadalupe Hidalgo pledged the United States’ protection of all rights of property, legal or equitable, perfect or imperfect, executory or executed. Just five years later, the Court engaged in a different interpretation of the same treaty. In a decision under the 1891 Act, the Court determined that the treaty protected inchoate rights only where the claimant “could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States . . . .” The Court assumed no responsibility for any inequities caused by its interpretation, placing the blame for non-completion of land grants upon the former government:

It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor nation may have theretofore committed upon every individual.

In sum, the generous promises of the Treaty of Guadalupe Hidalgo were minimized by the passage of increasingly strict implementing statutes and by a correspondingly rigid judicial interpretation of that legislation.

B. Federal Legislation and Indian Treaties

The property guarantees of Indian treaties, like those contained in the Treaty of Guadalupe Hidalgo, have been rendered less effective by subsequent federal legislation. It is now well established that Congress has plenary authority over tribal affairs, including the power to abrogate unilaterally Indian treaties. The harshness of that plenary power doctrine has been softened to some degree by judicially-created canons of construction and by a congressionally-recognized duty to provide monetary compensation for treaty violations. Judicial activism, however,

208. See Land, Water and Culture, supra note 18, at 44-45.
209. Id.
212. Cessna v. United States, 169 U.S. 165, 186 (1898) (rejecting land claim, in part because conditions subsequent were not performed).
213. See infra part IV.B.1.
214. See infra part IV.B.2.
215. See supra notes 42, 80 and accompanying text.
has been sporadic, making the courts the "fair-weather friend" of Indian tribes. 216

1. The Plenary Power of Congress to Abrogate Indian Treaties

The "later-in-time" rule of treaty abrogation was first articulated by the Supreme Court in The Cherokee Tobacco217 decision in 1870:

The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.218

The Cherokee Tobacco Court provided little analysis to support its opinion, but relied heavily upon Taylor v. Morton,219 the decision of a Massachusetts circuit court.

The rule was amplified by three Supreme Court decisions issued in the 1880s. In the Head Money Cases, the Court provided an institutional justification for the abrogation of treaty by statute.220 After observing that statutes are enacted by the President, the Senate, and the House of Representatives whereas treaties involve solely the President and the Senate, the Court concluded that "[i]f there be any difference in this regard [the relative superiority of treaties and statutes], it would seem to be in favor of an act in which all three of the bodies participate."221 Subsequently, Whitney v. Robertson established that courts should attempt to construe statute and treaty "so as to give effect to both . . . but if the two are inconsistent, the one last in date will control the other, provided the stipulation of the treaty on the subject is self-executing."222

The Whitney doctrine was approved by a third decision of the decade, The Chinese Exclusion Case.223 There, the Court asserted that treaties can be repealed or modified at the pleasure of Congress, but expressed confidence that Congress would not pass lightly laws in conflict with treaty obligations.224 The Court disclaimed moral responsibility for treaty violations, asserting that the "[C]ourt is not a censor of the morals of other departments of the government . . ."225 Likewise, the Justices accepted no political responsibility, claiming that treaty breaches should

216. GETCHES, WILKINSON, & WILLIAMS, supra note 80, at 332.
217. 78 U.S. (11 Wall.) 616 (1870) (holding that a general statute imposing taxes on liquor and tobacco products applied also to the Cherokee Nation, even if such application would violate a prior treaty provision).
218. Id. at 621 (citation omitted).
221. Id. at 599.
222. 124 U.S. 190, 194-95 (1888) (despite potential conflict between statute and treaty between the United States and the Dominican Republic, statutory tax is applicable to imported sugars).
223. Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (upholding the validity of a statute prohibiting the entry of Chinese laborers into the United States, where such statute was in violation of existing treaties between the United States and China).
224. Id. at 600.
225. Id. at 602-03.
be redressed through international diplomatic channels and not by the domestic courts of the United States.226

This congressional authority to abrogate treaties in general is supplemented by an express "plenary power" over Indian affairs in particular.227

Ironically, the federal interference with Indian treaty rights has evolved from the United States' protective obligation toward the Indian tribes.228

In addition, the plenary power doctrine has constitutional underpinnings, derived from the exclusive congressional authority "[t]o regulate commerce . . . with the Indian tribes."229 Together, the later-in-time rule and the plenary power doctrine have justified, in many cases, the United States' failure to live up to its treaty promises to Native American tribes.


Although the courts have supported the plenary power of Congress, they have also limited that authority through the development of special canons for the construction of documents affecting Indian tribes. As early as 1832, the Court noted that "[t]he language used in treaties with the Indians should never be construed to their prejudice."230 Under the canons, treaties are to be construed liberally, as the Indians would have understood them.231 Moreover, ambiguous expressions are to be resolved in the tribes' favor.232 These unique canons are justified in terms of the United States' trust obligation toward Native Americans233 and represent an attempt to compensate for the vast inequality in bargaining power during treaty negotiations:

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

226. Id. at 606. See also Whitney, 124 U.S. at 194-95 (treaty infractions do not involve judicial questions and remedy must be sought through diplomacy and legislation); Cherokee Tobacco, 78 U.S. at 621 (issue of treaty violations is political question beyond the sphere of judicial cognizance).


228. See supra notes 82-83 and accompanying text.


233. See, e.g., Choctaw Nation, 318 U.S. at 432 (quoting Tulee v. Washington, 315 U.S. 681, 684-85 (1942), treaties should be construed "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people").
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; that 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.234

Although the canons were developed originally for interpretation of treaty provisions, their application has been extended also to the interpretation of statutes and executive orders.235

Under the canons, then, courts interpret documents that establish Indian rights broadly, and interpret narrowly provisions that might limit such rights.236 Where there is a potential conflict between treaty and statute, the courts painstakingly examine both to determine whether a conflict actually exists.237 If so, then treaty provisions may be superseded by subsequent legislation, but only where Congress has demonstrated clearly its intent to abrogate the relevant treaty.238 Such careful analysis recognizes the solemn nature of Indian treaties.239

Despite this theoretical development of the canons, however, they have been applied with a judicial vigor that waxes and wanes over time.240 Often, courts have aggressively interpreted Indian treaties in a manner favorable to tribal interests. In Leavenworth, Lawrence, & Galveston R.R. v. United States, for example, the Court refused to find an implied abrogation of Indian land rights protected by treaty, even though a subsequent statute granted a portion of those same lands to the state for railroad purposes.241 In requiring a clear statement from Congress that abrogation was intended, the Court noted that “Congress cannot be supposed to have intended [to convey by statute] lands previously appropriated to another purpose, unless there be an express declaration

234. Jones v. Meehan, 175 U.S. 1, 10-11 (1899). The Meehan Court may have exaggerated the weakness of the tribes. See supra note 43 and accompanying text.
235. Cohen, supra note 9, at 224 n.60.
236. Id. at 225.
237. See Wilkinson & Volkman, supra note 6, at 623 (the later-in-time rule actually resolves few Indian cases and “the bulk of the analysis revolves around the question of whether a ‘conflict’ actually exists”). This detailed analysis occurs even when courts are faced with an “apparent conflict” between treaty and statute. Id. at 622.
238. Id. at 623-24 (describing various judicial tests employed to determine whether or not a treaty has been abrogated by statute).
240. See Wilkinson & Volkman, Treaty Abrogation, supra note 6, at 645 (the issue of treaty abrogation has been governed by “ambiguous tests that facilitate contradictory results”).
241. 92 U.S. 733, 741-42 (1876).
to that effect.\textsuperscript{242} Similarly, \textit{Menominee Tribe v. United States} protected Indian treaty rights actively.\textsuperscript{243} There, the Court found that a treaty establishing the Wolf River Reservation "for a home, to be held as Indian lands are held" impliedly protected Indian hunting and fishing rights.\textsuperscript{244} Moreover, those implied treaty rights were not limited by state hunting and fishing regulations, even though a federal statute provided explicitly that "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."\textsuperscript{245} Under such cases, the Court has exercised a protective role over the tribes.\textsuperscript{246}

In other cases, however, legislation was interpreted literally to the detriment of treaty rights. The Court was particularly passive during the late nineteenth and early twentieth centuries, during the same period that the \textit{Botiller} and \textit{Barker} decisions severely undermined private property rights under the Treaty of Guadalupe Hidalgo.\textsuperscript{247} \textit{Lone Wolf v. Hitchcock}, a case decided in 1903, held that Congress could appropriate treaty lands by statute.\textsuperscript{248} In upholding Congress' "full administrative power . . . over Indian tribal property,"\textsuperscript{249} the Court deferred to Congress:

\begin{quote}
We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned . . . relief must be sought by an appeal to that body for redress, and not to the courts.\textsuperscript{250}
\end{quote}

A similarly limited view of tribal rights was adopted in \textit{United States v. Kagama}, where a federal statute was construed strictly to terminate tribal criminal jurisdiction over Indian conduct affecting Indians within Indian country.\textsuperscript{251} For the next half-century, tribal rights were strictly limited by legislative enactments.\textsuperscript{252}

In conclusion, although both Indian and Hispanic treaty rights are vulnerable to restrictive federal legislation, special canons of construction offer limited assistance to Indian tribes in the preservation of treaty rights. The particularly harsh decisions of the late nineteenth century are

\begin{itemize}
\item \textsuperscript{242} Id.
\item \textsuperscript{243} 391 U.S. 404 (1968).
\item \textsuperscript{244} Id. at 405-06.
\item \textsuperscript{245} Id. at 410.
\item \textsuperscript{246} See generally Collins, supra note 2, § 57.04(b), at 235 (stating that before 1871, statutory overrides of treaties were rare).
\item \textsuperscript{247} See supra parts IV.A.2.b (discussing \textit{Botiller}) and IV.A.2.c (discussing \textit{Barker}).
\item \textsuperscript{248} 187 U.S. 553 (1903).
\item \textsuperscript{249} Id. at 568.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} 118 U.S. 375 (1886). In \textit{Kagama}, the Indian rights at issue were derived from inherent tribal sovereignty rather than from treaty.
\item \textsuperscript{252} GETCHES, WILKINSON, & WILLIAMS, supra note 80, at 187 (after \textit{Kagama}, tribes were viewed as helpless wards under congressional control).
\end{itemize}
consistent with the prevailing national attitude of distrust toward those of non-European descent. Decisions such as Botiller and Kagama join ranks with relatively contemporaneous cases such as Plessy v. Ferguson\textsuperscript{253} Dred Scott v. Sandford\textsuperscript{254} and The Chinese Exclusion Case\textsuperscript{255} as stark reminders of a not-so-distant and intolerant past.

V. COMMUNAL LAND USE AND OWNERSHIP

Although common lands are vitally important to both Indian tribes and to Hispanic communities, tribal commons received far more extensive recognition and protection under United States law than did their Hispanic counterparts.\textsuperscript{256} Even that protection was sporadic, however, as federal policy toward the tribes vacillated between isolation on reservations and assimilation through the assignment of individual plots of land.\textsuperscript{257} For both groups of commons, federal recognition was at a critical low point during the late nineteenth century. Through the General Allotment Act of 1887,\textsuperscript{258} Congress diminished the tribal land base from 138 million acres to 34 million acres.\textsuperscript{259} Just ten years later, United States v. Sandova\textsuperscript{260} laid the groundwork for a similar devastation of Hispanic community lands.

A. Tribal Commons

The group identity of Native Americans has been institutionalized to a far greater extent than that of any other ethnic minority in the United States.\textsuperscript{261} In 1832, Chief Justice Marshall characterized the Cherokee Nation as a "distinct community, occupying its own territory."\textsuperscript{262} The tribal identity was strengthened, perhaps, by the perception that Indians were incapable of assimilating into the society of their conquerors.\textsuperscript{263}

Federal Indian policy has been cyclical. At times, recognition of the communal nature of Indian life has led to a legal acceptance of common property rights. Throughout much of the nineteenth century, for example,
the federal government promoted the physical and political segregation of Indian tribes. Numerous treaties set aside lands for exclusive tribal occupancy, in many instances after the tribes had been "removed" from their original territory to make way for the westward tide of Euroamerican settlement. By 1880, 113 reservations had been created in states west of the Mississippi River. On those reservations, property was held in common tribal ownership and individuals possessed a derivative interest based upon tribal membership. Critics of the reservation system claimed that tribal commons were excessive, preventing Native Americans from acquiring a knowledge of individual property. As a practical matter, the isolation of tribes on large reservations proved to be unworkable as non-Indians pushed relentlessly westward, engulfing Indian settlements in their path.

By the late nineteenth century, federal policy no longer favored the creation of communally-owned reservations. Instead, an allotment policy developed under which tribal members were given individual parcels of land and the "surplus" commons were sold to non-Indian purchasers. Initially, tribal lands were allotted to individual Indian members on a piecemeal basis. With the passage of the General Allotment (Dawes) Act of 1887, the allotment of tribal lands accelerated. Ostensibly created for the benefit of the Indian people and to promote their civilization, the allotment policy was more successful in advancing non-Indian interests. Overall, the experiment was devastating to the tribes, opening up about two-thirds of all Indian lands to non-Indian settlement.

The allotment era came to an end in 1934 with the passage of the Indian Reorganization Act, legislation designed to revive tribalism and to encourage self-determination and cultural plurality. The Act attempted to restore partially the Indian land base that had been dismantled under allotment practices, providing for the purchase of additional tribal lands.

265. See generally COHEN, supra note 9, at 78-92, 123 (removal and concentration on reservations were seen as means by which to "civilize" and assimilate the Indian into American life).
266. Deskbook, supra note 64, at 14 n.71, (citing PRUCHA, THE GREAT FATHER, 578-79 (1984)).
267. See Collins, supra note 2, § 57.03(d), at 231, § 57.06(a), at 249-50 (Like other persons in the United States, Native Americans also have the right to own individual interests in land.). Id. § 57.06(a), at 249.
268. COHEN, supra note 9, at 124, (citing COMM'N IND. AFF. ANN. REP., S. EXEC. DOC. No. 1, 35th Cong., 2d Sess. 354 (1858)).
269. See Getches, Wilkinson, & Williams, supra note 80, at 175-80.
270. COHEN, supra note 9, at 127-44.
271. See id. at 129-30. As early as 1633, Indian lands had been allotted to individual owners. The early experiments with allotment proved to be a failure, as Indians lost their lands through subsequent sale and/or fraud. Id.
273. See Getches, Wilkinson, & Williams, supra note 80, at 175-80.
275. COHEN, supra note 9, at 147.
The reorganization period was followed by yet more cycles of assimilation and tribalism. 277

B. Common Lands of Spanish and Mexican Land Grants

The sharing of common lands was an important custom in New Mexico, an adaptive practice well suited to that isolated, harsh environment on the northern frontier of New Spain, and later, Mexico. 278 In general, when the Spanish or Mexican government awarded a land grant to a community of settlers, each member received an allotment of land for a house, fields for cultivation, and the right to use community lands as a source of water, pasture, wood, and game. 279 By the time of the United States occupation of New Mexico, over sixty such community grants were in existence. 280

Although the common lands were clearly granted for community use, it is not clear whether title passed to the community or remained with the sovereign. 281 The issue took on a new significance with the United States' conquest of Mexico because, under international law, Mexico could cede only sovereign territory that had not been granted previously to individuals. 282 If the commons belonged to the community, then, post-conquest title would remain in the community. On the other hand, territory retained by the Spanish and Mexican governments for communal use became part of the United States' public domain, even where local communities had relied for generations on the commons for their subsistence. Scholars disagree as to whether the communities possessed fee title or simply a usufructuary right to their commons. 283 In either case, however, the communities were the intended beneficiaries of the commons:

276. See id. at 152-80 (describing the "termination" period of 1943-61).
277. See id. at 180-207 (describing the "self-determination" period, beginning in 1961).
278. See John R. Van Ness, Hispanic Land Grants, Ecology and Subsistence in the Uplands of Northern New Mexico and Southern Colorado, in LAND, WATER AND CULTURE, supra note 18, at 141, 204 (describing the Hispanic "community-based agro-pastoral system of subsistence" as "a remarkable and distinctive adjustment to a very rugged frontier environment"); see also Van Ness, supra note 194, at 49-50.
280. Together, these grants included hundreds of thousands of acres of common lands. Rock, supra note 186 at 55.
281. "No question has so perplexed both historians and lawyers as . . . [the question] under Spanish law [of] who owned the common lands of a community land grant." Ebright, supra note 279, at 5.
282. See, e.g., Strother v. Lucas, 37 U.S. (12 Pet.) 410, 437-38 (1838) (under international law, upon conquest, the King "cedes" only what is his).
283. See Ebright, supra note 279, at 5 (concluding that New Mexican communities owned the common lands); Van Ness, supra note 194, at 47 (New Mexico grants included "communal landholding with individual rights of usufruct"); Clark S. Knowlton, The Town of Las Vegas Community Land Grant: An Anglo-American Coup d'État, in SPANISH AND MEXICAN LAND GRANTS IN NEW MEXICO AND COLORADO 16-17 (John R. Van Ness & Christine M. Van Ness eds., 1980) (Spanish and Mexican law and landholding practices of Spanish-Americans support the view that land grants, including commonlands, belonged collectively to all grant inhabitants).
284. Rock, supra note 186, at 53 (arguing that New Mexico community lands grant residents have a usufructuary right to their common lands, with title remaining in the government).
In Spain both the ungranted crown lands . . . and the common lands of areas that had been granted to communities in fee and full ownership were broadly classified as public domain, but the community lands possessed some qualities of private property so only the [ungranted crown lands] of the sovereign were truly public domain. Even if only the usufruct (use) to community lands had been granted, and not its fee-simple ownership, that type of usufruct is perpetual under normal circumstances. Either way, the land was strictly set aside for the common use of the citizens, present and future, of that community and no other.  

In 1897, the United States Supreme Court tackled the issue of who owned the common lands. In *United States v. Sandoval*, the Court determined that the common lands of the San Miguel del Bado grant in New Mexico—comprising over 300,000 acres—belonged to the United States government and not to the community that had settled on the grant more than ninety years previously. Although the town’s outer boundaries had been established by a valid land grant, the Court construed the title to all common lands within those boundaries as inchoate, unless and until such commons were allotted to a particular individual. Based upon a narrow construction of its jurisdiction under the Court of Land Claims Act, the Court determined that it lacked jurisdiction to confirm the incomplete grant of such common lands. The *Sandoval* judgment set an important precedent. Prior to the decision, community title to common lands had been confirmed for some twelve land grants. After *Sandoval*, the claims court rejected all community land grants presented for confirmation. As a result, the United States acquired immense tracts of land in which Mexican citizens possessed a strong equitable, if not legal, interest. *Sandoval* and its progeny have been criticized for per-

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285. Westphall, *supra* note 48, at 10. See also Vernon Irrigation Co. v. City of Los Angeles, 39 P. 762, 765 (Cal. 1895) (“Whether, under the Mexican system, any title [to common lands] was vested in the pueblos, or the title remained in the nation, with power in the [government officials] to administer the properties, is now immaterial. In either event, the mode adopted was a proper mode to preserve the equity which it is agreed the pueblos had in the lands set aside and devoted to the use of the pueblo.”).  
286. 167 U.S. 278 (1897).  
287. The 315,300 acre San Miguel del Bado grant was made in 1794; possession of the grant was delivered in 1803. *Id.*, at 279, 295. Of the 315,300 acres, the Court confirmed title to only 5,207 acres. *Land, Water, and Culture, supra* note 18, at 46-47.  
288. *Sandoval*, 167 U.S. at 293-98 (discussing the nature of incomplete property rights and concluding that “unallotted lands were subject to the disposition of the government”).  
289. The Act required, *inter alia*, that the court should not allow imperfect claims unless the claimant would have had a lawful right against Spain or Mexico to make the grant perfect. See *supra* part IV.A.3.  
290. *Sandoval*, 167 U.S. at 298 (Court of Private Land Claims not empowered to recognize title to incomplete land grants).  
292. *Land, Water, and Culture, supra* note 18, at 47. See, e.g., Rio Arriba Land & Cattle Co. v. United States, 167 U.S. 298 (1897) (declining to confirm the common lands of the 472,764 acre Cañon de Chama Grant in New Mexico).
petuating the "striking misconception" that the Anglo-American concept of individual fee-simple ownership should be projected onto "a legal system which emphasizes community ownership of commonlands and the importance of local custom in establishing legal precedents." 293

The story of the commons is not simply a matter of historic interest. To this day, the commons remain a central component of rural Hispanic communities in New Mexico and Colorado, as well as an important symbol of cultural survival. In Costilla County, Colorado, for example, Hispanic settlers shared a 77,000 acre mountain tract for more than a century for grazing, hunting, fishing, and wood-gathering. 294 For the past thirty years, they have been involved in litigation in an attempt to defend their right to the land based upon Mexican law and custom. 295 In an emotional political campaign that complements their legal efforts, the county's Hispanic residents have asserted that their "sacred right" to use the mountain commons is essential to "the right to exist and [to] the preservation of a culture and a way of life that has persisted ... for nearly 150 years." 296

C. The Commons Revisited: Adverse Possession

The relative degree to which modern Indian and Hispanic communities are perceived as distinct legal entities capable of common land ownership is illustrated concisely by two federal court decisions on the law of adverse possession. In one, an Indian tribe was awarded an easement through private property on the basis of regular tribal use. 297 In that case, the court presumed without extensive analysis that the tribe functioned as a unit and that tribal possession of the disputed land was sufficiently "exclusive" to satisfy the relevant state requirement. 298 In the other case, a community of Hispanic farmers was unable to maintain title to its traditional common land, despite continuous adverse use for over a

293. LAND, WATER AND CULTURE, supra note 18, at 3, 8. Several years before Sandoval, the California Supreme Court noted the "startling" difference between the American system of "reduc[ing] everything to private ownership from which a profit can be made" and the Mexican system where "[s]o far as communal ownership would answer the purpose of the community, it was preferred." Vernon Irrigation Co. v. City of Los Angeles, 39 P. at 766 (discussing riparian water rights).


295. See generally Sanchez, 377 F.2d 733 (Hispanic residents asserted community land rights in defense to a quiet title action); Rael v. Taylor, 876 P.2d 1210 (Colo. 1994) (claiming common usufructuary rights in mountain tract and alleging that Sanchez v. Taylor suffered from various procedural defects).


298. Id. at 323 (applying state adverse possession law and finding that "it is reasonable to conclude that if people are occupying a tract of land at a particular time, another person or other people, cannot simultaneously occupy the same space").
There, the court presumed that the community was a collection of individuals rather than a legal unit. Accordingly, the community’s claim of adverse possession was denied because “usage in common” was insufficient for the acquisition of rights in another’s land by custom or common prescription.

VI. THE OWNERSHIP OF SUBMERGED LANDS

At the time the Treaty of Guadalupe Hidalgo and Indian treaties were drafted, it is likely that the negotiators were not concerned excessively with the ownership of land beneath streams and tidal waters. Because the young nation was rich in rivers, coastline, and their associated resources, there was no pressing need to determine the title to submerged lands. Thus, land boundaries were described often in general terms such as “by the bay,” “bounded . . . by the Columbia River,” or “west by the anchorage for ships” which were ambiguous descriptions that left unresolved the ownership of submerged lands. Later, upon the discovery of valuable mineral deposits in streambeds and as fishery resources became scarce, the title to long-settled properties became the subject of litigation.

In the United States legal tradition, there is a strong presumption against the private ownership of lands underlying major waterways. Due to the important public interest in maintaining navigation and related activities, watercourses are held generally as commons, with the states maintaining title on behalf of all their citizens. With respect to the original thirteen states,

when 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.

299. See generally Sanchez, 377 F.2d 733 (discussed in supra notes 294-95 and accompanying text). The Sanchez defendants claimed a right to the commons under the alternative theories of adverse possession and Mexican law doctrines. Sanchez, 377 F.2d at 734.
300. See id. at 738.
301. Id. The Sanchez court denied the adverse possession claim, in part, because “others” were making similar claims and uses to the common lands. Id. The court did not explain, however, whether those “others” were members of the general public or simply part of the land grant’s original settlers and their descendants.
305. See, e.g., Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (dispute over title to streambeds from which oil and gas were produced); Montana v. United States, 430 U.S. 544 (1981) (dispute over title to riverbed and ability to regulate its fishery).
Later, as the United States gained additional territory, new states were admitted to the union on an "equal footing" with the original thirteen states, acquiring a similar title to the beds and shores of navigable waters within their borders.\textsuperscript{308}

Prior to the admission of new states into the union, the federal government held territorial lands in trust for future states.\textsuperscript{309} Thus, submerged lands could not be conveyed into private ownership, except in a limited range of circumstances. The Supreme Court delineated three such exceptions in \textit{Shively v. Bowlby}:\textsuperscript{310}

We cannot doubt, therefore, that Congress has the power to make grants of lands below the high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so \textit{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 objects for which the United States hold the Territory.\textsuperscript{311}

The \textit{international obligation} exception has been applied by the Supreme Court to uphold the validity of Spanish and Mexican land grants pur-
porting to convey tidal lands into private ownership. No such exception has been applied consistently to Indian treaties.

A. The Treaty of Guadalupe Hidalgo and Submerged Lands

Just as United States courts interpreted Spanish and Mexican law in a manner that disfavored the common use and ownership of land, so also did they decline to recognize an aquatic commons. Despite considerable evidence that Spanish and Mexican law provided at least some protection of tidelands as a public commons, American courts consistently upheld private claims to such lands based upon Hispanic land grants. Because the rights of the public were generally not considered in the original land grant confirmation proceedings, controversy over title to lands beneath watercourses often did not erupt until many years later when a state, on behalf of its citizens, claimed some interest in grant lands. By that time, many of the contested lands had passed out of Hispanic ownership. Ironically, therefore, the courts' generosity and concern with the fulfillment of treaty promises often served to benefit corporations or cities, rather than the descendants of the original beneficiaries of the treaty. In a line of cases concerning Mexican land grants in California, the Supreme Court has recognized private rights in tidal lands, free of any easement or servitude in favor of the public. In a few of those cases, the Court has based its holding directly upon an interpretation of Mexican law. In *Arguello v. United States*, the Court determined that Mexican law did not forbid coastal land grants to Mexican

312. See infra part VI.A.
313. See infra part V.B.
314. See Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 39 n.221 (1995) (in the context of water rights, asserting that Spanish and Mexican law extended the public trust doctrine to tidelands, pueblo common lands, and to fresh waters flowing through the pueblo); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS 195, 197 (1980) (Spanish and Mexican law recognized the principle that "[e]very man has a right to use the rivers for commerce and fisheries, to tie up to the banks, and to land cargo and fish on them"); Dion G. Dyer, *Comment, California Beach Access: The Mexican Law and the Public Trust*, 2 ECOLOGY L.Q. 571, 600-11 (1972). See also Internal Improvement Trust Fund v. Webb, 618 So.2d 1381, 1383 (Fla. App. 1993) (under the law of Spain as it existed in 1817, submerged lands were held as res communes for the public use and could not be conveyed into private ownership without a "clear showing of express sovereign intent"); National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983) (Spanish and Mexican law recognized that the sovereign owns navigable waterways and underlying lands as trustee of a public trust for the benefit of the people); State v. Balli, 190 S.W.2d 71, 110 (Tex. 1945) (Sharp, J., dissenting) (under Mexican law, settlement of coastline not encouraged and the coast, and ten littoral leagues inland was reserved from colonization, "except by consent of the general government of Mexico"); Apalachicola Land & Dev. v. McRae, 98 So. 505, 523-24 (Fla. 1923) (under Spanish law, navigable waters were public and their waters and beds were not conveyed into private ownership).
Despite the fact that relevant Mexican law forbade clearly the colonization of any territory within ten leagues of the sea-coast without the approval of the supreme executive power, the Court determined that such prohibition applied only to "foreigners" and not to Mexican citizens:

But while a judicious policy might forbid the settlement of large bodies of foreigners on the boundaries and sea-coast, we cannot impute to [the Mexican government] the weakness, or folly, of confining their native citizens to the interior, and thus leaving their sea-coast a wilderness without population.

Although that interpretation of Mexican law was supported by little more than the Court's perception of what Mexican policy should have been, it served as a guide for future judicial decisions.

More commonly, however, the Court has avoided such an inquiry into the substance of Mexican law, upholding submerged land grants under a variety of legal theories. In some cases, the Court applied the Shively international obligation rationale. Under that view, courts distinguish between tidelands that passed from federal to state ownership for the benefit of the public, and tidelands that never passed into federal ownership because they had been granted previously by the Mexican government to private parties. In the latter case, the Treaty of Guadalupe Hidalgo imposes an international obligation upon the United States to confirm such land grants, rather than to hold them in trust for future states.

In other cases, the Court has been unwilling to disturb confirmed Mexican grants of tidal lands based upon the policy of promoting the...
certainly of property rights. That certainty should be maintained, said the Court, even where the United States may have confirmed erroneously a grant in excess of that which would have been allowed by the Mexican government. In United States v. Coronado Beach Co., the Court rejected a collateral attack upon title to submerged lands, allegedly confirmed in contravention of Mexican law. The Court’s opinion, written by Justice Holmes, was pragmatic in tone:

The question whether there was such a prior grant and what were its boundaries were questions that had to be decided in the proceedings for confirmation and there was jurisdiction to decide them as well if the decision was wrong as if it was right. Justice Holmes concluded that it was “too late” to challenge the title, even though the grant may well have been construed more narrowly in the original patent proceedings.

Most recently, the Court has protected Mexican grants to tidal lands by extending the doctrine of Barker v. Harvey to the states. Barker had held that the Mission Indians had abandoned all land claims derived from the Mexican government for failure to present those claims before the California board of land commissioners for confirmation. Similarly, Summa Corp. v. California ex rel. State Lands Comm’n held that the State of California had no right to claim an easement over lagoon property that had been confirmed previously by the United States to the owner of a Mexican land grant in a proceeding in which the state had not participated. As a result, the City of Los Angeles, as successor to California’s alleged interest, could not dredge the lagoon and make other improvements to petitioner’s property without exercising its power of eminent domain and compensating the landowner for such activities.

In a holding that was reversed by the Summa Court, the California Supreme Court had found that the conveyance of tidelands into absolute private ownership was contrary to Mexican law in general and to the Summa grant in particular. The public had a right to the use of tidelands, said the state court, in accordance with Las Siete Partidas, the Mexican law in effect at the time California was governed by Mexico.

325. See, e.g., Knight v. United States Land Ass’n, 142 U.S. 161, 190 (1891) (Field, J., concurring) (reconsidering confirmed Mexican land grants would “lead to great litigation in the State, to the serious detriment of its interests and those of its people”).
326. 255 U.S. 472 (1921).
327. Id. at 487-88.
328. Id. See also Summa Corp. v. California ex rel. State Lands Comm’n, 466 U.S. 198, 206 (1984) (an overriding purpose of the California confirmation proceedings was to provide repose to land titles originating with Mexican grants).
329. 181 U.S. 481 (1901) (discussed in supra part IV.A.2.c.).
330. See supra part IV.A.2.c.
331. 466 U.S. at 198, 209 (1984), rev’g, City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792 (Cal. 1982). Although the Court’s decision purported to protect Mexican land grants, the primary beneficiary of the Court’s ruling was Howard Hughes, the owner of the Summa Corporation. See Summa Corp. v. Trans World Airlines, Inc., 540 A.2d 403, 404 (Del. 1988) (Summa Corp. is the successor-in-interest to Toolco, an enterprise wholly owned by Howard Hughes).
332. 446 U.S. at 200.
333. Venice Peninsula Prop., 644 P.2d at 797.
The things which belong in common to the creatures of this world are the following, namely, the... sea and its shores, for every living creature can use each of these things according as it has need of them. For this reason every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage.334

Furthermore, the Mexican government had imposed a servitude upon petitioner's land grant, allowing the grantee to enclose the lands only if such enclosure was "without prejudice to the traversing roads and servitudes."335 The Summa Court did not disturb the state court's interpretation of Mexican law, but merely suggested in a footnote that such law was irrelevant to its decision.336 The Court concluded that even if the disputed property had been subject to a public easement under Mexican law, "the State's claim to such a servitude must have been presented in the federal patent proceeding in order to survive the issue of a fee patent."337

The Summa decision may have far-reaching consequences. In California, over ten million acres of prime real estate trace their title to Mexican land grants.338 At the same time, the California Supreme Court has reacted to growing public pressure by aggressively asserting a "public trust" interest in tidelands and navigable waters on behalf of its citizens.339 The combination of these two factors is certain to produce future conflicts similar to those underlying the Summa litigation.340

B. Indian Treaties and Submerged Lands

Under the Supreme Court's interpretation of the Treaty of Guadalupe Hidalgo and its implementing legislation, title derived from Hispanic land grants to submerged lands has been protected, even where such protection may be contrary to Mexican law and where its beneficiaries are not those specifically protected by the treaty.341 In contrast, Indian title to submerged lands has rarely been recognized, even where applicable treaties established

334. Id. at 797 n.8 (citing Las Siete Partidas, Law III, Title XXVIII. The Court also took note of Law VI, under which "Rivers, harbors, and public highways belong to all persons in common...")

335. Id. According to expert testimony, that reservation preserved the rights of the public in tidelands. Id.

336. 466 U.S. at 201 n.1.

337. Id. at 201.

338. Id. at 202.


340. See Federico M. Cheever, Comment, A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo, 33 U.C.L.A. L. Rev. 1364, 1372-73 (1986) (describing Summa as "the first convergence of the public trust doctrine and the protected interest of Spanish and Mexican land grant titleholders" and predicting that "[i]t is not likely to be the last"). See also Eric T. Freyfogle, Context and Accommodation in Modern Property Law, 41 Stan. L. Rev. 1529, 1553, 1556 n.107 (1989) (citing Summa as a rebuke against California courts' "agrandizing behavior").

341. See supra part VI.A
clearly the expectation that such lands would be owned by the tribes.\textsuperscript{342} The central issue in the determination of ownership of aquatic lands is whether the United States intended to convey title to a particular tribe.\textsuperscript{343} There is a strong presumption against such intent “unless . . . definitely declared or otherwise made very plain.”\textsuperscript{344} In only two cases has the United States Supreme Court upheld tribal ownership of submerged lands. First, \textit{Choctaw Nation v. Oklahoma}\textsuperscript{345} recognized Indian title to lands underlying navigable portions of the Arkansas River in Oklahoma\textsuperscript{346} based in part upon treaty language guaranteeing that “no part of the land granted to [the Choctaw Nation] shall ever be embraced in any Territory or State”\textsuperscript{347} and promising that the granted lands would constitute “\textit{a permanent} home . . . which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever . . . .”\textsuperscript{348} The Court interpreted that treaty language in accordance with the precept that treaties should be interpreted as the tribes would have understood them, with doubtful expressions resolved in the Indians’ favor.\textsuperscript{349} Particularly influential were the unique circumstances under which the Oklahoma reservation had been established, including several bungled attempts by the federal government to remove and relocate the Cherokee and Choctaw Nations to western lands beyond the reach of Euroamerican settlement.\textsuperscript{350} Taken together, the treaty language and the circumstances of negotiation demonstrated that the United States intended to convey title of the Arkansas riverbed to the Indian nations.\textsuperscript{351} Second, in \textit{Alaska Pacific Fisheries v. United States},\textsuperscript{352} the Supreme Court recognized that the Annette Islands Indian reservation off the coast of Alaska included adjacent submerged lands.\textsuperscript{353} In protecting the Indians’ exclusive right to the fishery, the Court noted that the United States had been aware that fishing was the Indians’ primary means of subsistence at the time of treaty negotiation.\textsuperscript{354}

\begin{itemize}
  \item \textsuperscript{342} See Collins \textit{supra} note 2, § 57.05(b), at 246-47 (describing tribal expectation that property encompassed by treaty reservations included watercourses).
  \item \textsuperscript{344} United States v. Holt State Bank, 270 U.S. 49, 55 (1926).
  \item \textsuperscript{345} 397 U.S. 620 (1970).
  \item \textsuperscript{346} The real interest at stake was the ownership of minerals beneath the river bed. \textit{Id.} at 621.
  \item \textsuperscript{347} \textit{Id.} at 625, 635 (quoting the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, at 7 Stat. 333-34).
  \item \textsuperscript{348} \textit{Id.} at 624 (quoting Treaty of May 6, 1828 with the Cherokee Nation, at 331).
  \item \textsuperscript{349} \textit{Id.} at 631.
  \item \textsuperscript{350} \textit{Id.} at 622-28, 634 (courts not required to blind themselves to the circumstances of the grant in determining the intent of the grantor). See generally \textit{Cohen, supra} note 9, at 120-55 (discussion of the United States’ removal policy).
  \item \textsuperscript{351} \textit{Choctaw Nation}, 397 U.S. at 620-21. \textit{Choctaw Nation} has been described as a “singular exception” and its “very peculiar circumstances” were distinguished in \textit{Montana v. United States}, 450 U.S. 544, 555-56 n.5 (1981).
  \item \textsuperscript{352} 248 U.S. 78 (1918).
  \item \textsuperscript{353} \textit{Id.} at 89.
  \item \textsuperscript{354} \textit{Id.} at 88-89. \textit{Alaska Pacific Fisheries} has been applied by the Ninth Circuit Court of Appeals. See Muckleshoot Indian Tribe v. Trans-Canada Enter. Ltd., 713 F.2d 455, 457 (1983) (per curiam) (citing Puyallup, \textit{cert. denied}, 465 U.S. 1049 (1984); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1258 (9th Cir. 1983) (inferring intent to convey submerged lands where grant to
Choctaw Nation and Alaska Pacific Fisheries are two limited exceptions to the general presumption against pre-statehood federal grants of submerged lands. The usual rule was followed in Montana v. United States, where the Court found that the Crow Tribe of Montana did not own the bed of the Big Horn River, even though the river lay within reservation boundaries and relevant treaties had set aside land for exclusive Indian use in terms arguably as strict as the treaties construed in Choctaw Nation. Eschewing reliance on the canons of construction employed in Choctaw Nation, the Montana Court held that the Crow treaties failed to overcome the presumption that the beds of navigable waters remain in trust for future states.

In some cases, the Court has acknowledged that tribal land rights antedate the United States’ acquisition of Indian territory and, therefore, that treaty lands are a reservation by the tribes, and not a grant to the tribes by the United States. However, the court has construed those reservations narrowly, presuming that tribal submerged lands passed into federal ownership, absent explicit federal intent to the contrary. This judicial inquiry focuses upon the intent of the United States as grantee, ignoring the intention of the tribe as grantor. This reversal of ordinary

tribe included a navigable water within its boundaries and tribe was dependent on fishery resource for its survival), cert. denied, 465 U.S. 1049 (1984); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 952 (9th Cir.) (lands beneath southern portion of Flathead Lake in Montana included in Flathead Indian reservation where tribe was heavily dependent on fishing for its subsistence), cert. denied, 459 U.S. 977 (1982); Skokomish Indian Tribe v. France, 320 F.2d 205 (9th Cir. 1963); but see United States v. Aam, 887 F.2d 190, 194, 196-97 (9th Cir. 1989) (tidelands not conveyed where fishery, although important to tribe at time reservation was created, did not supply a “significant portion of the tribe’s fishery needs”); United States v. Aranson, 696 F.2d 654, 666 (9th Cir. 1983) (tribes assume burden of persuasion that they “depended heavily” on the disputed body of water for subsistence).

355. See United States v. Holt State Bank, 270 U.S. 49, 55 (1926) (“[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency.”).


357. See supra note 347-48. In Montana, treaties provided that the Crow Reservation “shall be set apart for the [tribe’s] absolute and undisturbed use and occupation.” Montana, 450 U.S. at 548. In addition, the United States “solemnly agree[d] [that unauthorized persons would never] be permitted to pass over, settle upon, or reside in [the reservation].” Id. at 553-54.

358. See supra note 349 and accompanying text. Justice Stevens, in concurrence, stated that the canons of construction do not exempt Indian reservations from the strong presumption against dispositions by the United States of land under navigable waters in the territories. Montana, 450 U.S. at 567-68. See supra part IV.B.2 for a general discussion of the canons of construction.

359. Montana, 450 U.S. at 553. The Court stated that the “mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.” Id. at 554. The Court also declined to adopt the treaties’ most literal reading. Id. at 555 (“whatever [the treaties] seem to mean literally, [they] do not give the Indians the exclusive right to occupy all the territory within the described boundaries”).

360. Id. at 554 (Crow treaty “reserved[d] in a general way for the continued occupation of the Indians what remained of their aboriginal territory”) (quoting United States v. Holt Bank, 270 U.S. 55, 58 (1926)).

361. Ordinarily, courts consider the intent of both parties when construing the scope of a grant of land from one party to another. See generally Roger A. Cunningham, William B. Stoebuck, Dale A. Whitman, The Law of Property § 11.1 (1993) (the parties’ intent is the touchstone for determining the scope of a grant).
roles can be explained, perhaps, by the established principle that original Indian title is less than full fee simple ownership and is subject to the ultimate dominion of the federal government. Unlike its treatment of Hispanic land grants, therefore, the United States has acknowledged no obligation to recognize the tribes’ pre-existing claims to submerged lands.

VII. CONTINUING PROTECTION OF TREATY LANDS FROM STATE AND PRIVATE INTERFERENCE

Federal promises to respect Hispanic and tribal property would be of little practical significance if treaty lands were lost subsequently to state and private ownership. Native American territory was insulated from such non-federal interference through a series of federal trade and intercourse statutes and by application of the federal trust duty. Under such legal theories, certain tribal land claims remained viable even after over a century of non-use. In contrast, Spanish and Mexican land grants received a more limited degree of federal protection. Although many confirmed grants were shielded from collateral attack and from adverse claims initiated during the pendency of title confirmation proceedings, others were lost after only a few years of non-use under state doctrines such as adverse possession, laches, and statutes of limitation.

A. Limited Protection of Spanish and Mexican Land Grants

1. The Diminishing Protection of Federal Legislation

The adjudication of Spanish and Mexican land grants was often a lengthy process. From the time the United States acquired Mexican territory until the conclusion of those title proceedings, competing claims to the same property might be established by virtue of possession or under a purported grant from the federal government. Absent legislative or judicial protection, the owner of a confirmed land grant might be forced to bear the expense of additional litigation in order to defend his or her newly-confirmed title against those competing claims. Judicial interpretation of the treaty’s implementing legislation ameliorated that problem to some extent. Over time, that judicial protection became more limited in scope. Under the Supreme Court’s interpretation of the California land act, property claimed under an Hispanic land grant was reserved from disposition under the United States land laws pending adjudication of the grant. Section thirteen of the Act declared that all Spanish and Mexican land claims not presented within two years for

362. See supra part II.A.
363. See infra part VII.B.
364. See infra part VII.A.1.
366. The three methods established by Congress for the confirmation of land grants are discussed in supra part IV.A.
adjudication should "be deemed, held, and considered to be a part of the public domain of the United States." In an extraordinary bit of judicial activism, the Court, in Newhall v. Sanger, converted that limitation into a land grant protection. Newhall held that Section thirteen "was notice to all the world that lands in California were held in reserve to afford a reasonable time to the claimant under an asserted Mexican or Spanish grant to maintain his rights before the [California Land Claims Commission]. Based upon that interpretation, the Court invalidated a portion of an explicit federal grant to the Western Pacific Railroad Company made while an overlapping land grant was sub judice. The Court stated that during the adjudication of any lands claimed under a foreign grant, such lands could not be disposed of by the federal government, even where the foreign land claim was later determined to be unfounded or fraudulent. In New Mexico, the treaty's implementing legislation presaged the Newhall holding. Section eight of the legislation establishing the Office of the Surveyor General provided that "until the final action of Congress on [claims derived under Spanish and Mexican land grants], all lands covered thereby shall be reserved from sale or other disposal by the government . . . ." That policy of withdrawal was reversed by the 1891 legislation creating the Court of Private Land Claims. Subsequently, hundreds of Mexican grants became subject to attack.

The vulnerability of land grants did not end upon title confirmation, as numerous collateral attacks challenged the validity of confirmed titles. The Court consistently deflected those attacks, thus promoting important policy considerations:

If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record [confirming Mexican land grants], and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the

367. 9 Stat. 633 (Mar. 3, 1851).
368. 92 U.S. 761 (1875).
369. Id. at 763.
370. Id.
371. Id. at 764-65. See also Southern Pacific R.R. v. United States, 200 U.S. 354, 357 (1906) (property encompassed by pending land grants was withdrawn from disposition and could not be the subject of a federal railroad grant). The Court's generous interpretation of section 13 as a reservation of grant lands was counterbalanced by its view that section 13 required the adjudication of perfect, as well as inchoate, land grants. See supra part IV.A.2.
372. See supra part IV.A.3 for a general discussion of the New Mexico Act.
373. 26 Stat. 308, 309. See Cameron v. United States, 148 U.S. 301, 310 (1893) (statute withdraws from disposition lands that are the subject of pending confirmation proceedings).
United States in the location of the same, the patent would fail to be . . . an instrument of quiet and security to its possessor. 376

In California, federal legislation provided that land grants confirmed pursuant to the Act's procedures "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." 377 The Court interpreted narrowly the reference to "third persons" such that legal challenges to a confirmed land grant could be maintained only by those claiming title under a prior Spanish or Mexican land grant. 378 Excluded from the definition of "third person" were Indian tribes, the states, and those claiming under a grant from the United States government. 379 A similarly protective stance was adopted with respect to land grants in the Territory of New Mexico. 380

2. Non-Use of Confirmed Lands Grants

The Treaty of Guadalupe Hidalgo is ambiguous with respect to the degree of protection afforded Mexican property. On the one hand, the treaty recognizes absentee landownership and provides that the property of such landowners would be "inviolably respected." 381 Other treaty language, however, suggests that Mexican property is entitled to no special protection beyond that given to United States citizens:

The present owners, the heirs of these, and all Mexicans who may hereafter acquire [property belonging to Mexicans not established in

376. Beard v. Federy, 70 U.S. (3 Wall.) 478, 492 (1865). See also Leese v. Clark, 20 Cal. 387, 424 (1862) (if confirmed land grants were not conclusive against adverse parties, patent would become "a source of perpetual and ruinous litigation").
378. See Beard, 70 U.S. at 493 ("The term 'third persons' . . . does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property"); More v. Steinbach, 127 U.S. 70 (1887); Interstate Land Co. v. Maxwell Land-Grant Co., 139 U.S. 569, 580 (1891) ("And the only way that that grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican government to some other person.").

From the perspective of Indian tribes and states, this created an incongruous situation. For the purpose of invalidating title, certain Indian and state claims were considered to be derived from the Spanish or Mexican government and therefore subject to abandonment unless presented to the California Land Claims Commission for adjudication during a two-year window of time. See supra note 378. On the other hand, for purposes of challenging the title of others, those same Indian and state parties were not regarded as claimants under prior Spanish and Mexican land grants. See supra note 172.
381. See Beard v. Federy, 70 U.S. (3 Wall.) 478, 492 (1865) (confirmed land grant conclusive against the government and "equally conclusive against parties claiming under the government by title subsequent").
382. See Ely Real Estate & Investment Co. v. Watts, 262 F. 721 (9th Cir. 1920) (rejecting collateral attack upon land grant confirmed by the Court of Private Land Claims); Russell v. Maxwell Land-Grant Co., 158 U.S. 253 (1895) (rejecting collateral attack upon land grant confirmed by Congress).
the territory ceded to the United States] by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States. 384

When resolving challenges to land grants brought under state law theories, courts tend to rely upon this latter language of equal protection. 385 In so doing, they emphasize the traditional deference given to states in matters regarding real property. In Montoya v. Gonzales, Justice Holmes approved the application of a New Mexican statute of limitation to a Mexican land grant confirmed as perfect by the Court of Private Land Claims. 386 Under that statute, defendants gained title to the entire land grant through the possession of a portion of the grant for a period of ten years—a limitation period shorter than that applicable to other property. 387 The Court held that the statute did not deny equal protection of the law, "even if it should be confined to Spanish and Mexican grants" because "there very well may have been grounds for the discrimination in the history of those grants and the greater probability of an attempt to revive stale claims." 388 As the lower court had explained,

"[T]he New Mexico statute was not intended to be a statute of limitation and repose merely, but was also intended to grant affirmative relief by way of conferring title upon the pioneer agricultural settlers as a reward of honest toil and diligence, indicating good faith in the settlement and improvement of what was at that time a comparatively barren and sparsely settled section, as, indeed, the whole territory was at that time, for that matter. 389"

The equal protection rationale of Montoya v. Unknown Heirs of Vigil was applied in several lower court decisions. In one case, the Fifth Circuit articulated clearly a rationale for the application of state statutes of limitations to the holders of confirmed land grants:

"We regard the phrase [inviolably respected] as a covenant on the part of the United States to respect from thenceforth any title that Mexicans then had, or might thereafter acquire, to property within the region, but not that it would guarantee that those Mexicans would never lose...

384. 9 Stat. 929-30 (emphasis added).
385. See Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554, 558 (5th Cir.) (fundamental purpose of article VIII was "to secure Mexicans in their title and to guarantee to them in that respect the same protection of law that it extended to the citizens of the United States"), cert. denied, 331 U.S. 808 (1947).
386. 232 U.S. 375, 376-77 (1914). The statute in issue had been enacted by the Territory of New Mexico, prior to statehood. Id.
387. Under the relevant legislation, "possession for ten years, under a deed purporting to convey a fee simple, of any lands which have been granted by Spain, Mexico or the United States, gives a title in fee to the quantity of land specified in the deed, if during the ten years no claim by suit in law or equity effectually prosecuted shall have been set up." Id. at 377.
their title to persons by foreclosure, sales under execution, trespasses, adverse possession, and other nongovernmental acts.  

Similarly, another court has held that Spanish and Mexican grantees may lose title to grant lands through non-use and laches, even if such lands had been fraudulently withheld from their rightful owners. Together, these decisions indicate a policy quite different from that applied to Native Americans, under which tribal lands generally cannot be lost through non-use.

B. Continuing Protection of Indian Lands

Unlike the case of Hispanic grantees, time generally works in the tribes’ favor. Special legal concepts protect Indian lands from loss due to non-use. At the same time, tribes are able to take advantage of the non-use of others, gaining important access rights under state statutes of limitation and adverse possession laws.

This protection of tribal lands has two separate, but interrelated, legal bases. First, under the sovereignty doctrine, tribes are treated as governments and therefore cannot be divested of unused property solely through the operation of state law. The Court has said that “sovereign power, even when unexercised, is an enduring presence . . . and will remain intact unless surrendered in unmistakable terms.” Second, the Court’s reluctance to allow loss of tribal powers through non-use is also

390. Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554, 558 (5th Cir. 1947) (affirming judgment that claim to oil lands under a Spanish land grant had been lost through the adverse possession of others).


392. See infra part VII.B.

393. See Wilkinson, supra note 20, at 53: The tribes, then, have sought and obtained a substantial measure of insulation from many of the negative effects of the passage of time. Concurrently, however, they have attempted to make time work in their favor by seeking to establish a vigorous, modern tribal sovereignty with actual powers far beyond those exercised at the time of the treaties and treaty substitutes.

394. See supra part V.C.

395. See Wilkinson, supra note 20, at 44 (discussing the Supreme Court’s “extreme reluctance to allow settled expectations, even over lengthy periods of time, to deny tribal prerogatives”). The sovereignty doctrine recognizes Indian tribes as governmental entities. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (establishing the foundation of the sovereignty doctrine through its holding that the state of Georgia has no jurisdiction in Cherokee country); see also Collins, supra note 2, § 57.11(a)(1), at 293 (“parties to early treaties between the United States and the Indian nations intended that tribes continue to exercise internal sovereignty over land reserved to them except for limited federal jurisdiction over interracial matters). Although the sovereignty doctrine protects tribes from certain state actions, it provides no such protection from federal intrusions. See id. § 57.04(d), at 241 (“The Supreme Court has consistently sustained federal legislative power to override Indian treaty rights and to restrict tribal sovereignty”).

based upon the practical observation that non-use often resulted from factors beyond tribal control:

The State questions the existence of any inherent tribal powers in this case. It argues that the Tribe could not have exclusive rights in any traditional territory because, in effect, there is no traditional territory: “the Mescaleros were being swept from their lands by a tide of white settlers.” If we were to accept the State’s argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, i.e., when a dominant group has succeeded in temporarily frustrating exercise of those rights.\(^{397}\)

Judgments such as this establish the principle that the occupation of Indian lands by force should not be condoned or rewarded by the law.

Beyond this protection of tribal lands from involuntary loss through non-use, federal law imposes restraints on the tribes’ intentional conveyance of their own property. These restraints on alienation can be traced generally to the discovery rule, an understanding among European nations that the first sovereign to "discover" lands in the New World acquired the exclusive right to acquire title from the Indians occupying such lands.\(^{398}\) This rule was intended, in part, to promote the orderly settlement of the new territories and to prevent overreaching by the states or individuals.\(^{399}\) This policy of federal restraints on alienation was codified into law, beginning with the Nonintercourse Act of 1790.\(^{400}\) As a result, only the federal government can extinguish title to Indian lands. Even voluntary sales to the states or private individuals, without federal approval, are void.\(^{401}\) The Nonintercourse Act has been the basis of an extraordinary series of lawsuits in the eastern states under which tribal

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397. Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 730 (10th Cir. 1980) (tribal hunting and fishing regulatory authority over non-Indians not lost through non-use), vacated, 450 U.S. 1036 (1981), original opinion reinstated, 677 F.2d 55 (1982), aff’d, 462 U.S. 324 (1983). Professor Wilkinson observes that judicial reluctance to penalize tribes for non-use can also be explained by another pragmatic concern, that “the exercise of long-dormant governmental and economic powers is their best hope for breaking the cycle of a gripping poverty that has debilitated Indians since the reservation system was established.” Wilkinson, supra note 20, at 44.


399. The motivation behind the enactment of the Nonintercourse Acts was not entirely altruistic. See United States v. Candelaria, 271 U.S. 432, 441 (1926) (Nonintercourse Acts protect tribes from “improvidently disposing of their lands and becoming homeless public charges”); Collins, supra note 2, § 57.04(a), at 232 (although the discovery rule helped to promote the policy that Indian land should be honorably bought, it also provided to the sovereign “a convenient way to reward favorites or to resell land at a profit”).


401. See Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) (Indian title or right of occupancy “was recognized and extinguishable only by agreement with the tribe with the consent of the United States”).
title has been recognized after more than a century of non-use. In County of Oneida v. Oneida Indian Nation, the Court found that a 1795 agreement in which the Oneida Nation conveyed approximately 100,000 acres to the State of New York was void for lack of federal approval. Although the Oneidas failed to challenge the transaction for some 175 years—during which time good-faith, non-Indian purchasers had settled the land—the tribal claim was not barred by any state statute of limitations.

Despite the fact that Indian lands are protected by legal theories not applicable to Hispanic lands, such protection is far from perfect. In many cases, protection was after the fact, resulting in monetary settlements, but rarely resulting in the restoration of lands to the tribes. In other instances, the federal government lacked the will or the authority to protect the tribes from state and private interference. In still other cases, it was the federal government itself that was the Indian’s worst enemy. Despite tribal reliance on federal protection, at times “Congress... chose to exert its overriding military and legal authority and departed from that promise [of protection], forcing many tribes to accept successive treaties and agreements.”

VIII. CONCLUSION

In the Treaty of Guadalupe Hidalgo and in numerous Indian treaties, the United States promised to respect property rights of the conquered. To make such promises during the nation’s idealistic youth or during its feverish expansion across a seemingly-unlimited continent is one thing; to keep them is quite another. A nation’s character is tested severely by the arduous process of implementing treaty promises—a process measured in centuries, not years.

It is difficult to generalize accurately about such a lengthy process. Nevertheless, the cases and legislation analyzed in this article support several broad observations. With respect to the Treaty of Guadalupe

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405. See supra note 20.
406. See Collins, supra note 2, § 57.04(b), at 234-35. See also Seminole Tribe of Florida v. Florida, 64 LW 4167 (Mar. 27, 1996) (Congress’ attempt through the 1988 Indian Gaming Regulatory Act to permit Indian Tribes to sue states for failure to negotiate in good faith over the operation of gambling casinos on tribal land held unconstitutional).
407. Wilkinson, supra note 20, at 45.
Hidalgo, the meaning of its simple promise to inviolably respect Mexican property rights changed over time as Congress passed increasingly strict legislation to implement the treaty. Thus, that guarantee might mean one thing in California under the California Land Claims Settlement Act, and another in New Mexico under subsequent legislation establishing the Court of Private Land Claims.

Similarly, the effect of treaty guarantees to Indian tribes varied over time, as Congress alternately favored assimilation and tribalism. It is tempting to assert that tribal property rights received greater protection than did Hispanic property rights, but that observation is riddled with exceptions. It is true that special legal theories and legislation protected Indian rights, including the federal trust duty, the canons of construction, the non-intercourse statutes, and the legislation establishing the Indian Claims Commission. But, it is equally true that Indian treaties were not always ratified by Congress;\(^4\) that the federal trust duty was also a source of plenary power over tribal affairs; that the canons of construction were applied sporadically; that Indians were generally unsuccessful in maintaining rights to the lands and resources associated with watercourses; and that at times tribal property rights were lost to Hispanic claims under the Treaty of Guadalupe Hidalgo.\(^4\)

It is also true that the Treaty of Guadalupe Hidalgo acted to minimize the rights of Indian tribes located in the territory formerly governed by Mexico. With respect to the Pueblo Indians in New Mexico, in 1877 the United States Supreme Court determined that because the Pueblos had previously been part of Mexico, they "[held] their lands by a right superior to that of the United States" and were not entitled to special protection under the general trust duty applicable to other Indian tribes.\(^4\) That position was later reversed in United States v. Sandoval.\(^4\) With respect to the California Indians, the Treaty of Guadalupe Hidalgo established a special title litigation requirement not imposed upon other Indian tribes.\(^4\) Ironically, then, the Treaty of Guadalupe Hidalgo penalized tribes that had suffered multiple conquests—first by Spain and Mexico, and later by the United States—by stripping them of rights to which they might otherwise be entitled under federal Indian policy.\(^4\) In retrospect, the late-nineteenth and early-twentieth centuries were particularly troublesome times for the protection of treaty-based land rights.

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408. Treaties were negotiated with California Indians in order to make land available to non-Indians for settlement and gold prospecting. The Indians had begun performance of their treaty obligations when the United States rejected the treaties. Thus, "the tribes had surrendered their homes with no place to go" and "the tribes became landless." COHEN, supra note 9, at 95.
409. See supra parts IV.A.2.c. and III.B.
411. 231 U.S. 28 (1913). See supra part III.B.
It was during that period that the courts and Congress determined that the federal trust duty supported also a vast power over the tribes;\(^{414}\) that the Pueblos of New Mexico were not protected as wards of the nation;\(^ {415}\) that tribal common lands were "surplus" property available for sale to non-Indians;\(^ {416}\) and that the Indian right of occupancy could be lost for failure to comply with a federal two-year statute of limitation.\(^ {417}\) Rights under the Treaty of Guadalupe Hidalgo experienced a similar contraction during that period, as the Court established that even perfect land grants were subject to statutory litigation requirements;\(^ {418}\) that the common lands of community land grants passed to the United States' public domain;\(^ {419}\) and that title derived from the Spanish or Mexican governments might constitutionally be subject to more stringent state statutes of limitation than are applicable to other property.\(^ {420}\)

The treaties considered here have no expiration date and their guarantees remain alive in the hearts of Hispanic and Native American communities. To this day, litigation over treaty-based land rights continues, providing an ongoing opportunity for the United States to give meaning and respect to the promises it made long ago.

\(^{415}\) See United States v. Joseph, 94 U.S. 614 (1877). See supra part III.B.
\(^{416}\) See The General Allotment Act of 1887, 24 Stat. 388. See supra part V.A.
\(^{417}\) See Barker v. Harvey, 181 U.S 963 (1900). See supra part IV.A.2.c.
\(^{419}\) See United States v. Sandoval, 167 U.S. 278 (1897). See supra part V.B.