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COMPATIBILITY OF THE FEDERAL TRUST RESPONSIBILITY WITH SELF-DETERMINATION OF INDIAN TRIBES: REFLECTIONS ON DEVELOPMENT OF THE FEDERAL TRUST RESPONSIBILITY IN THE TWENTY-FIRST CENTURY

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COMPATIBILITY OF THE FEDERAL TRUST RESPONSIBILITY WITH SELF-DETERMINATION OF INDIAN TRIBES: REFLECTIONS ON DEVELOPMENT OF THE FEDERAL TRUST RESPONSIBILITY IN THE TWENTY-FIRST CENTURY

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I. Tribal Self-Determination policy.

Modern federal Indian policy enunciated by both federal political branches – Congress and the Executive – since the late 1960s has promoted the "self-determination" of Indian tribes and communities, through strengthened tribal governments and increased economic self-sufficiency. This policy of strengthening tribal governments, together with promoting Indian economic development, actually commenced during the New Deal with enactment of the Indian Reorganization Act of 1934,[1] which was drafted and strongly supported by the Roosevelt Administration.[2] This Act enabled tribes to reorganize their governments and began to free those governments from decades of intensive federal paternalism during which Indian people and reservation lands had been governed – essentially as colonies – by federal bureaucrats Indians did not elect or appoint, and who were accountable to superiors in the Executive Branch and ultimately Congress, not to the Indians. For example, in the debate when the Senate considered the Indian Reorganization Act of 1934, the bill's sponsor, Senator Wheeler, stated that "the Indian agent located upon an Indian reservation, was a czar."[3]

Even as late as 1968, the Harvard Law Review reported that:

> Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may

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[1] 25 U.S.C. § 461 *et seq.*

[2] *E.g.*, S.Rep. No. 1080, 73d Cong. 2d Sess. at 3-4 (1934) (letter of April 28, 1934 from President Roosevelt to Senator Wheeler, stating the "bill embodies the basic and broad principles of the administration for a new standard of dealing with the Federal Government and its Indian wards.").

[3] 78 Cong Rec. 11125 (1934).

> not do anything unless it is specifically permitted by the government.[4]

This condition persisted as late as the 1960s because – during the decade or so immediately after the Second World War – federal Indian policy retrogressed, moving away from supporting tribal self-government and toward reimposing bureaucratic paternalism, with the ultimate goal of "terminating" the federal trust relationship with tribes, abolishing reservations and subjecting Indians to the control of state laws.[5] Where it was implemented for particular tribes and reservations, this termination program created disastrous poverty and dislocation for Indian communities.[6] Many terminated tribes have since been "restored" to federal recognition by Congress in the past four decades[7] after both Presidents Johnson and Nixon and Congress returned to the wiser policies set by President Roosevelt and the New Deal Congress.

The centerpiece of the new policy was President Nixon's Message to Congress on Indian Affairs in 1970,[8] espousing an Indian policy favoring tribal self-determination and rejecting termination. Two years earlier, in his Message to Congress on "Goals and Programs for the American Indian" on March 6, 1968, President Johnson had similarly "propose[d] a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help."[9] President Nixon's comprehensive and thoughtful Message expressly rejected both the policy of "forced termination" and the contrasting system of "excessive dependence on the Federal government" where "the Indian community is almost entirely run by outsiders who are

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[4] Warren H. Cohen & Philip J. Mause, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1820 (1968).

[5] See generally Felix S. Cohen, *Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348 (1953).

[6] See generally, Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

[7] *E.g.*, 25 U.S.C. §§ 566 (Klamath), 711a (Siletz), 712a (Cow Creek Band of Umpqua), 713b (Grand Ronde), 714a (Confederated Tribes of Coos, Lower Umpqua, and Siuslaw), 715a (Coquille), 733 (Alabama Coushatta), 762 (Paiute of Utah), 861 (Wyandotte, Peoria, Ottawa, and Modoc of Oklahoma), 903a (Menominee), 941b (Catawba) 983a (Ponca), 1300g-2 (Ysleta Del Sur), 1300j-1 (Pokagon Band of Potawatomi), 1300l (Auburn Indians), 1300m-1 (Paskenta Band of Nomlaki), 1300n-2 (Graton Rancheria) (2005).

[8] Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS (July 8, 1970).

[9] Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 113 PUB. PAPERS (March 6, 1968).

responsible and responsive to Federal officials" rather than tribal communities. In announcing the policy of "self-determination without termination," President Nixon stated that "the time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."

In rejecting termination, President Nixon also recognized the federal trust responsibility to Indians as a legal obligation of the federal government:

> Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations.
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> * * * *
>
> The special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.[10]

President Nixon included in his Message specific proposals to Congress requiring federal agencies to transfer administrative responsibility for federal services and programs to tribes at the tribes' options and spurring Indian economic development by providing federal loan guarantees, loan insurance and interest subsidies. These proposals were enacted by Congress in 1975 as the Indian Self-Determination and Educational Assistance Act,[11] and Indian Financing Act.[12]

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[10] *Id.*

[11] 25 U.S.C. § 450, *et seq*. (2005)

[12] 25 U.S.C. § 1451, *et seq*. (2005)

Subsequent Administrations and Congresses have furthered and expanded the tribal self-determination policies of Presidents Johnson and Nixon in a bipartisan fashion. For example, President Reagan's Message to Congress on January 24, 1983[13] continued the commitment of the Nation to strong government to government relations with tribes and to support of tribal self-government and economic self-sufficiency. President Clinton's Executive Order 13175[14] recognized "the right of Indian tribes to self-government" and supported "tribal sovereignty and self-determination." President George W. Bush issued a Presidential Proclamation 7500 November 12, 2001 stating "we will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities."[15]

In the 1980s and 1990s, Congress amended the Indian Self-Determination and Educational Assistance Act to strengthen the process of contracting of federal programs to tribes,[16] and enacted the Tribal Self-Governance Act of 1994[17] which essentially allows tribes to receive federal program monies as block grants. In a series of amendments to federal environmental statutes during the 1980s, Congress authorized the Environmental Protection Agency to treat tribes as states for purposes developing and enforcing environmental standards and administering most federal environmental programs on reservations – including the Clean Air Act,[18] Clean Water Act,[19] Safe Drinking Water Act,[20] Federal Insecticide, Fungicide and Rodenticide Act[21] and major parts of the Superfund[22] program. The Native American Housing Assistance and Self-Determination

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[13] 19 Weekly Cong. Press Doc 99 (1983). Statement on Indian Policy, PUB. PAPERS (Jan. 24, 1983).

[14] Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000). See also President George H.W. Bush, Statement Reaffirming the Government-to-Government Relationship between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc 936 (June 14, 1991).

[15] Proclamation No. 7500, 66 Fed. Reg. 57641 (Nov. 12, 2001).

[16] Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994); Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2258 (1988).

[17] 25 U.S.C. § 458aa *et seq.* (2005).

[18] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 107, 104 Stat. 2399 (codified at 42 U.S.C. § 7601(d)(1)(A) (2005)).

[19] Clean Water Act Amendments of 1988, Pub. L. No. 100-581, § 207, 102 Stat. 2938 (codified at 33 U.S.C. § 1377(e) (2005)).

[20] Safe Drinking Water Act, 42 U.S.C. § 300j-11 (2005).

[21] An Act to Amend the Federal Insecticide, Fungicide, and Rodenticide Act 1978, Pub. L. No. 95-396, 92 Stat. 819 (codified at 7 U.S.C. § 136u (2005)).

[22] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §

Act of 1991[23] allows tribes and tribal housing authorities to manage public housing on their reservations. The Indian Tribal Justice Support Act of 1993[24] provided increased federal funds, training and technical assistance to tribal judicial systems, and assistance to tribes for developing tribal codes, rules of procedure, court administration systems, court records management systems and standards of judicial conduct. The Transportation Equity Act for the 21st Century of 1998[25] confirmed that Indian tribes may contract for and perform federal programs and activities concerning construction and maintenance of roads on their reservations. As a result of these and similar contemporaneous statutes,[26] enacted in furtherance of the bipartisan tribal self-determination policy, tribes today typically administer the full panoply of governmental services on their reservations and exercise enhanced political control as governments on their reservations.

II. The Federal Trust Responsibility to Indians.

While the self-determination policy is only several decades old, the trust responsibility is a judicially developed doctrine that spans nearly two centuries of Supreme Court jurisprudence.[27] Unsurprisingly for so longstanding a doctrine, it has

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101(a) 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9657 (2005)).

[23] Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101 *et seq.* (2005).

[24] Indian Tribal Justice Support Act, 25 U.S.C. § 3601 *et seq.* (2005).

[25] Transportation Equity Act for the 21st Century, 23 U.S.C. § 202(d) (2005).

[26] See text accompanying notes 167-179, *infra*.

[27] *E.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Fellows v. Blacksmith*, 60 U.S. (19 How) 366 (1856); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 654-55 (1890); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 300-05 (1902); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Nice*, 241 U.S. 591 (1916); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Payne*, 264 U.S. 446 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946); *United States v. Mason*, 412 U.S. 391 (1973); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974); *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980); *Nevada v. United States*, 463 U.S. 110, 142 (1983); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (*Oneida II*).

been at times interpreted and applied by the Court in different fashions and for different purposes. This part will explore its development and principal alternative formulations.

A. Origins in Cherokee cases as a doctrine protecting tribes as distinct political societies.

The trust responsibility doctrine was originally expounded by the Supreme Court in the two Cherokee cases, both of which involved the question of whether Georgia state statutes were applicable to persons residing on lands secured to the Cherokee Nation by federal treaties. In *Cherokee Nation v. Georgia*,[28] the Court held that it lacked original jurisdiction over a suit filed by the Nation against Georgia to enjoin enforcement of the state statutes because the Nation was not a "foreign state" within the meaning of that term in Article III of the Constitution. In *Cherokee Nation*, Chief Justice John Marshall described the Federal-Indian relationship as "perhaps unlike that of any other two people in existence" and "marked by peculiar and cardinal distinctions which exist no where else."[29] The Court agreed with the Cherokee Nation's contention that it was a "state" in the sense of being "a distinct political society . . . capable of managing its own affairs and governing itself."[30] But the Court held that Indian tribes were not "foreign states," but rather were subject to the protection of the United States and might "more correctly, perhaps, be denominated domestic dependent nations."[31] Chief Justice Marshall pronounced that "[t]heir relation to the United States resembles that of a ward to his guardian."[32]

In the second Cherokee case a year later, *Worcester v. Georgia*,[33] the Court invalidated the Georgia statutes because the treaties with the Cherokees and the Federal Trade and Intercourse Acts[34] protected tribal communities as "having territorial boundaries, within which their authority [of self-government] is exclusive. . . ."[35] In *Worcester*, Chief Justice Marshall meticulously analyzed the treaties with the Cherokee

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[28] 30 U.S. (5 Pet.) 1 (1831).

[29] *Id.* at 16.

[30] *Id*.

[31] *Id*. at 17.

[32] *Id*.

[33] 31 U.S. (6 Pet.) 515 (1832).

[34] Act of July 22, 1790, 1 Stat. 137, 139; Act of May 19, 1796, §12, 1 Stat. 469, 472; Act of March 3, 1799, § 2, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143, *codified* at 25 U.S.C. § 177.

[35] 31 U.S. at 557.

and emphasized that their right "to all the lands within those [territorial] boundaries . . . is not only acknowledged but guaranteed by the United States."[36] The trusteeship reflected in *Cherokee Nation* was implied from this guarantee, for there was no express language in any treaties specifically recognizing a trust relationship. The Court also based its analysis on the Trade and Intercourse Acts - which protected Indian land occupancy - as providing an additional source for the immunity of the Cherokee lands from state jurisdiction and implicitly an additional basis for the trust relationship itself. While based upon these treaties and statutes, the trust responsibility emerged as and has remained essentially a judicially developed concept of federal common law.

Worcester is significant for additional reasons. *Cherokee Nation* had not been a unanimous opinion, which was more unusual for the Marshall Court than for the Court today. In *Cherokee Nation*, Justices Johnson and Baldwin had concurred in the dismissal of the case because, they reasoned, the tribe was not a "state at all." The two concurring Justices, especially Justice Baldwin analogized the tribe to a conquered domain, which had no territorial rights save at the pleasure of the conqueror. Justice Johnson considered the Nation a sort of tenant-by-sufferance on the lands secured by the treaties, from which it could be dispossessed at will.[37] In *Worcester*, Chief Justice Marshall carefully refuted these conceptions by a detailed analysis showing that the treaties themselves confirmed the right of self-government in the Nation.

The specific holding of the Cherokee cases was that federal power over Indian affairs was exclusive vis-a-vis the states. In modern parlance, state power was preempted. Chief Justice Marshall concluded that the framers of the Constitution intended Indian affairs to be exclusively the province of the federal government by contrasting the constitutional provisions dealing with Indians with comparable ones in the Articles of Confederation it replaced.[38] But the implications of the Court's analysis in *Worcester* went well beyond the holding that the state statutes were "repugnant" under the Constitution. It established that tribes' status as sovereign entities was protected by federal law – from state legislative control, as *Worcester* specifically held, but also more broadly from the exclusive federal power over Indian affairs established under the Constitution. While the Court in *Cherokee Nation* denominated tribes as "dependent" nations vis-à-vis the federal government, that conception reflected the relationship established by the treaties that extended the protection of the United States over the tribes which were in fact within its national territory, and thus were sovereign entities protected by the United States, rather than "foreign" states. But Chief Justice Marshall's analysis of the treaties with the Cherokee also established a federal-tribal relationship that protected tribes' self-governing status from federal as well as state interference.

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[36] *Id.*

[37] *Cherokee Nation*, 30 U.S. at 27.

[38] *Worcester*, 31 U.S. at 559.

Chief Justice Marshall in *Worcester* recurrently emphasized that Britain and the United States had never attempted under the treaties or otherwise to govern tribes' internal affairs. The Court in *Worcester* first considered the actions of the British with the Tribes prior to the Revolution, concluding that:

> "certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the past of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers . . . . The King . . . never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only."[39]

Turning to the treaties between the United States and Indian tribes, Chief Justice Marshall concluded that the United States had also adhered uniformly to the same general policy.[40] Addressing specific provisions in the Cherokee treaties, the Court construed them as "explicitly recognizing the national character of the Cherokees and their right of self-government . . . [and] assuming the duty of protection, and of course, pledging the faith of the United States for that protection."[41]

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[39] *Worcester*, 31 U.S. at 547.

[40] *Id.* at 549-556.

[41] *Id.* at 556. The Court determined that under the treaties: "[t]he Cherokees acknowledge themselves to be under the protection of the United States and of no other power. Protection does not imply the destruction of the protected." *Id.* at 552. It stated "[t]heir relation was that of a nation claiming and receiving the protection of one more powerful, not of individuals abandoning their national character, and submitting as subjects to the laws of a master." *Id.* at 555.

The Court construed the ninth article of the treaty – which provided

> 'For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs*, as they think proper.'"

and concluded that "to construe the expression 'managing all their affairs,' into a surrender of self-government would be a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them.

Id. at 553-54. The Court also determined that:

> It is equally inconceivable that they [the Cherokees] could have supposed themselves . . . to have divested themselves of the right of self-government . . . ." [which] construction would be inconsistent with the

As noted, the Court in *Cherokee Nation* also analogized the trust relationship to a guardianship.[42] Recognizing that the United States has, under the Constitution, broad power over Indian affairs sufficiently extensive to make the tribes comparatively vulnerable to the exercise of that power, this guardian-ward construct also protects tribes from the peril to which that power potentially subjects them.

The treaties and federal statutes Chief Justice Marshall relied upon in the Cherokee cases also served as the basis for a holding by the Marshall Court that tribes possessed legal rights to those lands habitually possessed and occupied by them.[43] Like the trust responsibility, this possessory right is also a doctrine of federal common law.[44] Because of the tribes' legal right to the land, treaties and agreements were necessary to accomplish the extinguishment of their title and the opening of Indian lands to non-Indian settlement. The treaties were consequently a legally required transaction, contract, or bargain. The ensuing trust relationship protective of tribal self-government and of the lands and resources the tribes retained was a significant part of the consideration for that bargain offered by the United States.[45] For these treaties and agreements, the Indians commonly reserved their governmental authority and part of their aboriginal land base which was guaranteed to them by the United States.[46] By administrative practice and later by statute, the title to this land came to be held in trust by the United States for the benefit of the Indians. The tribes have later come to be recognized as holding full beneficial ownership to the retained lands and the equitable title to them. The concept of the trust responsibility under the Marshall Court decisions, then, was that tribes agreed to cede some of their lands in return for a federal obligation to protect the remaining lands and tribes rights to govern themselves free from interference by any other government.

> spirit of this and of all subsequent treaties; especially of those articles which recognize the right would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

Id. at 554.

[42] 30 U.S. at 17.

[43] *Johnson v. McIntosh*, 21 U.S. 543, 568 (1823); see also *Santa Fe Pac. R.R. Co.*, 314 U.S. at 345-46.

[44] *Oneida II*, 470 U.S. at 236.

[45] *See e.g.*, *Payne*, 264 U.S. at 448 ("These Indians yielded whatever claims they may have had to a valuable and extensive area in exchange for a relatively small reservation, relying upon what they undoubtedly understood to be an assurance on the part of the general government that they would be given . . . permanent homes therein.").

[46] *Cf. United States v. Winans*, 198 U.S. 371, 381 (1905) ("treaty was not a grant of rights to the Indians, but a grant of rights from them, - a reservation of those [rights] not granted").

B. The Trust Responsibility as a source of federal power.

When it next discussed and applied the federal trust responsibility, in the late nineteenth and early twentieth centuries, the Court conceived of it quite differently than the Marshall opinions – as an extra-constitutional source of federal power, implicit but apart from the express powers in the Constitution. In *United States v. Kagama*,[47] the Court considered the constitutionality of the Major Crimes Act,[48] enacted by Congress in 1885 to provide federal court prosecution and punishment for felony-type crimes on all Indian reservations. Prior to that date, federal criminal law did not extend to Indians committing crimes against other Indians in Indian country. Kagama, an Indian arrested and prosecuted under the Major Crimes Act for murdering another Indian on the Hoopa Valley Reservation in California, challenged the constitutionality of the statute. The Supreme Court agreed with his contention that Article I, Section 3, Clause 8–which confers upon Congress the express power "to regulate Commerce with the Indian Tribes" – did not authorize enforcement of a federal criminal code on Indian reservations. But the Court nonetheless sustained the constitutionality of the Major Crimes Act by relying on the government's fiduciary relationship to the Indians, holding that "these Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection and with it the power."[49]

Kagama presents a very different conception of the trust responsibility from that of the Cherokee cases – as a basis for congressional power outside the enumerated provisions in Article I which also seems unconstrained by any requirement to protect tribal self-government. A different approach, using the Cherokee cases, could have been to sustain the Major Crimes Act as related to protecting or reinforcing tribes' political integrity as functioning political societies. Some approximately contemporaneous decisions did reflect concern for protecting tribal self-government.[50] But the Court in *Kagama* even implied that tribes did not possess governmental authority:

> [T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two.[51]

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[47] 118 U.S. 375 (1886).

[48] Major Crimes Act, 23 Stat. 362, 385 (1885), (*codified at* 18 U.S.C. § 1153).

[49] *Kagama*, 118 U.S. at 383-84.

[50] *See Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883); *Talton v. Mayes*, 163 U.S. 376 (1896).

[51] *Kagama*, 118 U.S. at 379.

While *Kagama* is no longer interpreted as recognizing unlimited power in Congress over tribes, subsequent cases in the ensuing decades held that Congress had a very extensive power over Indians. Statutes granting easements and leases over Indian lands without tribal consent were sustained in the decades following *Kagama*, as was the constitutionality of statutes like the Trade and Intercourse Acts which prevented sale of Indian property without approval by the Secretary of the Interior.[52] The basis for these decisions was the Court's conception of the trust responsibility very different from the one in the Cherokee cases – that the Indians were "in a condition of pupilage or dependency, and subject to the paramount authority of the United States" as guardian.[53]

Probably the most extreme case of this period in terms of federal power was *Lone Wolf v. Hitchcock*,[54] which declared that Congress had a "plenary" power deriving from the guardianship to manage Indian property that enabled it to unilaterally abrogate treaties with tribes.[55] *Lone Wolf* concerned a statute which allotted tribally owned reservation lands to individual Kiowas and Comanches, and authorized the sale of unallotted lands on the reservation to non-Indians. The Indians sued to enjoin enforcement of the allotment statute because it conflicted with terms of their 1867 treaty that expressly prohibited any cession of reservation lands without consent of three-quarters of the tribal members. This consent admittedly had not been obtained. The Supreme Court held that "as with treaties made with foreign nations . . . the legislative power might pass laws in conflict with treaties made with the Indians."[56] The Court stated that the treaty could not operate "to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and . . . deprive Congress, in a possible emergency . . . of all power to act, if the assent of the Indians could not be obtained."[57] The Court in *Lone Wolf* declined to review whether Congress had acted consistently with its trust responsibility, and simply presumed that Congress had acted "in perfect good faith in the dealings with the Indians."[58]

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[52] *See Cherokee Nation v. Southern Kansas Ry. Co*., 135 U.S. 641 (1890); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

[53] *Cherokee Nation v. Hitchcock*, 187 U.S. at 305.

[54] 187 U.S. 553 (1902).

[55] *Id*. at 565.

[56] *Id.* at 566.

[57] *Id.* at 564.

[58] *Id*. at 568; *see also Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902).

C. Modern cases applying the trust responsibility.

Modern cases have tempered the power-conferring aspect of the trust responsibility expressed in the *Kagama-Lone Wolf* line of cases to reestablish significant limits on both congressional and executive power over Indians in a manner reminiscent of the Cherokee decisions.

First, they have rejected the notion expressed in *Lone Wolf* that congressional enactments concerning Indians are immune from judicial review. In *Delaware Tribal Business Committee v. Weeks*,[59] the Supreme Court expressly rejected an argument that there could be no judicial review of statutes affecting Indians, and stated instead that federal legislation affecting Indians must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[60] These cases thus teach that the trust responsibility provides a standard of review for legislation in the field of Indian affairs: whether the legislation is rationally related to the trust responsibility.

By using the trust responsibility as the standard by which congressional power is measured, the Court indicated that whenever Congress acts in the field of Indian affairs, it does so as trustee, and its actions are subject to review under the trust responsibility standard. Consequently, today the "exclusive" congressional power recognized in the Cherokee cases and "plenary" power of Congress as elucidated in turn-of-the-century cases like *Kagama* and *Lone Wolf* is neither absolute nor unreviewable. Instead, the trust responsibility has been expressed also as a limit on Congress' power to manage Indian relations. To be valid, enactments must be tied rationally to the trust obligations. However, the Court has not to date applied this standard either to invalidate any act of Congress applying to Indians or to give precise content to the elements of the trust responsibility the standard embodies.

Modern cases have also treated the trust responsibility as a lens through which federal statutes should be interpreted as they impact tribes. Thus, general federal laws which have a direct impact on Indian treaty and other federal rights have been held not to abrogate tribal treaty rights or rights to self-government unless Congress specifically states that intention.[61] Similarly, an act of Congress will not be construed to extinguish

[59] 430 U.S. 73 (1977).

[60] *Id.* at 85 (quoting its earlier decision in *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

[61] *E.g., EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1083 (9th Cir. 2001) (Age Discrimination in Employment Act ("ADEA") does not apply to the tribal housing authority); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1292 (11th Cir. 2001) (Rehabilitation Act does not abrogate tribal immunity to subject it to actions brought under Act); *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1133-1134 (11th Cir. 1999) (Americans with Disabilities Act does not waive tribal immunity from suit); *EEOC v. Fond du Lac Heavy Equip. & Const. Co.*, 986 F.2d 246, 249-51 (8th Cir. 1993) (ADEA does not apply to

Indian property rights under the *Lone Wolf* doctrine unless that intent is clearly and plainly expressed.[62] In addition, because of the trust responsibility, it is well settled that statutes affecting Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[63]

Several Supreme Court cases have also held that the trust responsibility imposes legal duties on federal executive agencies separate and apart from any express provisions of a treaty, statute, executive order or regulation. In *Lane v. Pueblo of Santa Rosa*,[64] the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, "would not be an exercise of guardianship, but an act of confiscation."[65] The lands in *Lane* were not protected by any treaty, and there was no claim that the Secretary's proposed disposition of them violated any treaty or statute. Shortly after *Lane*, in *Cramer v. United States*,[66] the Court voided a federal land patent that had conveyed – 19 years previously – lands occupied by Indians to a railway. The Indians' occupancy of the lands was not protected by any treaty, executive order or statute, but the Court placed heavy emphasis on the trust responsibility and national policy protecting Indian occupancy as a basis for relief.[67] This

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tribal enterprise because it would affect the "tribe's specific right of self-government"); *EEOC v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989) (holding that ADEA does not apply to Nation when it would interfere with its treaty right to self-government).

[62] *See United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941).

[63] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) ("ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence" (quotation omitted)); *Oneida II*, 470 U.S. 226, 247 (1985) (canon of construction "rooted in the unique trust relationship between the United States and the Indians"); *see also County of Yakima v. Confederated Tribes of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

[64] 249 U.S. 110 (1919).

[65] *Id.* at 113.

[66] 261 U.S. 219 (1923).

[67] The Court observed "unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy . . . ." 261 U.S. at 227 (citations omitted).

The Court further noted, "[t]o hold that . . . they acquired no possessory rights to which the government would accord protection would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation." *Id.* at 228.

responsibility meant that the officials involved had no statutory authority to convey the lands.[68]

Similarly, in *United States v. Creek Nation*,[69] the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Court bottomed its decision on the federal trust doctrine:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions.[70]

More recent lower court decisions have similarly enforced fiduciary obligations against executive officials apart from any treaty or statutory limitations[71].

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[68] *See Cramer*, 261 U.S. at 232-35. Prior to *Cramer* and *Lane*, in a case involving a claim under a special jurisdictional statute authorizing an action to be brought in the Court of Claims, the Supreme Court held that the United States had acted "clearly in violation of the trust" by opening a reservation to settlement under the general land laws of the United States, and observed:

> That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolutions, unlike the legislation sustained in [*Cherokee Nation v. Hitchcock*] . . . were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert . . . an unqualified power of disposal over the [Indian] lands as the absolute property of the government.

United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 510-11 (1913) (citation omitted). An accounting to the ward, in the form of payment of monetary damages, was required. *See also Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358 (1937).

[69] 295 U.S. 103 (1935).

[70] 295 U.S. at 109-10 (emphasis added).

[71] *E.g., Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857-59 (10th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 970 (1986) (holding Secretary's fiduciary duties in

While the Court in *Creek Nation* did not specify precisely what "limitations" do "inhere to such a guardianship,"[72] subsequent cases have defined the standard applicable to the United States, in its capacity as trustee for Indian trust funds and natural resources, by applying the common law standards that govern private trusts and trustees. The Supreme Court looked to common law trust duties when it decided *Seminole Nation v. United* States.[73] The Court there held that the conduct of the United States, as trustee for the Indians should "be judged by the most exacting fiduciary standards. 'Not honesty alone, but the punctilio of an honor the most sensitive.'"[74] The Court has continued to rely on the common law of trusts to define the United States' trust obligations to Indians in other modern cases. In *United States v. Shoshone Tribe of Indians*,[75] the Court explained that "[a]s transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe." In *United States v. Mason*,[76] the Court relied on A. Scott, *Trusts* (3d Ed. 1967) for standards governing United States as trustee, stating that the Government's duty is "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." In *United States v. Mitchell* (*Mitchell II*),[77] the Court looked to the *Restatement (Second) of Trusts*, §§ 205-212 (1959), to find that all common law elements of a trust relationship are present with regard to Government's obligations to Indians.[78] And following common law trust principles, the Court in *Mitchell II* held the United States as trustee liable to the Indians in damages despite the United States' sovereign immunity.

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mineral lease administration exceed requirements in Department's regulations); *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1100-01 (8th Cir. 1989) (holding BIA and IHS have a trust responsibility to clean up hazardous open dumps on Indian reservation despite lack of specific statutory language in Resource Conservation and Recovery Act so stating). See also text accompanying notes 82-89, *infra*.

[72] *Creek Nation*, 295 U.S. at 109-10.

[73] 316 U.S. 286, 297 n.12 (1942).

[74] *Id*. at 297 & n.12 (quoting Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)).

[75] 304 U.S. 111, 117 (1938).

[76] 412 U.S. 391, 398 (1973).

[77] 463 U.S. 206, 226 (1983).

[78] *Id.* at 226 (citing *Restatement (Second) of the Law of Trusts*, §§ 205-212 (1959); G. Bogert, *The Law of Trusts and Trustees*, § 862 (2d Ed. 1965); 3 A. Scott, *The Law of Trusts*, § 205 (3d Ed. 1967)).

A recent Supreme Court decision adhered to this concept, albeit by a 5-to-4 vote. In *United States v. White Mountain Apache Tribe*,[79] the Court held that the United States was liable for damages for breach of its fiduciary duties to maintain, protect and preserve the property of a historic former military post it both owned in trust for a tribe and had administrative control over. The majority opinion and dissent differed sharply, however, as to the standards by which the Government's management of the former post should be judged. The majority held the government to the standard fundamental common-law duties of a trustee to preserve and maintain trust assets,[80] just as the Court had done in *Seminole Nation*, *Shoshone Tribe*, *Mason*, and *Mitchell II*. By contrast, Justice Thomas' dissent would have rejected the concept that "the relationship between the United States and Indians" should be "governed by ordinary trust principles" or treated as "comparable to a private trust relationship," since the "duties of a trustee are more intensive than the duties of some other fiduciaries," such as those of a guardian to a ward.[81]

Lower federal courts have also generally applied common law fiduciary standards in evaluating executive actions dealing with Indians. In *Menominee Tribe of Indians v. United* States,[82] the Court of Claims found it to be "settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee," citing *Seminole*, and testing the Government's handling of the Indians' funds "by the standards applicable to a trustee."[83] In *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*,[84] the Court of Claims looked to the *Restatement of Trusts* to define the United States' duties concerning investment of Indian trust funds, and held that as trustee, the Government was obligated: to promptly place trust funds at interest, to maximize trust income by prudent investment, and "to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested."[85] Other cases have applied the same common law

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[79] 537 U.S. 465 (2003).

[80] *Id.* at 475-76.

[81] *Id.* at 483, n1 (in part quoting *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 573 (1990)).

[82] 101 Ct. Cl. 10, 19-20 (1944).

[83] Accord, *Menominee Tribe of Indians v. United States*, 102 Ct. Cl. 555, 562 (1945) (same).

[84] 512 F.2d 1390, 1394 (Ct. Cl. 1975).

[85] *Accord Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (finding "[i]t is well established that conduct of the Government as a trustee is measured by the same standards applicable to private trustees" and relying on the *Restatement (Second) of Trusts* to hold that the United States as trustee is, *inter alia*, "under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary," to account to the beneficiary for any profit arising out of the administration of the trust, and "to use reasonable care and skill to make the trust property productive").

trust principles to the government's administration of Indian trust land and natural resources. In *Coast Indian Community v. United States*,[86] the Court held that "[t]he United States, when acting as trustee for the property of its Indian wards, is held to the most exacting fiduciary standards," and looked to A. Scott, *Trusts* (3d Ed. 1967) to define standards applicable to United States in leasing land for Indians.

The courts have also consistently rejected arguments that the government's conduct in its administration of the trust, can be tested simply by a standard of reasonableness, but have required that the government meet the higher standards applicable to private trustees. In *Navajo Tribe of Indians v. United States*,[87] the court of claims rejected the Government's argument that no fiduciary obligation exists unless there is an express provision of a treaty, agreement, executive order or statute creating such a trust relationship. In *Duncan v. United States*,[88] the court rejected an argument that Congress must spell out specifically all trust duties of the Government as trustee, finding that the creation of the trust sufficient to establish trust obligations. The court held that "the standard of duty for the United States as trustee for Indians is not mere 'reasonableness,' but the highest of fiduciary standards."[89]

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[86] 550 F.2d 639, 652, 653 n.43 (Ct. Cl. 1977).

[87] 624 F.2d 981, 991 (Ct. Cl. 1980).

[88] 667 F.2d 36, 42-43, 45 (Ct. Cl. 1981).

[89] *See also Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857-59 (10th Cir. 1986) (*en banc), cert. denied*, 479 U.S. 970 (1986) (adopting the dissenting opinion at 728 F.2d 1555, 1563 (10th Cir. 1984) (holding Secretary's duties in mineral lease administration are *not* limited to complying with administrative law and regulations, but are subject to "the more stringent standards demanded of a fiduciary;" thus when Secretary is faced with a decision on mineral lease management for which there is more than one "reasonable" choice, the Secretary is required to select the alternative that best serves the Indians' interests)); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 794 (9th Cir. 1986) ("Courts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries") (citing *Mitchell II; Seminole)* (third citation omitted); *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997) (relying on G.G. and G.T. Bogert, *The Law of Trusts and Trustees*, for standard defining the Government's duty to provide adequate notice to Indian trust beneficiaries); *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 586 (9th Cir. 1990) ("[t]he same trust principles that govern private fiduciaries determine the scope of FERC's obligations to the [Indian] Community") (citation omitted); *Red Lake Band of Chippewa Indians v. Barlow*, 834 F.2d 1393, 1399 (8th Cir. 1987) (Secretary has duty to actively seek the best use of reservation funds); *White Mountain Apache Tribe of Arizona v. United States*, 20 Cl. Ct. 371, 380 (1990) (BIA "'obligation to maximize the trust income by prudent investment'") (citation omitted).

The various decisions of the Court of Appeals for the District of Columbia Circuit in *Cobell v. Norton* apply these principles. *Cobell* is a class action brought on behalf of individual Indians for whom the United States maintains trust accounts. Late 19th century and early 20th century federal Indian policy, as exemplified by the agreement and statute construed in *Lone Wolf v. Hitchcock*, favored dividing tribally-owned reservation lands into tracts to be beneficially owned by Indian individuals. Today, over 8 million acres of lands, mostly on reservations, remain owned by the United States in trust for individual Indians. The Interior Department administers over 200,000 individual Indian money (IIM) accounts reflecting the proceeds from leasing or otherwise using these lands. The Indian plaintiffs in *Cobell* seek an accounting for the trust funds held in those accounts claiming that the United States has breached its trust responsibility by failing to account to the individual Indian beneficiaries. In the course of this protracted litigation, it has become clear that the Interior Department does not possess the records necessary for it to provide an accurate accounting of these funds.

The court of appeals in *Cobell* defined the standard applicable to the United States with regard to administration of the IIM accounts by relying on the Supreme Court's decision in *Mitchell II.* The court stated:

> "A fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds)."[90]

The court further found, as did the Supreme Court in *Mitchell II*, that "[t]his rule operates as a presumption," and that a trust relationship arises "'where the Federal Government takes on or has control or supervision over tribal monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund or a trust or fiduciary connection.'"[91] The court of appeals also explained – consistent with the analysis applied by other courts – that while relevant statutes and treaties will define the contours of the Government's trust obligations, "[t]his does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee's duties absolves the government of its responsibilities."[92]

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[90] *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (quoting *Mitchell II*, 463 U.S. at 225).

[91] *Id.* (quoting *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987)).

[92] *Id*. at 1099.

Rather, "[t]he general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through . . . the general trust law."[93]

Relying on these principles, the court of appeals then rejected the government's contention that the government's obligations with regard to the trust funds of individual Indians was limited only to the express terms of the 1994 Trust Fund Management Reform Act. The court carefully examined the text of the Act, concluding that by it Congress "reaffirmed and clarified preexisting duties" but did not create them.[94] The Court found that the Act "sought to remedy the government's long-standing failure to discharge its trust obligations; it did not define and limit the extent of appellants' obligations" but instead listed some of the means by which those duties may be discharged.[95]

Applying those principles to the evidence before the district court, the court of appeals affirmed the district court's ruling that the United States had failed to timely implement trust reforms required by the 1994 Act. The court further affirmed the district court's conclusion that the United States was also required – by both the terms of the 1994 Trust Fund Management Reform Act and common law trust principles – to provide the IIM beneficiaries with a complete historical accounting of their funds.[96]

In a subsequent, more recent decision in *Cobell*, the D.C. Circuit once again rejected the Secretary's claim that because she had not violated a specific statute in managing the IIM accounts, she was not liable to the plaintiffs. The court of appeals observed that "[c]ontrary to the Secretary's view '[w]hile the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms' . . .", reaffirming that "the Secretary has an 'overriding duty . . . to deal fairly with Indians' . . . and the Secretary's actions must be judged by 'the most exacting fiduciary standards.'"[97]

Taken together, these modern decisions return to a Marshallian conception of the trust responsibility, limiting federal power to adversely impact treaty and other Indian rights such as self-government. Many of these cases have concerned protecting Indian property resources, rather than tribal self-government, from overreaching by federal agencies or from executive actions abrogating Indian property rights based on uncertain

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[93] *Id.* at 1101.

[94] *Id.* at 1100.

[95] *Id.* at 1100-01.

[96] *Id.* at 1102, 1103.

[97] *Cobell v. Norton*, 391 F.3d 251, 257 (D.C. Cir. 2004)), quoting *Morton v. Ruiz,* 419 U.S. 199, 236 (1974) and *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942).

or ambiguous directives from Congress. The concept of protecting tribes and their property against encroachment by federal as well as state authority was, however, a purpose embedded implicitly in Chief Justice Marshall's analysis.[98]

III. Consistency of tribal self-determination and the federal trust responsibility to tribes.

Despite President Nixon's embrace of the federal trust responsibility to Indians and express rejection of the termination policy, in recent years some questions have been raised as to whether the trust responsibility remains compatible with tribal self-determination and increased tribal autonomy in management of governmental programs. Recent expressions of doubt about the compatibility of the two doctrines have usually focused on the legal responsibilities of federal officials to control and manage Indian lands. Most Indian lands are owned in fee simple by the United States in trust for a tribe or individual Indian(s). Other Indian lands owned in fee by a tribe or individual Indians are commonly restricted against alienation by federal law.[99] In either circumstance, the Secretary of the Interior as trustee must approve virtually all transactions between Indian tribes or individual landowners and private companies seeking to use or develop such Indian lands.[100]

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[98] Set text accompanying notes 38-42, *supra*. Another line of modern cases, beginning with *Williams v. Lee*, 358 U.S. 217 (1959) has likewise protected "right of reservation Indians to make their own laws and be ruled by them" *id.* as 220, from infringement by states, *e.g.*, *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382 (1976), and also federal authorities. In *Iowa Mut. Ins. Co. v. LaPlante*, for example, the Court observed that "a federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts," 480 U.S. 9, 15, and that "adjudication of such matters by any non-tribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16. Similarly, in *Santa Clara Pueblo v. Martinez*, the Court determined that inferring a right of action in federal court to enforce provisions of the Indian Civil Rights Act against tribal officials" plainly would be at odds with the congressional goal of protecting tribal self-government," 436 U.S. 49, 64 (1978), and "undermine the authority of tribal forums." *Ibid.* And in *United States v. Wheeler*, the Court observed that "[f]ederal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench on important state interests." 435 U.S. 313, 332 (1978).

[99] 25 U.S.C. § 177; *United States v. Ramsey*, 271 U.S. 467, 470-471 (1926); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Bowling*, 256 U.S. 484, 486-89 (1921).

[100] *E.g.*, 25 U.S.C. §§ 415 *et seq.* (surface leases of Indian trust and restricted lands); *Id.*, §§ 396, 396a *et seq.* (leases of allotted or unallotted Indian lands for mining purposes); §§ 2101 *et seq.* (Indian minerals development agreements). The constitutionality of the approval power as a restraint on alienation of Indian lands was sustained in *Tiger v. Western Inv. Co*, 221 U.S.

A. Supreme Court's Navajo Nation decision.

The Supreme Court recently held in *United States v. Navajo Nation*[101] that the United States was not liable in money damages to the Navajo Nation by virtue of its approval of amendments to a coal lease between the Nation and Peabody Coal Company. Like most Indian owned lands, the lands involved in this case are owned in fee simple by the United States in trust for the Nation. A federal statute, the Indian Mineral Leasing Act of 1938,[102] requires that mineral leases of tribal trust lands must be approved by the Secretary of the Interior.

The Nation claimed that the Secretary of the Interior had breached trust obligations to the tribe by approving lease amendments containing a royalty rate of 12 ½ percent which, although it was the customary rate for leases to mine coal on federal and Indian lands,[103] was below the 20 percent rate which several internal Interior Department studies concluded was the fair value of the Nation's coal.[104] The Nation also claimed that the Secretary himself had violated the trust obligations of the United States by personally engaging in a secret *ex parte* communication with Peabody and acceding to Peabody's request that the Department withhold action on an administrative appeal Peabody had filed with the Department seeking reversal of a determination by a lower echelon BIA official that the royalty rate should be 20 percent, based on the internal Department studies. As a result of these communications, the Secretary sent a memorandum to his subordinate, the Deputy Assistant Secretary for Indian Affairs, who had drafted and was about to issue a decision affirming the BIA determination that the royalty rate should be 20 percent.

The Secretary's memorandum "suggested" instead that the Deputy Assistant Secretary advise the Nation and Peabody that a decision in the administrative appeal was "not imminent" and urge "them to continue with efforts to resolve the matter" by negotiation.[105] The Secretary's memorandum was actually drafted by Peabody.[106] The

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286 as an exercise of the protective power of the federal trust responsibility. *Id*. at 310-311 ("Congress . . . has undertaken from the earliest history of the Government to deal with the Indians as a dependent people and to legislative concerning their property with a view to their protection . . . .")

[101] 537 U.S. 488 (2003).

[102] 25 U.S.C. §§ 396a *et seq.*

[103] 537 U.S. at 498 and n.6, 511.

[104] *Id.* at 509-510, 518-519 and notes 3 and 4 (dissenting opinion of Justice Souter).

[105] *Id.* at 496-498. The administrative appeal came about because the original lease provided that the royalty rate would be "subject to reasonable adjustment by the Secretary of the Interior or his authorized representative" on the 20-year anniversary date of the lease. The Nation had written the Secretary asking that he exercise this authority, and the Director of the

Navajo Nation claimed that the Secretary had breached his trust responsibility by favoring Peabody's interests to those of the Nation by holding a secret meeting with Peabody and then signing a memorandum drafted by Peabody directing his subordinate to "withhold his decision [in the administrative appeal] affirming the 20 percent rate; directing him to mislead the Tribe by telling it no decision on the merits of the adjustment was imminent, when in fact the affirmance had been prepared for . . .signature, and directing him to encourage the Tribe to . . . return to the negotiating table, where 20 percent was never even a possibility."[107] In fact, after resumed negotiations, the Nation agreed to a 12 ½ percent royalty rate and various other terms, which the Secretary then personally approved.[108]

Despite the Secretary's extraordinary misbehavior, the Supreme Court rejected the Nation's breach of trust claim. In an opinion by Justice Ginsburg, the Court's majority concluded that the Indian Mineral Leasing Act "simply requires Secretarial approval before coal mining leases negotiated between tribes and third parties become effective" rather than "giv[ing] the Federal Government full responsibility to manage Indian resources. . .for the benefit of the Indians."[109] Justice Ginsburg construed the Act as aiming "to enhance tribal self-determination by giving tribes, not the Government, the lead role in negotiating mining leases with third parties."[110] She contrasted the Indian Mineral Leasing Act with predecessor statutes under which "decisions whether to grant mineral leases on Indian land generally rested with the Government" and concluded that the Indian Mineral Leasing Act was instead "designed to advance tribal independence" by "empower[ing] Tribes to negotiate leases themselves, and, as to coal leases, assign[ing] primarily an approval role to the Secretary."[111] Justice Ginsburg considered that "the ideal of Indian self-determination is directly at odds with Secretarial control over leasing."[112]

The Court in addition dismissed the Nation's breach of trust claims based on the Secretary's secret *ex parte* meetings with Peabody and directions to his subordinates to withhold a decision in the administrative appeal establishing the 20 percent royalty rate

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BIA for the Navajo Area had set a 20 percent rate, which Peabody appealed to the Deputy Assistant Secretary for Indian Affairs. *Id.* at 495-496.

[106] *Id.* at 520 (dissenting opinion of Justice Souter).

[107] *Ibid*.

[108] *Id.* at 498-500.

[109] *Id.* at 507.

[110] *Id.* at 508.

[111] *Id.* at 494.

[112] *Id.* at 508.

on the ground that nothing in the Indian Mineral Leasing Act or its implementing regulations "proscribed the *ex parte* communications in this case, which occurred during an administrative appeal process largely unconstrained by formal requirements."[113]

Justice Souter's dissent articulated a somewhat more expansive concept of the Secretary's trust responsibility under the Indian Mineral Leasing Act – one requiring the Secretary "to make a more ambitious assessment of the best interest of the Tribe before signing off" by approving a particular lease.[114] The dissent pointed out that the Secretary's regulations as well as the legislative history of the Indian Mineral Leasing Act stressed the "overarching purpose" of ensuring that the terms and conditions of a lease are in the best interests of the Indian landowner."[115] Justice Souter also relied on "the protective purpose of the Secretary's approval power" as discussed in a number of prior Supreme Court decisions construing other statutes requiring Secretarial approval of Indian land transactions, including a decision in the *Kagama-Lone Wolf* era concluding that the Secretary's statutory power to approve leases of allotted lands "was 'unquestionably . . . given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation'."[116]

Although Justice Souter also questioned the majority's limitation of trust obligations only to circumstances where the Government had "elaborate control" of the lease transaction,[117] the two opinions in *Navajo Nation* could plausibly both be read as presenting different visions of the trust responsibility, both of which appear in conflict with tribal self-determination. The majority opinion believed that tribal autonomy limits federal trust obligations, while in the view of the dissent, the trust obligations apply to protect dependent Indians against improvident transactions. Under both of these views, Indian dependency seems the underlying premise of the trust responsibility.

In my view, however, it misunderstands *Navajo Nation* to read the opinions in that fashion. Because *Navajo Nation* was a "claim for compensation from the Federal Government,"[118] the Government's sovereign immunity from suit was the dominant issue in the case.[119] The primary issue before the Court was, accordingly, whether the Indian Mineral Leasing Act or its implementing regulations could be "fairly interpreted as

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[113] *Id.* at 513.

[114] *Id.* at 515.

[115] *Id.* at 517 and n.1.

[116] *Id.* at 515 (quoting *Anicker v. Gunsburg*, 246 U.S. 110, 119 (1918)).

[117] 537 U.S. at 517 and n2.

[118] *Id.* at 493.

[119] *Id.* at 502-506.

mandating compensation for breach" of the Secretary's duties to the Nation, not whether trust obligations had been violated. Following its earlier precedents on sovereign immunity, the Court held that a violation of the common law trust relationship by the Secretary standing alone did not waive Government's sovereign immunity so as to impose monetary liability on the Government.[120] Accordingly, while the opinion states that the "case concerns the Indian Mineral Leasing Act of 1938 . . . and the role it assigns to the Secretary of the Interior . . . with respect to coal leases executed by an Indian tribe and private lessee,"[121] that statement was made in the context of considering a claim for money damages, not equitable relief where sovereign immunity has been waived by the Administrative Procedure Act.[122]

Because both the recent *Navajo* and *White Mountain Apache* decisions concerned claims of monetary liability against the United States, moreover, the majority and dissenting opinion in those cases focused on the extent to which the Government had active control and management over the properties in question – the former military post in *White Mountain Apache* and the lease of lands for strip-mining coal in *Navajo*. The *White Mountain Apache* majority included all three dissenting Justices in *Navajo*, and the *White Mountain Apache* dissent included four of the six justices in the *Navajo* majority. While there is certainly room reasonably to disagree with the ultimate conclusion in *Navajo* that federal control and management of the coal lease there was insufficiently extensive to impose monetary liability on the Government for the Secretary's actions – which plainly did not comport with the stricter fiduciary standards set forth by the Court in *Seminole Nation*,[123] – it is at least reasonable to conclude that where a tribe has control over programs and policies on a reservation, the federal government should not be held responsible in money damages for matters that it lacks sufficient legal authority to control. A decision on a "breach of trust" claim that the United States' sovereign immunity protects it from money damages where it has limited control and management responsibility over the trust property, therefore, teaches little if anything about the nature or purposes of the trust responsibility itself. However, because of the limitation sovereign immunity places upon recovery of money damages, *Navajo Nation* does of course restrict the enforceability of the trust responsibility's legal principles.

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[120] *Id.* at 506.

[121] *Id.* at 493.

[122] 5 U.S.C. § 702.

[123] See text accompanying n.74, *supra*: "Not honesty alone, but the punctilio of an honor most sensitive." 316 U.S. at 297 n12.

B. The trust responsibility as impeding tribal economic development.

In his thoughtful paper "A Changing Landscape: Practical Considerations for Balancing the Federal Trust Responsibility and Tribal-Private Economic Development: Taming the Paper Tiger",[124] my co-panelist Lynn Slade sets forth several ways in which he believes the statutory requirements that the Secretary approve transactions involving Indian lands, which are a consequence of the federal trust responsibility, have discouraged private capital investment on Indian reservation lands and consequently retarded Indian economic development and self-sufficiency.

First, pursuant to the trust responsibility BIA evaluates the economic terms of the proposed transaction to confirm its fairness from the standpoint of the Indian landowners,[125] often after time-consuming appraisals. At a minimum this causes delay, sometimes substantial delay.[126]

Second, because of ownership of and federal supervision over Indian lands, the courts have held that myriad federal restrictions unrelated to any trust obligation to Indians apply to development of Indian lands that would not apply to similar private lands owned by non-Indians. A primary example is court decisions holding that the Secretary must comply with the National Environmental Policy Act[127] in approving transactions involving Indians lands. That means that where the Secretary's approval constitute a "major federal action that significantly affects the environment," an environmental impact statement must be drafted, submitted for public comment and finalized, a process that can take more than a year if the private developer pays the commission and costs of the study and much longer if it does not and relies on the Interior Department to prepare the statement using federal dollars.

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[124] American Bar Association, Section of Environment, Energy and Resources, 11th Section Fall Meeting (October 2003) (hereafter "Slade paper").

[125] See 25 C.F.R. 162.107(a).

[126] Slade paper at 24. Under the current process, approval of a major business lease may take six months to one year, apart from NEPA compliance. April Reese, *Plains Tribe Harnesses the Wind*, HIGH COUNTRY NEWS, Aug. 4, 2003, at http://www.hcn.org/ervlets/hcn.Article?article_id=14139, and the cumbersomeness and delay deters potential investors. *Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act*: *Hearing on S.424 Before the Comm. on Indian Affairs*, 108th Cong. 108-61 (Mar. 19, 2003) (statement of Vicky Bailey, Assistant Secretary for Policy and International Affairs, Department of Energy).

[127] 42 U.S.C. 4321 *et seq.*

In *Davis v. Morton*,[128] the Tenth Circuit held that the Secretary's approval of a lease of Tesuque Pueblo lands for development of a sizeable non-Indian residential subdivision constituted a "major federal action" requiring preparation of an environmental impact statement under NEPA. The Tenth Circuit rejected the argument that "the government is operating in a different capacity when dealing with Indian lands" than when it approves, licenses or permits activities under other constitutional authorities such as the Interstate Commerce Clause, because in approving Indian leases, the government is acting purely as a trustee and should therefore "approve the lease if it is advantageous to the beneficiaries of the trust."[129] The Tenth Circuit recognized that imposing the burden of NEPA compliance "on private Indian land places the Indians at an economic and competitive disadvantage, and subjects their property to judicial challenge by non-Indian competitors laboring under no such environmental restriction."[130] But ignoring this problem – which is a serious one, as Lynn has pointed out – the court reasoned that "all public lands are held . . . in trust for the people of the United States" and thus concluded that exempting Indian lands from NEPA jurisdiction would entail a similar exemption for all federal lands.

The Tenth Circuit's decision in *Davis* erroneously disparaged the trust responsibility to Indian lands by equating it to the Secretary's responsibilities to federal lands or other federal decisions. The sole purpose of the Secretary's lease approval power for Indian lands is to fulfill a federal trust responsibility to tribes and tribal members while approving leases of public land entails the full range of public policy considerations – including protecting the environment for the region or entire Nation.[131]

The trust responsibility, however, likely does require the Secretary to analyze the environmental impacts of a lease for a sizeable residential subdivision should prior to secretarial approval – but for the more limited purpose of informing both the Secretary as trustee and the tribe of these environmental effects. However, the trust responsibility should preclude a disapproval of an Indian lease because of its environmental impacts on

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[128] 469 F. 2d. 593 (10th Cir. 1972).

[129] *Id.* at 597.

[130] *Ibid*.

[131] In a decision subsequent to *Davis*, *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977), the Tenth Circuit suggested otherwise, holding that a tribe was a necessary party to a suit against the Secretary claiming that approval of a tribal uranium lease was based on a deficient environmental impact statement on the theory that the Secretary's "duties and responsibilities . . . may conflict with the interests of the Tribe . . . . [because] the Secretary must act in accord with . . . the national objectives declared by NEPA . . . [which are] not necessarily coincidental with the interest of the Tribe in the benefits which the . . . agreement provides." *Id.* at 558. In *Manygoats*, like *Davis*, the Tenth Circuit failed to properly consider and apply the trust responsibility as the sole basis for federal authority over Indian leasing transactions.

the non-Indian public, since those considerations are outside any conception of the Secretary's trust responsibility to the tribe.

Davis is settled law today at least to the extent it holds NEPA applies to the Secretary's approval of Indian land transactions. Lynn is therefore correct that, since the adequacy of the environmental impact statement (or agency finding that no significant environmental impact is involved and thus no statement is required) can later be challenged in federal court, years of delay and consequent uncertainty for investors and Indian landowners may ensue. And since the courts have held that no transaction can bind the Indian landowner until approved after completion of the NEPA process,[132] a tribe or Indian owner can freely rescind its execution of the agreement at any time prior to BIA approval. This creates additional risk and uncertainty for private investors.[133]

Lynn concludes, correctly I think, that these delays, risks, uncertainties and added costs diminish the value of Indian lands and other resources as contrasted with comparable privately-owned lands. Since Indians and Indian tribes remain generally impoverished,[134] this discrepancy seems unwarranted. Positing that the trust responsibility is premised on the dependency of tribes and individual Indian landowners,[135] Lynn suggests that the trust responsibility concept should be rethought in an era of increasing tribal autonomy and independence from federal control.

This Paper responds to that suggestion, but concludes that – rather than needing rethinking – the trust responsibility as conceived in the Cherokee cases and most modern decisions remains a viable doctrine. Lynn's premise that the trust responsibility is based upon Indian dependency is certainly reasonable and supported by some caselaw, principally in the *Kagama-Lone Wolf* era. But the trust responsibility as conceived by Chief Justice Marshall and by most modern cases is not based on tribes' dependency. The dependency conception is largely a relic of the federal paternalism in the decades prior to the self-determination policy, embodied in the *Kagama-Lone Wolf* set of cases, as discussed in more detail in Part IIID, *infra*. The more specific problem Lynn identifies, I think, is principally a consequence not of the trust responsibility itself but of the failure of

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[132] *E.g., Sangre de Cristo Development Co., Inc. v. United States*, 932 F.2d 891 (10th Cir. 1991); *cf. Gray v. Johnson*, 395 F.2d 533 (10th Cir), *cert. denied*, 392 U.S. 906 (1968).

[133] Slade paper at 22.

[134] Per capita income among tribes on reservations is thirty-five to forty-five percent of national levels, college matriculation rates are eight to eleven percent the national level. Family poverty rates are three times as high and overcrowding and unemployment are nearly double national averages. Jonathan B. Taylor & Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Census*, THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, 2005, at 23, 36, 50, 57.

[135] Slade paper at 3, 30-33.

the courts in *Davis* and successor cases to distinguish between the Secretary's role and duties to Indians under the trust responsibility and her roles and duties in other contexts as a public official. The proper solution should lie either in a reformulation of the *Davis* rule or a statutory exemption from NEPA for the Secretary's approval of Indian land transactions.

C. Congressional retractions of trust obligations.

Several times in recent years – most recently in the Indian Title to the Energy Policy Act of 2005 – Congress has rescinded the requirement that the BIA approve certain transactions involving tribal lands, which appears to limit the extent of the trust responsibility in favor of tribal self-determination. For example, in 2000, Congress substantially amended a statute which had been in force since the 1870s requiring BIA approval of all contracts with any "tribes . . . or individual Indians" providing for "payment of money or other thing of value . . . in consideration of services for said Indians relative to their lands."[136] This nineteenth century statute had been applied in recent decades to require BIA approval for all contracts relating to Indian lands and resources, including contracts with attorneys and with companies managing tribal gaming operations.[137] Congress in 2000 drastically reduced the scope and extent of this statute by limiting the requirement of BIA approval to contracts or agreements "that encumber Indian lands for a period of 7 or more years."

In 2000, Congress also enacted a statute[138] exempting the Navajo Nation from the ordinary federal statutory requirement that surface leases for "public, religious, educational, recreational, residential, or business purposes"[139] or for farming, grazing and other agricultural purposes must be approved by the Secretary. This statute allows the Navajo Nation to lease tribally owned lands for business or agricultural purposes for 25 years with two renewal terms of not to exceed 25 years each, and for up to 75 years for all other purposes "except a lease for the exploration, development, or extraction of any mineral resources" without the Secretary's review and approval "if such a term is provided for by the Navajo Nation through the promulgation of regulations."[140] The Secretary must approve these Navajo regulations, which must be "consistent with" the

[136] Act of March 14, 2000, Pub. L. 106-179, § 2, 114 Stat 46, now codified as 25 U.S.C. § 81.

[137] E.g., *Littell v. Morton*, 369 F.Supp 411 (D. Md 1974); *aff'd*, 519 F.2d 1399 (4th Cir. 1975) (attorney contracts and fees); *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985) (gaming management contracts and fees).

[138] Act of December 27, 2000, 114 Stat. 2933, Pub. L. No. 106-568, Title XII, § 1202, codified as 25 U.S.C. § 415(e).

[139] 25 U.S.C. § 415(a).

[140] 25 U.S.C. § 415(e)(1).

BIA's regulations concerning Indian surface leases and must "provide for an environmental review process."[141] This statute also specifically constricts the legal obligations of the United States by providing that "the United States shall not be liable for losses sustained by any party" including the Navajo Nation, "to a lease executed pursuant to" these tribal regulations.[142]

Earlier, in 1970, Congress had enacted a somewhat similar statute authorizing the Tulalip Tribe in Washington State to conclude leases of tribal lands for terms of up to 30 years without BIA approval.[143] The period for which Tulalip tribal lands could be leased was increased in 1986 to 75 years.[144] These statutes require the Tulalip Tribe to adopt regulations governing such leases prior to their execution, and provide that these regulations must be approved by the Secretary.

In both the Navajo and Tulalip statutes, Congress expressed concerns about the constraints which the requirement of the Secretary's approval place on tribal autonomy and prospects for economic development. For example, the Senate Report to the 1970 Tulalip statute states that the Tribe has "an able and progressive leadership. In order to take advantage of development opportunities as they arise the tribes feel that they should have more responsibility for and control over their property."[145] In a letter to the Chairman of the Senate Interior and Insular Affairs Committee, the Undersecretary of the Interior stated: "[t]he Tulalip Tribes have demonstrated themselves to be extremely responsible in the management of their affairs. The primary motive for the legislation is to remove those department restrictions which the tribes consider an impediment to tribal progress."[146] Similarly, in the 2000 Navajo statute, Congress made findings that:

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[141] 25 U.S.C. § 415(e)(3). Any "interested party may, after exhaustion of tribal remedies, submit, in a timely manner, a petition to the Secretary to review the compliance of the Navajo Nation" with these regulations. If the Secretary finds a violation, she may "take such action as may be necessary to remedy the violation, including rescinding the approval of the tribal regulations and reassuming responsibility for the approval of leases for Navajo Nation tribal trust lands." *Id.*, § 415(e)(b).

[142] The Navajo Nation can enter into even longer leases, of up to 99 years, with approval of the Secretary, Act of June 11, 1960, Pub. L. No. 86-505 § 2, 74 Stat. 199, as can a number of other tribes. 25 U.S.C. § 415(a).

[143] Act of June 2, 1970, Pub. L. No. 91-274, § 3, 84 Stat. 302, codified as 25 U.S.C. § 415(b).

[144] Act of October 18, 1986, Pub. L. No. 99-500, Title I, § 101(h), 100 Stat. 1783-267, codified at 25 U.S.C. § 415(b).

[145] S. REP. NO. 773, 91st Cong., 2d Sess. 2 (1970).

[146] *Id.* at 3.

> "(6) the requirement that the Secretary approve leases for the development of Navajo trust lands has added a level of review and regulation that does not apply to the development of non-Indian land; and
>
> "(7) in the global economy of the 21st Century, it is crucial that individual leases of Navajo trust lands not be subject to Secretarial approval and that the Navajo Nation be able to make immediate decisions over the use of Navajo trust lands.

Finally, Congress very recently enacted legislation that will remove the approval requirement from virtually all mineral transactions between tribes and developers if the tribe elects to comply with the Act's requirements. The "Indian Title" of the Energy Policy Act of 2005, passed on July 29, 2005,[147] amends the current mineral leasing statute[148] which requires all tribal mineral leases to be approved by the Secretary of the Interior. The Act allows tribes to initiate leasing agreements for up to 30 years – or for 10 years and so long thereafter as minerals are found in paying quantities for oil and gas – for exploration or extraction of minerals or for generation, transmission or distribution of electric power without Secretarial approval.[149] Tribes wishing to enter into such leases must create and submit to the Secretary a "tribal energy resource agreement" [TERA].[150]

In implementing a TERA, a tribe must agree to establish a process for entering into energy business agreements to ensure that key issues such as term, consideration and environmental concerns are addressed by the tribal government prior to entering into the business arrangement.[151] Tribal review pursuant to this process would replace Interior's review and approval of such arrangements. In addition, once a TERA is in place, federal action would not be required to approve the agreement, avoiding one ground on which compliance with the National Environmental Policy Act (NEPA) might be required.

Under the Act, a tribe submits a proposed TERA to Interior. The TERA must include provisions regarding: (1) how to ensure acquisition of necessary information from the applicant for the lease, business agreement or right-of-way; (2) the term, amendments and renewals of agreements; (3) economic return to tribes; (4) technical or other relevant requirements; (5) environmental review; (6) compliance with all applicable environmental laws; (7) identification of final approval authority; (8) public notification

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[147] S. 10, 109th Cong., 1st Sess. (2005).

[148] 25 U.S.C. §§ 396a *et seq.*

[149] Energy Policy Act of 2005, sec. 503(a), § 2604(a)(1)-(a)(2) (2005).

[150] *Id.* sec. 503(a), § 2604(a)(2)(A).

[151] *Id.* sec. 503(a), § 2604(e)(2)(c).

of final approval of any business agreement; (9) consultation with any affected state concerning potential off-reservation impacts and (10) remedies for breach of any lease, agreement or right-of-way.[152] The TERA must also include provisions requiring the Secretary to conduct a periodic review and evaluation to monitor the performance and activities of tribes.[153]

In addition, the TERA must require each agreement to include (1) a statement that if any provision of an agreement violates the TERA, the provision is null and void, and if the Secretary determines it to be material the Secretary can suspend or rescind the agreement, and (2) citations to tribal laws setting out tribal remedies that must be exhausted before an interested person may petition for review of tribal compliance.[154]

In terms of environmental review, the Act requires the TERA to establish a process for how the tribe would (1) identify and evaluate significant environmental impacts (as compared to the impacts of a no-action alternative), including effects on cultural resources of any proposed project; (2) identify proposed mitigation; (3) inform the public and (4) afford the public the opportunity to comment on the environmental impacts before tribal approval.[155] The Act specifically provides that tribes must commit to oversee activities taken pursuant to TERAs, such as activities by lessees, to ensure compliance with the TERA and with applicable federal environmental laws.[156]

The Secretary is required to approve or disapprove a proposed TERA no later than 270 days after receiving it.[157] Upon receipt, the Secretary is required to provide public notice and opportunity to comment prior to approval or disapproval.[158] Upon completion of this process, if the Secretary determines that a TERA includes all of the above described elements, and that the tribe has demonstrated that it has sufficient capacity to regulate the development of its energy resources, the Secretary is required to approve it.[159]

Once a TERA is approved, the Secretary is obligated to act in accordance with the trust responsibility and act in good faith and the best interests of the tribe. The Secretary is obligated to fulfill the trust obligation to ensure the interest of the tribe is protected if

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[152] *Id.* sec. 503(a), § 2604(e)(2)(B).

[153] *Id.* sec. 503(a), § 2604(e)(2)(D).

[154] *Id.*

[155] *Id*. sec. 503(a), § 2604(e)(2)(c).

[156] *Id.*

[157] *Id.* sec. 503(a), § 2604(e)(2)(4).

[158] *Id*. sec. 503(a), § 2604(e)(3).

[159] *Id.* sec. 503(a), § 2604(e)(2)(B).

any party violates an agreement or a TERA. However, as with Navajo surface leases, the United States would not be liable for any losses resulting from a term negotiated in any particular agreement that is tribally approved pursuant to a TERA. Instead, the Act provides that, if leases are consistent with the requirements of approved TERAs, the United States government is absolved of any potential liability for any resulting loss or unfair term.[160] Therefore, the federal government could not be legally liable for any injury sustained under a valid lease, regardless of whether the government was aware of the potential injury, the inequity of the leasing term, or the unfairness of leasing payments.

D. An assessment of the consistency of the trust responsibility with the self-determination policy.

Whether the trust responsibility is compatible with tribal self-determination chiefly depends on which conception of the trust responsibility one refers to. As discussed in Part II, there are two basic alternative conceptions of the trust responsibility. The conception articulated in the Cherokee cases as having the purpose of protecting tribes as distinct political societies and limiting the power of federal and state government to infringe on tribal self-government seems generally if not entirely consistent with tribal self-determination. On the other hand, a conception of the trust responsibility premised on dependency of tribes and having objectives such as sustaining federal power and control over tribal affairs or protecting supposedly dependent tribes from improvident transactions, represented by the *Kagama-Lone Wolf* line of cases, does appear incompatible with tribal self-determination.

While both these conceptions have some historical support, and thus a single doctrinally pure conception of the trust responsibility is probably not achievable, the sounder conception of the trust responsibility is clearly anchored in the *Cherokee* cases as well as the more modern court decisions employing trust obligations as limiting federal congressional and executive powers. This is so for several reasons.

First, tribes are not in reality dependent in the sense of being incompetent to manage their affairs – if indeed they ever were. The Cherokee Nation in the 1830s, for example, was in fact (as well as law) "a distinct political society" – with a written Constitution, elected legislature, tribal courts and laws, schools, an established military and had developed a written language with a much higher adult literacy rate than most States of the Union at the time.

Second, the Kagama-*Lone Wolf* line of cases appears based on a conception of non-Indian superiority and Indian inferiority that has been long discarded and is self-evidently unacceptable today. In a leading case of that period, for example, *United States*

[160] *Id.* sec. 503(a), 2604(e)(6)(D).

v. Sandoval,[161] the Court decided that Pueblos in New Mexico were in fact "Indians" and within the federal trust responsibility, by relying on factual information supposedly showing the Pueblos to be an inferior race. The Court observed, for example, that the Pueblos were "living in largely separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism (sic), and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people."[162] The Court noted that one government report described the Pueblos as "dependant upon the fostering care and protection of the government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants."[163] The Court quoted several excerpts in Bureau of Indians Affairs superintendents' reports, including language such as:

> "until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe it is little less than a ribald system of debauchery."[164]

Many of the superintendent's reports relied upon by the Court to justify treating the Pueblo's as "Indian" characterized their customs as "pagan," "simple and ignorant," "immoral," and "heathen."[165]

Third, the trust responsibility doctrine is a creation of federal common law and thus the court should interpret it in a manner broadly consistent with contemporaneous federal Indian policy as established by the political branches. While the *Kagama-Lone Wolf* line of cases were probably consistent with the prevailing federal Indian policy a century ago, Congress in the past several decades has recurrently based its enactments on a vision of the trust responsibility that Congress sees as fully compatible with strengthened tribal self-determination. In the Indian Self-Determination Act of 1975 itself, Congress expressly declared:

> "its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian

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[161] 231 U.S. 28 (1913).

[162] *Id*. at 39.

[163] *Id*. at 40-41.

[164] *Id.* at 42.

[165] *Id*. at 43-44.

> people as a whole through the establishment of a meaningful Indian Self-Determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.[166]

The Native American Business Development, Trade Promotion and Tourism Act of 2000,[167] also specifically linked the trust responsibility with strengthened tribal self-government:

> Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties, and the enactment of other laws . . . .
>
> the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination and economic self-sufficiency among Indian tribes;
>
> the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to –
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> encourage investment from outside sources that do not originate with the tribes; and
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> facilitate economic ventures with outside entities that are not tribal entities.)[168]

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[166] 25 U.S.C. § 450a(b); *see also* Tribal Self-Governance Amendments of 2000, 25 U.S.C.§ 458 aaa note, § 3(c) (the Congressional policy "to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals" underlies the Self-Governance program).

[167] 25 U.S.C. §§ 4301, *et seq.*

[168] 25 U.S.C. § 4301(5), (6), (9).

Many other recent enactments have enhanced tribal control over lands and natural resources while also expressly referencing the trust responsibility as a basis for congressional action. For example, in the American Indian Agricultural Resource Management Act, Congress found that "the United States has a trust responsibility to protect, conserve, utilize and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes".[169] Similarly, in the National Indian Forest Resource Management Act, Congress found that "the United States has a trust responsibility toward Indian forest lands".[170] The American Indian Trust Fund Management Reform Act, describes its purposes as "to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians" regarding trust fund management.[171]

In a like manner, Congressional enactments concerning aspects of Indian affairs other than land and natural resources have been explicitly rooted in the trust responsibility. For example, the federal government's trust responsibility for Indian education was recently expressed by Congress in the No Child Left Behind Act of 2001,[172] amending the Indian Education Act (stating "[i]t is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.".[173] The same is true with respect to statutes relating to the federal provision of health care for Indians,[174]

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[169] 25 U.S.C. § 3701.

[170] 25 U.S.C. § 3101(2).

[171] 25 U.S.C. § 4041(3).

[172] Pub. L. No. 107-110, 115 Stat. 1425, § 701 (2002).

[173] S*ee also* Tribally Controlled School Grants Act of 1988, 25 U.S.C. § 2501 *et seq*., *see* § 2502(b) (expressing "the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy for education which will deter further perpetuation of Federal bureaucratic domination of programs"); Higher Education Tribal Grant Authorization Act, 25 U.S.C. § 3302(7) (BIA program for postsecondary education grants: "these services are part of the Federal Government's continuing trust responsibility to provide education services to American Indian and Alaska Natives").

[174] Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. § 2401(1) and (2), (finding that "the Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members,"), Indian Health Care Improvement Act, 25 U.S.C. § 1601(a), ("Federal health services to maintain and improve the health of Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people"); ("it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the

and statutes dealing with social issues on Indian reservations. For example, the Indian Child Welfare Act of 1978,[175] recognized tribal courts' primary authority to control the adoption, custody and parental rights over Indian children. In this Act, Congress found

> "that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;"[176]

In the Indian Child Protection and Family Violence Act of 1990,[177] which provides federal funding and assistance to tribes dealing with these problems, Congress found that "the United States has a direct interest, as trustee, in protecting Indian children."[178] In the Native American Housing Assistance and Self-Determination Act Congress found that:

> "there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique federal responsibility to Indian people;
>
> the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;
>
> the Congress, through treaties, statutes and the general course of dealings with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition.[179]

Most of the statutes discussed in Part IIIC rescinding the requirement that the Secretary approve certain transactions between tribes and non-Indians do not seem a

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American Indian people, to assure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy.") *Id.* § 1602(a).

[175] 25 U.S.C. § 1901, *et seq.*

[176] *Id.* § 1901(2), (3).

[177] 25 U.S.C. §§ 3201, *et seq.*

[178] *Id.* § 3201(a)(1)(F).

[179] 25 U.S.C. § 4101(2)-(4).

departure from Congress' consistent reaffirmation of the trust responsibility in the statutes discussed above and Congress' own perception that the trust responsibility is consistent with self-determination. Rather they represent an adjustment that harmonizes the trust responsibility with the modern factual reality that most tribes have assumed significantly greater autonomy in operation of their governmental affairs, partly as a result of the self-determination policy. The statutes permitting two tribes, Navajo and Tulalip, to enter into surface leases of up to 75 years in length were both based on an appraisal by Congress that those individual tribes possessed sufficient expertise to evaluate business and other lease transactions to warrant removing the requirement of Secretarial approval. Longer term leases, such as for up to 99 years, would still require Secretarial approval under 25 U.S.C. § 415(a), which allows both tribes to enter into surface leases for that term. Similarly, the modification of the 19th century statute requiring the Secretary's approval of tribal contracts relating to Indian lands and resources eliminated the approval requirement only for contracts of less than seven years' duration.[180] All three statutes are limited to tribal transactions, recognizing that contracts and leases dealing with trust or restricted lands beneficially owned by individual Indians commonly require greater federal oversight. All three statutes also reflect awareness by Congress of the factors raised by Lynn's paper, *viz*, that excessive federal oversight and regulation impairs tribal economic development.

I have long been of the view that Congress should eliminate the approval requirement for all short term tribal surface leases.[181] Secretarial approval should be preserved only for long-term tribal transactions that can permanently or irreparably alter reservation lands and thus have the potential to diminish either the tribe's long-term control and governmental authority over those lands or the ability of future generations of tribal members to utilize those lands. Long-term business, residential and mineral transactions have the potential to interfere in at least two ways with the trust responsibility's primary purpose of protecting the self-governing authority of tribes over reservation lands.

First, and most directly, leasing to non-Indians may lead to assertions of state jurisdiction over reservation lands. While, absent express authorization by Congress, states are categorically prohibited from taxing Indians on reservation lands subject to the trust responsibility,[182] and generally lack regulatory authority over Indians on those

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[180] 25 U.S.C. §81(b).

[181] Chambers and Price, *Regulating Sovereignty*; *Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev 1061, 1084-87, 1094-95 (1974). (hereafter "Chambers and Price").

[182] *Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *California v. Cabazon Mission Band of Indians*, 480 U.S. 215, n 17 (1987); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985).

lands,[183] states have often successfully asserted authority to tax and regulate some non-Indian commercial activities on reservation lands leased to non-Indian businesses and mineral operators.[184] At the very least, tribes allowing long-term non-Indian activities on tribal reservation lands invites conflict with state taxing and regulatory authority and may result in concurrent jurisdiction that diminishes tribal control over those lands.

Long-term transactions may also diminish tribal authority over tribal reservation lands in another respect. Court decisions – particularly in recent years – have limited tribal taxing and regulatory authority over non-Indians even on reservation trust lands.[185] While lessees and other entities entering into private commercial transactions on trial reservation lands are very likely subject to tribal governmental authority,[186] state officials and transient visitors not directly engaged in business with the tribe may not be. [187]

Finally, as a practical matter a long-term commitment of tribal reservation lands to residential, mineral or other business development can remove those lands from use by the tribal distinct political society either forever or at least for a very long time.[188] If, for example, tribal reservation lands are leased for an open-pit mine, residential subdivision or nuclear waste storage facility, the transaction may operate as the functional equivalent

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[183] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

[184] *E.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

[185] The Supreme Court recently read its decision in *Montana v. United States*, 450 U.S. 544 (1981), as establishing

> "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,' 450 U.S. at 565[.] [W]e nonetheless noted in *Montana* two possible bases for tribal jurisdiction over non-Indian fee land. First, 'a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements.' *Id.* Second, [a] tribe may . . . exercise civil activity over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 (2001).

[186] *E.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Lessees are likely subject to tribal jurisdiction under the first *Montana* exception because they have entered into private commercial relationships with tribes. *See Nevada v. Hicks*, 533 U.S. 353, 359 and n 3, 372 (2001).

[187] *See Nevada v. Hicks, supra; Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[188] Chambers and Price at 1080.

of a sale of the lands despite the Indian Trade and Intercourse Act, as well as creating serious impacts on other lands on the reservation. The federal trust responsibility to the tribe as a distinct political society and reservation as a permanent homeland would seem to justify retention of federal review of such transactions.[189]

For these reasons, the Indian title of the recently passed Energy bill requires a more complex assessment of the relationship between the trust responsibility and tribal self-determination than the Tulalip or Navajo leasing statutes or the limitation of tribal or Secretarial approval of contracts relating to lands to transactions of over seven years. On the one hand, removal of the requirement that the Secretary approve mineral transactions reflects the expertise many tribes possess to evaluate those transactions (often substantially greater than the Secretary's). While the option of dispensing with Secretarial approval is open to all tribes, exercise of the option requires that a tribe complete a regulatory process that gives some assurance that the tribe possesses the necessary expertise to manage mineral transactions without federal oversight. On the other hand, all substantial mineral transactions inevitably result in depletion of irreplaceable tribal resources. Moreover, many of these transactions can permanently alter the character of the reservation, thus implicating the same trust responsibility concerns as long-term residential or business leases of surface lands. Equally serious is the fact many minerals transactions continue into the indefinite future, for they commonly last "so long as minerals are found in paying quantities." For these reasons, the Act's provisions can be seen as excessively promoting tribal self-determination at the expense of a trust responsibility that protects the tribe as a distinct political society into the future. In addition, to the extent the Act allows tribal transactions to avoid protracted procedures and delay under NEPA, it achieves that advantage at the price of removing trust obligations of the United States to preserve a tribe's resource base as the fulcrum for its continued functioning as a political community.

[189] While the approval power should be retained for such transactions, there is a danger that the Secretary might exercise it with excessive open-ended discretion. The general standard – preserving sufficient resources for the future functioning of a tribe as a distinct political community – is sufficiently imprecise that it might sanction virtually any decision by the Secretary. See generally Chambers & Price at 1083. There are several ways in which this excessive discretion might be curbed. The Secretary might promulgate regulations setting forth in advance the criteria she will follow in approving different kinds of long-term leases. Alternatively or in addition, the Secretary could be required to prepare a written statement setting out the pertinent facts and reasons for her decision either to approve or not approve each lease. See generally *id.* at 1088.

IV. Concluding preliminary thoughts on directions for the trust responsibility in the 21st century.

The analysis above shows that the federal government has frequently failed to serve as an adequate trustee, not just historically, but in recent decades as well. Courts have often so held in suits challenging the actions of federal executive branch officials, or, even where they have not held the United States legally liable in cases like *Navajo Nation*, the facts often show that the Secretary dealt with the tribe's property in a manner not befitting a trustee although he is not liable for some collateral reason, such as sovereign immunity.

The structure of the trust responsibility portends these failures for at least two reasons. The first concerns institutional competence, the second concerns politics. As for the first reason, although private banks and brokerage firms can efficiently manage tens of thousands of accounts, *Cobell* shows the Secretary evidently cannot. There are moreover several good reasons, as Lynn has pointed out, to believe the Secretary's review of land transactions actually retards Indian economic developing and fails to result in the maximum economic return for Indians. Many, probably most, tribes possess or can hire persons with more competence and expertise than the federal officials who routinely exercise the trust obligations – in approving transactions, managing funds and the like. The lengthy and well-known *Cobell* litigation illustrates that no well-counseled owner of funds would willingly choose the federal government as trustee to manage them over long periods of time.

The second reason for failures inheres in politics. The *Navajo Nation* case illustrates this problem well: the Secretary of the Interior and other high Department officials appointed by and responsible to the Secretary or President are political appointees, likely to be at least as receptive to entreaties by Peabody and other large corporate interests as to the principled observance of fiduciary duties to a tribe.

Because of deficits in its institutional competence and because of its political nature, the federal executive, then, will often fall short of the fiduciary ideal of a disinterested trustee resolutely protecting Indian property and tribal self-government, competently and prudently investing and managing Indian funds and property. Of course, the fact that the government often fails to adhere to its trust duties might not *ipso facto* be upsetting. Governments – both federal and state – also frequently violate the United States Constitution as well. If the trust responsibility, like many constitutional principles, is seen as a kind of ideal standard to guide governmental behavior, then failure to achieve it in every situation might not be a cause for great concern, particularly if judicial remedies were readily available when failures occur. But because of constraints such as the United States' sovereign immunity in suits for money damages and because the trust responsibility itself has not always been a coherent doctrine (as discussed in Part

II), the courts are at times imperfect enforcers of the federal trust duties when the executive falls short.

Judicial enforcement of trust standards in suits against executive officials might be improved by broadening the congressional waiver of the sovereign immunity of the United States where tribes or individual Indians bring suits against it for money damages. Since the structure of the trust responsibility foretells that at least some failures in executive performance will likely occur, tribal and individual Indian trust beneficiaries ought not fairly to bear the risk of monetary losses resulting from those failures.

Thought should also be given to judicial redress for situations where Congress acts in a manner inconsistent with the trust responsibility. A broad reading of *Lone Wolf*, of course, suggests that Congress has the power to act in that fashion, subject to payment of compensation under the Fifth Amendment if it abrogates Indian rights to property. And like the Executive, Congress can be expected to function sometimes as a poor protector of tribal self-government and property rights. Its members are elected politicians who may be inclined simply to balance Indian interests against other concerns depending upon their relative importance to the member's constituency, and it is a rare member who will have trust obligations to Indians foremost in his or her mind. Statutes like NEPA get enacted without focus on their potential impact on trust duties or become politically difficult to amend in a manner that addresses trust concerns. As *Davis v. Morton* illustrates, courts may be imperfect enforcers of the trust responsibility in situations like this, either because of insufficient understanding of the trust duties in a particular situation or because of the divergent formulations of the trust responsibility over two centuries of time.

Nevertheless, this paper suggests that a sound and coherent general formulation of the trust responsibility does emerge from the Cherokee cases and most modern caselaw. Under this formulation, the federal government is necessarily the trustee for Indian property despite its institutional incompetence faithfully to perform trust functions, because the trust duties of protection are governmental in nature, established in bilateral treaties and statutory enactments going back to the beginning of the Republic with the primary purpose of protecting tribal self-government. If that is so, the question arises as to how the trust responsibility can be better enforced. While the cases discussed in Part IIC give evidence of adequate enforcement at times when executive agencies are involved, a possible improvement could come from increased use of the trust responsibility as a judicially enforced limitation upon congressional power. A theoretical structure seems in place: the standard that a federal statute affecting Indians is valid only if it is tied rationally to the United States' trust obligations to Indians, contained in *Delaware Tribe v. Weeks*.[190] As noted, however, no statute has been struck down under this standard.

[190] See text accompanying notes 59-60.

In the recent *Lara* case, Justice Thomas posited an inconsistency between the plenary power of Congress under the *Lone Wolf* line of cases and the tribes' right to self-government.[191] Chief Justice Marshall implicitly perceived the same tension nearly two centuries ago, but also foresaw that the trust responsibility might provide a way to resolve the paradox. If the trust responsibility's primary goal is protecting tribal self-government, as I have posited, it could be used more assertively by courts to limit Congress' plenary power such that the potential inconsistency perceived by Justice Thomas is lessened or avoided. In the 21st century, where tribal members are all citizens (as most were not a century ago when *Lone Wolf* was decided), such a use of the trust responsibility could afford treaty and other Indian rights stricter protection than is available under *Lone Wolf*. Under this concept, federal statutes impairing those rights should be more carefully scrutinized to ensure they in fact comport with the purpose of the trust responsibility. The underlying purpose of protecting tribal self-government and other Indian property rights may give sufficient content to the trust responsibility to allow a reviewing court to enforce the "tied rationally" standard set forth in *Weeks* in reviewing congressional statutes dealing with tribes and their property.

An analogy may exist to the Interstate Commerce Clause, which has also been read in recent years to confer extensive but not limitless power on Congress. Under this Clause, Congress possesses power "to regulate activities that substantially affect interstate commerce."[192] But Congress lacks power to regulate purely local activities that are not part of an economic class of activities substantially affecting interstate commerce.[193] The apparent reason for this limitation is "to protect historic spheres of state sovereignty from excessive federal encroachment."[194] Similarly, the Indian Commerce Clause could be read to ensure federal control exclusive of the states over commerce with tribes, but tempered by the trust responsibility's protecting an appropriate area of tribal self-government free from congressional encroachment.

In addition, the concept in *Kagama* that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself" has been affirmed in modern cases.[195] To the extent the trust

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[191] *United States v. Lara*, 541 U.S. 193, 214-226 (2004) (concurring opinion of Justice Thomas).

[192] *Gonzales v. Raich*, 125 S.Ct. 2195, 2205 (2005) (citing *Perez v. United States*, 402 U.S. 146, 150 (1971) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

[193] *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

[194] *Raich*, 125 S.Ct. at 2220 (Justice O'Connor dissenting, citing *Lopez, supra* and *Jones & Laughlin, supra*).

[195] *Morton v. Mancari*, 417 U.S. 535, 551-552 (1975) (citing *Kagama*).

responsibility is implicitly embedded in the Constitution, in addition to or apart from constituting a doctrine of federal common law, it constitutes an intrinsic and potentially enforceable limitation on congressional power.