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Introduction

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SYMPOSIUM: THE INDIAN TRUST DOCTRINE AFTER THE 2002-2003 SUPREME COURT TERM

INTRODUCTION

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Asserting the existence of the trust relationship between Indian tribes and the federal government is far easier than defining its contours. The trust—as the doctrine is known informally—developed out of two quite different analogies used by Chief Justice John Marshall in the *Cherokee Cases*[1] to describe the federal-tribal relationship.

Marshall famously analogized the relationship of tribes in the United States to the federal government as that of a "ward to his guardian"[2] in *Cherokee Nation v. Georgia*. In *Worcester v. Georgia*, he relied on the leading international law treatise of the day in comparing tribes' relationship to the federal government as similar to those of feudatory and tributary states of Europe.[3] Each characterization contains quite different connotations: The wardship analogy can be seen as treating tribes as "in a state of pupilage"[4]—backward as well as subjugated people owed a duty of protection by those of a superior race possessing superior arms. The analogy to the feudatory states, on the other hand, treats tribes as sovereign entities allying themselves to a stronger power. Such alliances are often undertaken out of necessity not just to stave off other powers, but to prevent the stronger ally from overrunning the weaker. Even when built on such shaky foundations, however, such an alliance is one comprised of two sovereign entities in a government-to-government relationship.

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1. *Worcester v. Ga.*, 31 U.S. 515 (1832); *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831).

2. *Cherokee Nation*, 30 U.S. at 17.

3. 31 U.S. at 561 ("A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.'").

4. *Cherokee Nation*, 30 U.S. at 17.

As many of the contributors to this symposium note, Chief Justice Marshall's invocation of the wardship analogy in the *Cherokee Cases* was linked to his vision of the status of tribes as distinct political entities. The Supreme Court relied on the political relationship of tribes to the federal government grounded in treaties with the Cherokee Nation to hold the laws of Georgia to be preempted by federal law and policy in *Worcester v. Georgia.* Chief Justice Marshall also relied on the political relationship of tribes to the federal government in creating an interpretive methodology, according Indian treaties special status as being quasi-constitutional in nature and requiring a sensitive inquiry into the context of the particular treaty and the tribal party's understanding of the nature and meaning of words chosen, rather than reliance on ordinary standards such as the plain meaning of the treaty in question.[5] For example, the Court held that the treaty clause bringing the Cherokee Nation under the protection of the United States did not abrogate tribal sovereignty: "Protection does not imply the destruction of the protected."[6]

During the era of forced allotment of Indian lands and attempts at coercive assimilation of tribes into the dominant culture, the wardship language became predominant. During this late nineteenth and early twentieth century period, the trust was invoked primarily to rationalize actions by the federal government that would have raised constitutional questions had they been taken against other groups within the polity. Actions confiscating land without providing adequate compensation were justified as "a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government."[7] The fact that many of these actions were taken without due process or without a compensation scheme designed to provide fair market value appeared legally irrelevant to federal courts upholding these broad assertions of federal power.[8] Similarly, the Court upheld the Major Crimes Act, the first federal law interfering with internal tribal self-government and a law admittedly then unjustifiable on the basis of any enumerated constitutional power. The Court held that Congress's authority was constitutionally grounded in the government's power both as a guardian of tribes deemed to be acting in their best interests and as a superior sovereign entitled to govern all those within the

5. Philip Frickey's articles on the interpretive process in Indian law are the definitive studies. *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 (1996) [hereinafter Frickey, *Domesticating*]; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993) [hereinafter Frickey, *Marshalling Past and Present*]; Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137 (1990) [hereinafter Frickey, *Dynamic Nature of Indian Law*].

6. *Worcester*, 31 U.S. at 552.

7. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903). For a number of recent re-evaluations of the *Lone Wolf* case, see the *Tulsa Law Review* symposium on *Lone Wolf. See* Symposium, Lone Wolf v. Hitchcock: *One Hundred Years Later*, 38 Tulsa L. Rev. 1 (2002).

8. For an analysis of the decisions of this era, see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 207-28 (1984).

physical territory of the United States.[9] Attempts to invoke constitutional provisions or treaty guarantees of self-government to bar these actions were futile.

Since the late twentieth century, the government-to-government nature of the trust doctrine has predominated, and the relationship of tribes to the federal government as nations possessing at least quasi-sovereign status has been protected by federal statutes, executive actions, and judicial decisions.[10] The Indian canons of construction calling for special solicitude in reading ambiguous federal statutes as preserving tribal sovereignty and property rights have been more securely rooted in this government-to-government relationship rather than in the concept of protecting helpless and dependent people.[11]

The wardship analogy remained, but became rehabilitated as a trustee-beneficiary relationship, one in which it was not necessary to cast the tribes as helpless and backwards dependents subject to the paternalistic power of a guardian. Tribes could now be seen as modern day beneficiaries of trusts entitled to hold their federal trustee accountable. During this period, federal courts began to rule on a number of tribal claims for money damages or equitable relief for breach of trust in cases in which the government had mismanaged lands, resources, or funds under its supervision.[12] The notion of tribes as helpless wards may have served as a justification for undertaking this management role, but the fact of gross mismanagement of their assets by the Secretary of Interior provided a powerful rationale for treating the government as a trustee subject to the same standards the common law attaches to private trustees.

Careful attention to the historical and factual context in which the trust doctrine has been invoked can help clarify some of the confusion generated by competing visions of the trust. More important, uncritical reliance on language from judicial opinions of the plenary power era stressing the dependency, helplessness, and racial and cultural inferiority of tribes and the resulting need of the federal government to act as a guardian obfuscates rather than clarifies analysis. This vision of the trust appears unanchored in any legitimate source of law, such as international law, constitutional law, or property law, and instead appears as a high-sounding statement about moral obligations, with all the lack of enforceability the term has traditionally carried with it. Such formulations of the

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9. *U.S. v. Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

10. The first case to use the term "quasi-sovereign" to describe tribes was *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

11. Canons of construction are merely guideposts to interpretation. In Philip Frickey's words, canons "are simply rules of thumb that, by dint of judicial repetition, take on the appearance (though hardly the reality) of rules of law." Frickey, *Marshalling Past and Present*, *supra* n. 5, at 413. Some canons, however, have more force, being designed to protect important constitutional values, typically values of federalism. Such canons as "clear statement rules" and "super clear statement rules" have been applied to protect state sovereignty from incursion by Congress absent clear indication the incursion is intended. In his pathbreaking article, Frickey argued that the Indian canons advance similar goals and should be given the same quasi-constitutional status as the states' rights canons.

12. For the classic treatment of the development of this strand, see Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975).

trust doctrine seem both less relevant as tribes gain economic self-sufficiency and more than a little offensively paternalistic. In reaction to this wardship strand, modern scholars have sought to ground the trust in familiar legal doctrines rather than high-flown moral statements.

One of the questions facing scholars of the history of Indian law is the extent to which the trust doctrine has been purged of its dark side and fully rehabilitated as a doctrine favoring the preservation of Indian property and sovereignty rights. The notion of tribes as helpless and dependent, subject to the whims of the federal government with the power to abrogate all sovereignty and seize all tribal land as long as these devastating actions are undertaken to "help" the Indians haunts tribes who only have to look back to the 1950s Termination Era as an example of the last such effort. Modern scholars, including the contributors to this symposium, have sought to ground the trust in familiar legal doctrines, rather than in high-flown but unenforceable statements about moral niceties.

What are the proper contours of a robust trust doctrine in the age of self-determination? Each of the authors in this symposium addresses doctrinal and normative aspects of the trust doctrine.

Alexander Tallchief Skibine's contribution, *Integrating the Indian Trust Doctrine into the Constitution*, focuses on the essential question of federal power and seeks to cabin federal power by an ingenious argument.[13] Skibine asserts that the Supreme Court in *United States v. Sioux Nation*[14] and *Morton v. Mancari*[15] has constitutionalized the wardship strand of *Kagama* and *Lone Wolf* by adopting a vision of the trust relationship as capable of enhancing the power of Congress to act to protect tribal interests. In other words, the trust doctrine can be invoked to enlarge congressional power to enact a law designed to further Indian self-determination, even though such a law would otherwise be beyond the reach of congressional power to regulate commerce. Under Skibine's reconceptualization, the trust doctrine would serve as a one-way ratchet, coming into play only to support enhanced protection of tribal interests. Legislation designed to abrogate tribal property or sovereignty interests, on the other hand, could not be justified as an exercise of the trust relationship, but only on independent grounds, such as the power to regulate interstate commerce or commerce with the Indian tribes.[16]

Skibine explores the impact of a sharpened focus on this one-way ratchet in several related settings. First, such a focus would prevent courts from dismissing

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13. *See* Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 Tulsa L. Rev. 247 (2003).

14. 448 U.S. 371 (1980) (applying the Constitution's Fifth Amendment Takings Clause as requiring compensation for the taking of the Black Hills and rejecting the argument that such congressional actions are unreviewable).

15. 417 U.S. 535 (upholding legislation providing for an employment preference for Indians in the BIA).

16. Skibine endorses Robert N. Clinton's assertion that properly viewed in light of recent precedents narrowing the reach of Congress's power under the Interstate Commerce Clause, much legislation intruding into internal tribal affairs would not pass constitutional muster if based solely on the commerce powers. *See* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002).

cavalierly, as they do now, claims that federal legislation interferes with tribal self-government and is thus beyond the reach of Congress's constitutional powers. While much of this legislation could be upheld based on a showing of a nexus to commerce, some of it may not be able to survive the sharper scrutiny Skibine suggests. For example, he argues that his analysis would disempower Congress from terminating legitimate tribes and should, at the very least, prevent courts from invoking the political question doctrine to prevent an inquiry into such a decision. He argues that acceptance of his thesis would also clarify Congress's authority to enact legislation correcting the Supreme Court's federal common law decisions undercutting tribal sovereignty, a matter of great interest in this Term's case, *United States v. Lara*.[17] Finally, he argues that this focus on actions promoting tribal self-government would also clarify the extent to which legislation can be enacted regulating individual Indians, by requiring a focus on the extent to which the legislation is connected to the individual's relationship with his or her tribe.

Rebecca Tsosie's essay, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations* is also normative in scope.[18] Tsosie argues that both judicial interpretations of the existing Indian trust doctrine and the Constitution's Free Exercise Clause have failed to provide real protections for tribal people seeking access to important cultural and sacred sites located on public lands, which were once their homelands. While heartened by the administrative and statutory requirements for consultation with tribes in some public management regimes, Tsosie notes that under the public trust doctrine as it applies to public land, tribes are usually treated merely as stakeholders on an equal footing with other interested groups such as recreational and commercial users rather than as rights-holders entitled to protection based on their unique relationship to the land and the need to preserve their cultural and political sovereignty. In other words, tribes are treated as one interest group claiming access to lands owned by all, without sufficient understanding that this public land was often ceded by the tribes now seeking access.

Tsosie proposes several solutions that would give tribes a greater role and stronger voice in protecting land for cultural and religious uses. She argues for a greater understanding that the trust doctrine is properly grounded in the foundational compacts between native peoples and the United States government.

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17. 324 F.3d 635, 640 (8th Cir. 2003) (en banc), *cert. granted*, 124 S. Ct. 46 (2003) (holding that federal criminal prosecution of a non-member Indian after conviction in tribal court is barred by double jeopardy because tribal court jurisdiction was delegated by Congress and thus the two prosecutions were conducted pursuant to the jurisdiction of the same sovereign under the dual sovereignty doctrine). For an analysis of the tricky underlying constitutional issues, see Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After* Duro v. Reina, 38 Fed. B. News & J. 70 (1991); Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. Cal. L. Rev. 767 (1993).

18. *See* Rebecca Tsosie, *The Conflict between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 Tulsa L. Rev. 271 (2003).

These treaties and agreements ceded most of the public land subject to the public land laws. She argues that treaties should be interpreted as presumptively intended to protect tribes' continued right to use off-reservation land for religious purposes. Second, she urges Congress to recognize its trust relationship by enacting laws protecting tribal treaty rights and sacred sites. Third, she urges increased repatriation of sacred lands taken from tribes. Although this option may seem overly optimistic, Tsosie points to successful land restorations such as the return of the Blue Lake to the Taos Pueblo and the return of the island of Kaho'olawe to the Native Hawaiian people. Finally, Tsosie suggests that a mechanism for recognizing the importance of sacred and cultural sites to tribes could be created by granting tribes a role in co-managing public lands to which they have strong historic ties instead of merely treating tribes as one of many stakeholders.

The remaining essays in this symposium address two important trust cases from the Supreme Court's 2002-2003 Term, *United States v. Navajo Nation*[19] and *United States v. White Mountain Apache Tribe.*[20] In his essay, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, Gregory C. Sisk brings his considerable expertise in the field of litigation against the federal government[21] to bear on Indian claims seeking money damages in the Court of Federal Claims under the Tucker Act.[22]

Sisk ably synthesizes what might best be described as the first and second generation of modern claims for money damages for breach of trust brought by Indian tribes. The first generation of modern cases is represented by the *Mitchell* decisions,[23] and the second is represented by *Navajo Nation* and *White Mountain Apache Tribe.* Sisk views the two recent cases not as departures from the *Mitchell* cases, but as delineations of the contours of the earlier decisions and guideposts to issues that remain to be settled in future claims litigation. He notes that while members of the Court have come to agreement on some basic issues, they are still apart on the interpretive issue: to what extent can courts rely on interpretive methodologies grounded in the trust doctrine to interpret statutes as "rights-creating or duty-creating" and to determine that statutory duties are "money mandating" and thus appropriately regarded as a basis for a claim for money damages under the Tucker Act? Sisk counsels careful attention to the language of the statutes, the extent to which the United States exercises control over land, resources, or funds, and the extent to which a particular statutory scheme is designed to encourage self-determination.

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19. 537 U.S. 488 (2003) (holding applicable statutes giving the Secretary of the Interior power to approve coal leases did not create a claim cognizable under the Tucker Act).

20. 537 U.S. 465 (2003) (holding the retention of buildings comprising Fort Apache in trust created a claim cognizable under the Tucker Act).

21. He is the author of a textbook on the subject, *Litigation with the Federal Government* (Found. Press 2000).

22. *See* Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 Tulsa L. Rev. 313 (2003).

23. *U.S. v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"); *U.S. v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*").

With regard to the last factor, crucial to the majority in *Navajo Nation*, Sisk argues that increased tribal control is not necessarily inconsistent with fiduciary obligations of the government and urges courts to make a more careful determination of "whether the governmental role in a particular case is best described as one of engaged management of mineral resources or one of detached supervision of largely independent Indian management of their own resources."[24] In other words, courts should not assume that statutes giving the Secretary of the Interior approval power regard that power as a rubber stamp, but should put teeth into the exercise of the approval power when the statute at issue is subject to such an interpretation. Finally, he recommends that Congress draft standards for exercise of the approval power or other remaining statutory obligations of the government in statutes providing for increased tribal control over resources.

Sisk primarily works within the Court's framework, viewing last Term's cases as solidifying the basic teachings of the *Mitchell* cases. He clearly disagrees with the majority's reliance on the self-determination purpose of the Indian Mineral Leasing Act provisions dealing with coal leases, but urges the Court to adopt the more sensitive attempt to balance self-determination and the trust undertaken by Justice Souter in his dissent in *Navajo Nation*.[25]

While Sisk's essay focuses on Tucker Act jurisdiction, Mary Christina Wood focuses on claims seeking equitable relief in the federal courts of general jurisdiction.[26] Her contribution, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief against Federal Agencies*, urges courts and litigants to focus on an important distinction between the trust doctrine as a statutory claim and as a common law claim. She argues the trust is properly construed as a property concept enforceable under federal common law by the imposition of standards derived from the law of fiduciary relationships to curb discretion that could be appropriately exercised in cases not affecting Indian tribal interests.

Wood draws attention to an important distinction not always understood by those who seek injunctive or declaratory relief for breach of trust in the federal courts. Too often courts and litigants rely on the Supreme Court's most recent pronouncements regarding the trust, which have arisen in Tucker Act cases seeking money damages for breach of trust. Because the Tucker Act waives sovereign immunity and vests the Court of Federal Claims with jurisdiction only over claims based on a statute, treaty, or executive order, much of the analysis in the claims cases has focused on statutory interpretation. The jurisdictional requirement that the statute or statutory scheme relied upon creates rights and duties as well as mandates a money damages remedy has influenced these courts to adopt a more crimped construction of the statutory schemes than should be necessary in federal court. As I have explained elsewhere, federal question

24. Sisk, *supra* n. 22, at 348.

25. 537 U.S. at 514-21 (Souter, Stevens & O'Connor, JJ., dissenting).

26. *See* Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief against Federal Agencies*, 39 Tulsa L. Rev. 355 (2003).

jurisdiction permits claims brought on the federal common law as well as on statutes. In such cases, the issue of jurisdiction is settled, and there is consequently more room to interpret statutes liberally as creating trust duties.[27] In addition, federal courts may properly apply standards derived from the common law of trust to determine the scope of duties owed by the government in the management of tribal land and resources even in cases in which statutes do not impose such specific duties, but instead lodge discretion in the Secretary of the Interior.

Just as Tsosie expresses concern that the public trust doctrine of public land law assumes protection for tribes as stakeholders on an equal footing with all others, so does Wood warn that treating the trust as merely a statutory claim leads courts to interpret environmental laws as intended to protect Indian tribes to the same extent the laws protect all others, without reference to tribal peoples' unique relationship to the land or resources at issue. Collapsing trust standards into statutory standards leads to this unfortunate result according to Wood, who critiques a series of Ninth Circuit opinions that have fallen into this trap.[28] Finding no specific statutory language imposing specific duties on the government, the Ninth Circuit has declined to grant equitable or injunctive relief in such cases.[29] This problem is particularly acute in cases in which the statutory scheme vests broad discretion in the Secretary of the Interior to balance tribal interests against those of the majority and as a consequence provide minimal protection for tribal interests. She argues that the trust doctrine can be applied properly to set a higher standard of care for the Secretary in exercising discretion under these environmental statutes. Relying on *Pyramid Lake Paiute Tribe v. Morton*[30] as a model, Wood urges courts to require the government to exercise its discretion under environmental statutes to prevent off-reservation activities from harming tribal lands or resources.

Raymond Cross's essay, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, joins Sisk and Wood in criticizing last Term's decision in *Navajo Nation* as incompatible with a fully enforceable trust relationship. He argues that a fully enforceable trust duty is

27. Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship after* Mitchell, 31 Cath. U. L. Rev. 635, 673-74 (1982).

28. As Wood points out, a 1980 opinion of the District of Columbia Circuit started the Ninth Circuit down this unfortunate road. *See N. Slope Borough v. Andrus*, 642 F.2d 589, 611-12 (D.C. Cir. 1980) (rejecting the plaintiffs' claim that the Secretary of the Interior had a trust responsibility to protect and preserve the bowhead whale from off-shore leasing and stating that *Mitchell I* requires trust arguments to be grounded in specific statutes).

29. Cross takes issue with this focus on statutory specificity in the Tucker Act cases. *See* Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 Tulsa L. Rev. 369, 385-86 (2003). One can assume that *a fortiori* he would object to the analysis being migrated into the federal question jurisdiction cases where there is no jurisdictional requirement affecting the analysis.

30. 354 F. Supp. 252, 256 (D.D.C. 1973) (holding that allocating water among competing federal users, including an Indian tribe, based on a "judgment call" to be arbitrary and capricious in light of the Secretary of Interior's trust obligations to the tribe).

"essential to the future cultural and social survival of the Indian peoples."[31] He urges courts to revitalize the doctrine and restore it as an obligation rooted in treaties, agreements, and the course of dealing between tribes and the United States imposing upon the United States the duty to protect tribes' rights to remain culturally and politically distinct people. Like Skibine, he argues for a trust doctrine with some teeth in it that could be invoked both to limit congressional power to harm Indian interests and deter mismanagement of resources and funds by the executive branch.

Cross's reconceptualization would begin with the original Marshallian vision of the trust doctrine as inseparable from the self-government doctrine and similarly rooted in the political relationship between tribes and the United States government. This approach agrees with that of all the authors in this symposium, who seek to unify the trust doctrine as a "sovereign trusteeship," to use Mary Christina Wood's term.[32] Cross argues that a reconceptualized trust, a "hard-muscled trust,"[33] would repudiate the plenary power era misuse of the doctrine, which in turn represented a significant deviation from Marshall's original vision.

Cross criticizes the Supreme Court for adopting what he calls the "two-track" analysis of the *Mitchell* line of cases, differentiating between a "general trust" as normatively appealing but only morally enforceable and a trust grounded in specific statutes imposing full fiduciary obligations on the government. Like Wood, he argues that such an analysis reduces the trust doctrine to a statutory claim and thereby invites judges to scour statutes looking for specific evidence of statutory standards. He fears that such an analysis will slight common law principles of fiduciary and trust law and rightly notes that federal courts since *Mitchell* have frequently invoked the common law of trusts as a source of standards supplementing statutory language. Like Sisk, he also argues that the Supreme Court gave too much weight to the statutory purpose to promote tribal self-determination in the Indian Mineral Leasing Act and concomitant slighting of the trust doctrine.[34]

Normatively, Cross proposes the adoption of a new canon of construction that would simply flip the majority's presumption against finding statutes designed to further self-determination as creating rights: "federal judges would be required to presume that the existing and future Indian self-determination statutes, such as the Indian Mineral Leasing Act of 1938 (IMLA), preserve the historic rights Indians have traditionally enjoyed under the federal trust relationship unless

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31. Cross, *supra* n. 29, at 371.

32. In an influential article on the trust doctrine, Wood uses the term "sovereign trusteeship" to "embod[y] a strong presumption of native sovereignty . . . premised on a model of federal-tribal relations organized around a paradigm of native separatism." Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1498.

33. See text accompanying Cross, *supra* n. 29, at 374.

34. Unlike Sisk, however, he is far more critical of Justice Souter's dissent, arguing that while the dissenting opinion argues for a "balanced standard," in fact, the dissenting opinion invites a zero-sum analysis in which either tribal sovereignty or the trust relationship—but not both—must prevail. *Id.* at 393-95.

Congress clearly expresses its intent to the contrary"[35] on the face of the relevant statute. Application of this canon, he suggests, would have produced a different result in *Navajo Nation*. Again, this proposal is normative. As others have noted, the Court at times applies the Indian canons with sensitivity, but at others either subordinates them to canons protecting other interests, especially federalism, or—worse—simply ignores them.[36]

A final essay in this symposium issue is a short description of trust assets litigation in Japan, *A Comment on the Ainu Trust Assets Litigation in Japan*.[37] Like the *Cobell v. Norton*[38] litigation in the United States, these claims are on behalf of individuals and not the entire group. A 1997 law required assets held in trust for the Ainu minority in Hokkaido to be returned to their individual owners, but an unconscionable and arguably unconstitutional limitation of the period within which claims could be filed to one year has prevented most from succeeding. The authors point out that the Japanese press has given very little coverage to these cases, illustrating the marginalized status of the Ainu in Japanese society.

All of the authors appearing in this symposium are engaged in the same project from, as noted above, different perspectives. Each directs his or her intellectual efforts toward preserving what is positive about the trust doctrine as a means of protecting tribal autonomy, lands, and resources, while jettisoning the "dark side" of the trust, rooted in the wardship analogy portrayal of tribes as subjugated, helpless, and backward. Their essays will provide a useful starting point for those encountering this doctrine for the first time and food for thought for those of us who have been pondering its complexities for many years.

35. *Id.* at 374 (footnote omitted).

36. *Compare Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (applying Indian canons to interpret treaty as not abrogating usufructuary rights of tribe) *with Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (holding that the Eleventh Amendment bars tribes from suing states in federal court without any reference to Indian canons); *Cotton Petroleum Corp. v. N.M.*, 490 U.S. 163 (1989) (upholding state ability to impose severance tax on oil wells within Indian country, while citing but giving little weight to the Indian canons).

37. Mark Levin & Teruki Tsunemoto, *A Comment on the Ainu Trust Assets Litigation in Japan*, 39 Tulsa L. Rev. 399 (2003).

38. 334 F.3d 1128, 1133-37 (D.C. Cir. 2003) (giving the history of this complicated litigation by Indian owners of funds in "Individual Indian Money Accounts" seeking an accounting of funds held by the federal government).