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THE FEDERAL TRUST DUTY IN AN AGE OF INDIAN SELF-DETERMINATION: AN EPITAPH FOR A DYING DOCTRINE?

Raymond Cross*

As man advances in civilization, and small tribes are united into larger communities, the simplest reason would tell each individual that he ought to extend his social instincts and sympathies to all the members of the same nation, though personally unknown to him. This point being once reached, there is only an artificial barrier to prevent his sympathies extending to the men of all nations and races.

Charles Darwin¹

*The whole world is coming,
A nation is coming, a nation is coming,
The Eagle has brought the message to the tribe.
The father says so, the father says so.
Over the whole earth they are coming.
The buffalo are coming, the buffalo are coming,
The Crow has brought the message to the tribe,
The father says so, the father says so.*

Sioux Ghost Dance Chant²

I. INTRODUCTION

A. *Responding to the Realist Critique of the Federal Trust Doctrine*

An old European history professor of mine described Charlemagne's ninth century Holy Roman Empire as "neither holy, nor Roman, nor an empire."³ Likewise, legal critics of the federal trust duty characterize it, like the Holy Roman Empire of old, as a legal and political oxymoron. In all candor, they say, it is neither federal, nor a trust, nor a "duty." These realist critics argue that the federal trust duty has proven to be a largely

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1. Robert Wright, *Nonzero: The Logic of Human Destiny* iii (Pantheon Bks. 2000).

2. Frederick Turner, *Beyond Geography: The Western Spirit against the Wilderness* 290 (Viking Press 1980).

3. Voltaire is credited with coining this clever phrase in the eighteenth century. See Wright, *supra* n. 1, at 174.

illusory doctrinal resource for the Indian peoples' protection.⁴ They claim, with justification, that it has failed to protect from federal depredation or despoliation what the Indian peoples value most—their lands, their rights of self-governance, and their cultural and religious freedoms.⁵

As proof of their claim, the critics cite the ominous conclusion by one of the trust doctrine's most ardent advocates, Professor Reid Peyton Chambers. Chambers concluded in perhaps the leading law review article on this subject: "This power of Congress recognized under the *Lone Wolf* rendition of the [Indian] trust responsibility is manifestly awesome, perhaps unlimited. . . . For while courts recognize that Congress has a trust responsibility, they uniformly regard it as essentially a moral obligation, without justiciable standards for its enforcement."⁶

See, the critics say, even the most ardent advocate of this doctrine admits that the federal courts will idly sit by as a future Congress may decide, in its wisdom as the Indian peoples' guardian, to embark on a new and starkly pro-assimilationist Indian program that once again shrinks the land base reserved to the Indian peoples.⁷

But even more disturbing, these critics argue, is Professor Chambers's supposed remedial approach that ostensibly blunts the adverse future impacts of Congress's exercise of its plenary power over Indian lands and resources. Chambers draws a practical distinction between what he views as the judicially enforceable Indian trust obligations owed by the federal executive to the Indian peoples as against the judicially non-enforceable moral obligations that Congress owes to the Indian peoples.⁸

Chambers asserts that the federal trust duty is the appropriate judicial means for regulating federal administrative behaviors and regulatory actions undertaken by the now multifarious federal "Indian agents" who are charged with carrying out congressionally declared Indian policies.⁹ In his law review article on the subject, Chambers states:

If, as the Cherokee cases suggest, a chief objective of the trust responsibility is to protect tribal status as self-governing entities, executive extinguishment of the tribal land base diminishes the territory over which tribal authority is exercised and thereby imperils fulfillment of the guarantee of tribal political and cultural autonomy. If this is the correct interpretation of the trust responsibility, equitable relief in appropriate cases seems essential. Such relief is particularly vital to accommodate the conflicts between Indian trustee responsibilities and competing government projects that affect countless federal agencies.¹⁰

4. Because the *Lone Wolf* doctrine authorizes Congress to unilaterally abrogate Indian treaties or agreements and thereby take Indian lands or resources at will, some legal commentators deem the federal trust doctrine as being legally insufficient to protect the Indian peoples from future governmental abuse of the federal plenary power doctrine. See Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 Or. L. Rev. 245, 254-55 (1982).

5. See *id.*

6. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1226-27 (1975) (footnote omitted).

7. Newton illustrates this point by hypothesizing a contemporary Indian allotment act that once again shrinks the Indian peoples' reserved land base. She argues that nothing in present federal Indian law would effectively prevent Congress from doing so. Newton, *supra* n. 4, at 261-63.

8. Chambers, *supra* n. 6, at 1247-48.

9. *Id.*

10. *Id.* at 1236 (footnote omitted).

Aside from the obvious comment that it probably doesn't make a real difference to the affected Indian people whether it is Congress or the federal executive who acted wrongfully in extinguishing their tribal land base, the realist critics level a more serious and potentially devastating charge against Chambers's supposed remedial theory and approach for the judicial enforcement of the federal trust duty.¹¹ The critics contend that, as far as the U.S. Supreme Court is concerned given its recent decision in *United States v. Navajo Nation*,¹² there is no independent legal basis for imposing liability on federal Indian trust administrators for their alleged mismanagement of Indian trust resources, apart from any such liability specifically created by statutory imposition.¹³ If Indian advocates—and I count myself in their company—are to continue to espouse the federal trust doctrine as a meaningful legal resource for the Indian peoples, then I believe we must respond to what the legal realists regard as their devastating criticisms of that ostensible doctrine. Because I do believe that a vibrant and judicially enforceable federal trust doctrine is essential to the future cultural and social survival of the Indian peoples, a concerted scholarly inquiry must be undertaken by Indian advocates to respond to the realist critique of this doctrine.

There are two possible honest responses, I believe, to the realists' claims about the illusory character of the federal trust duty. Option one requires us to work internally, "inside history" so to speak, in an effort to breathe new life into the dying federal trust doctrine. This content-based approach, as I call it, seeks to reconnect the contemporary federal trust duty doctrine to those foundational Indian law principles established by the historic treaty-making era between the Indian peoples and the federal government. Only by reconnecting these historic principles to contemporary federal Indian law can a meaningful content be conferred on a now empty federal trust doctrine.

The content-based approach argues that the foremost principle of federal Indian law, that of inherent tribal sovereignty, was wrongfully disregarded and disrespected by the federal government during the Indian allotment and forced assimilation era of the late nineteenth century. It is this key principle that must be restored as the centerpiece of any revitalized federal trust doctrine. But for this content based approach to succeed, its advocates must meet the realists' charge that tribal sovereignty was judicially "killed off" during the federal Indian allotment and assimilation era of the late nineteenth century. According to the realist critics, it was replaced by the federal plenary power doctrine, the very doctrine that Professor Chambers admits is alive and well today.

Option two requires us to work externally, "outside of history" so to speak. I call this the process-based approach to revitalizing the federal trust doctrine. It works outside of history on two levels. First, it appropriates those legal fictions created by Chief

11. See generally Paul Frye, *A Travesty of a Mockery of a Sham: The Federal Trust Duty and Indian Self-Determination*, Rocky Mt. Spec. Inst. on Nat. Resources Dev. & Envtl. Reg. in Indian Country, Paper No. 2-B (unpublished manuscript 1999) (copy on file with author).

12. 537 U.S. 488 (2003).

13. The *Navajo Nation* Court held that "[t]o state a litigable claim, a tribal plaintiff must invoke a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *Id.* at 503 (quoting *U.S. v. Mitchell*, 463 U.S. 206, 218 (1983) ("*Mitchell II*").

Justice John Marshall in his famed trilogy of Indian law opinions¹⁴ as ahistorical and timeless ideals that should govern the modern development of the federal trust doctrine. Second, it candidly admits that Marshall's ideals can only be realized in an ahistorical era—one free from those destructive biases, prejudices, and conflicts that doomed the historic trust-based relationship between the federal government and the Indian peoples. This approach argues that Marshall's original ideation of the Indian peoples as "domestic dependent nations" did not contemplate their future integration or assimilation into American legal or political society. Indeed, in Marshall's scheme of things, he thought it highly unlikely that they could be successfully integrated into any future American society. Instead, his legal opinions argue that the Indian peoples were guaranteed by their natural inherent right, as well as by relevant federal treaties, to remain as the discovering Europeans had found them—culturally unassimilable and politically distinct Indian peoples.¹⁵ More remarkably, Marshall's opinions guaranteed the Indian peoples the active and permanent protection of a federal trustee who was charged with ensuring that the Indian peoples could forever maintain their "once and future" status as culturally and politically distinct entities within the growing American state.¹⁶

Marshall's opinions guaranteeing the Indian peoples' timeless right to remain culturally and socially distinct entities, oblivious to the obvious ravages of overweening federal Indian policies of the late nineteenth century, represent the process based approach to justifying the contemporary judicial creation and enforcement of a comprehensive and fully enforceable federal trust duty.¹⁷ Viewed in this light, Indian self-determination, the federal government's contemporary Indian policy, represents the legally necessary, but not practically sufficient, predicate for the future realization of Marshall's ahistorical vision of the Indian peoples as "domestic dependent nations."¹⁸

B. *Defending the Value of Scholarly Theorizing in the Federal Indian Law Context*

Well-informed friends of mine believe that the bitter historical experiences of the Indian peoples, resulting in part from the federal government's wrong-headed Indian allotment and anti-tribal programs of the late nineteenth century, can never be redressed by any contemporary federal Indian policy. Why then, they ask, do I, as an Indian person and Indian law teacher, expend so much effort to theorize and write about the federal trust doctrine and Indian self-determination? The "Indian fatalist" part of me sympathizes with and understands their point of view. But the "Indian law teacher" part

14. See *Worcester v. Ga.*, 31 U.S. 515 (1832); *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

15. The Indian peoples "had always been considered as distinct, independent political communities . . ." *Worcester*, 31 U.S. at 559.

16. *Id.* at 561-62 ("[T]reaties . . . guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the [Indian] nation to govern itself.").

17. Professor Wood's modern re-conception of the federal trust duty as encompassing a sovereign trust in favor of Indian self-determination embodies this ideal. See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109, 139-49.

18. Once fully sovereign peoples, the Indian peoples were reduced to "domestic dependent nations" upon their political incorporation into the United States. *Cherokee Nation*, 30 U.S. at 17.

of me is so unduly irked by Justice Ruth Bader Ginsburg's seemingly cavalier opinion in *Navajo Nation* that I will not rest until I respond in detail to what I believe are her mistaken assumptions about the incompatible nature of the federal trust duty and Indian self-determination.¹⁹

My essay evaluates the prospects for a revitalized federal trust doctrine that will complement the Indian peoples' efforts to realize a meaningful measure of self-determination. I conclude that Justice Ginsburg's opinion in *Navajo Nation* should be restricted to the peculiar facts of that case and should not be read as precluding the future development of a vibrant federal trust doctrine that serves as an essential complement to the shared federal-Indian goal of self-determination.

Indeed, unless the Supreme Court contemplates a perpetual state of federal governmental wardship for the large majority of the Indian peoples, it must work toward an effective legal synthesis of Marshall's two concepts—the federal trust duty and Indian self-determination. Congress's strong support for Indian self-determination must be matched by, in my estimation, an equally strong judicial commitment to define and enforce the federal trust duty. Given Congress's declaration that the Indian peoples' trust relationship with the federal government would not be jeopardized if they chose to pursue self-determination, I believe Justice Ginsburg's opinion in *Navajo Nation* is manifestly out of step with contemporary federal Indian policy.

That most famous proponent of Indian self-determination, President Richard M. Nixon, proclaimed in his 1970 Indian message to Congress, that the Indian peoples need not fear the loss of their rightful claims to the active involvement and help of their trustee, the federal government, if they decided to work towards self-determination.²⁰ Furthermore, absent a judicially enforced federal trust doctrine, today's "alphabet soup" of federal executive agencies—the Bureau of Indian Affairs (BIA), Army Corps of Engineers (ACOE), Bureau of Reclamation (BOR), Fish & Wildlife Service (F&WS), Forest Service (USFS), and National Park Service (NPS)—will likely exhibit little willingness or interest in developing effective "government-to-government" relationships with the Indian peoples within their respective jurisdictions.²¹

19. Justice Ginsburg concludes that because "[t]he IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties . . . 'the ideal of Indian self-determination is directly at odds with Secretarial control over leasing.'" *Id.* at 508 (quoting *Navajo Nation v. U.S.*, 46 Fed. Cl. 217, 230 (2000)).

20. President Nixon's 1970 Indian Message emphasized that "[t]he 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." H.R. Doc. 91-363, 91st Cong. 1 (July 8, 1970) (Message from the President of the United States Transmitting Recommendations for Indian Policy). Nixon's message goes on to say that the federal government "must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support." *Id.* at 3.

21. Professor Mary Wood includes these federal agencies within the doctrinal compass of the federal trust duty because their "actions . . . may profoundly affect Indian land, even though the effects are incidental in that they result from general government actions not directed toward tribes or their reservations." See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1527.

She rightfully concludes, in my estimation, that the federal courts have "evinced a strong willingness to impose a trust duty to protect Indian lands and corollary resources from adverse agency action of an incidental nature." *Id.* at 1532. However, I am troubled by her conclusion that her "expansive approach may not carry over to Tucker Act claims for damage to tribal lands or resources resulting from federal incidental actions in the post-Mitchell era." *Id.* I worry that she is endorsing, perhaps indirectly, the contemporary

While I am personally reluctant to be drawn into the “how to” discussion of Indian self-determination, I believe that the two reasons above justify the Supreme Court’s declaration of a new judicial canon of Indian statutory construction. Under this proposed canon, 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),²² preserve the historic rights Indians have traditionally enjoyed under the federal trust relationship unless Congress clearly expresses its intent to the contrary within the “four corners” of a given Indian statute. This new canon is the practical and logical corollary of Congress’s declared “two track” approach to Indian self-determination. Track one encourages the Indian peoples to assert their inherent rights of self-governance and economic or social self-determination. Track two assures the Indian peoples that needed technical and financial support will be forthcoming from the federal government to assist them in their efforts.²³

The plan of my essay is divided into several parts. Part Two explores the Marshallian roots of both the federal trust doctrine and Indian self-determination ideal. I argue that, like Romulus and Remus,²⁴ the trust doctrine and self-determination ideal are inseparable twins born together from Marshall’s famed trilogy. Part Three assesses the rise of the federal plenary power doctrine and its role in fostering the growth of what I call the “Indian administrative state.”²⁵ I argue that it was the de facto extension of federal administrative control over every aspect of Indian peoples’ lives during the late nineteenth century that prompted the Supreme Court to recognize an asserted federal plenary power over the Indian peoples’ lands and societies.²⁶ Part Four of my essay analyzes the contemporary Supreme Court’s rediscovery of Marshall’s concept of the federal trust doctrine. I argue that it was the accumulated horrific evidence of federal administrative abuse and disregard of the Indians’ inherent rights and interests that compelled the Supreme Court to rediscover the federal trust doctrine.²⁷

Part Five of my essay examines the judicial discomfort and ambivalence exhibited in the Supreme Court’s failure to develop a “hard muscled” federal trust doctrine as a

Supreme Court’s “two tier” theory of federal liability for breaches of the federal government’s fiduciary or trust obligations to the Indian peoples.

22. 52 Stat. 347 (1938).

23. See generally Wood, *supra* n. 17, at 139-49.

24. Romulus and Remus, in Roman mythology, are the twin founders of Rome. Raised by a defiant mother wolf who, apparently against the grain of “wolf tradition,” refused to kill and devour the two orphaned boys, she, instead, chose to raise them as her own cubs.

25. I have described the BIA’s “assumption by default” of administrative and practical control over the Indian peoples’ lives, and resources during the late nineteenth century in an earlier law review article. See Raymond Cross, *Tribes as Rich Nations*, 79 Or. L. Rev. 893 (2000).

26. *Id.*

27. In a more recent law review article, I make the same point:

But by the advent of the New Deal Era in the 1930s, America’s western frontier had long since closed. In 1934, Congress repudiated its Indian allotment policy and adopted fundamental Indian land and governmental reforms as the hallmark of its “Indian New Deal.” These reforms were intended to promote the new federal policy of tribal economic development and political self-determination. . . . A judicial rethinking of the *Johnson-Lone Wolf* line of decisions that had made Indian allotment and the surplus lands sales possible seemed likewise justified.

Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 Ariz. L. Rev. 425, 466-67 (1998) (footnotes omitted).

means of judicially policing the contemporary federal-Indian relationship. I argue that the Court's perceived conflict between the federal agencies' "public representational" responsibilities and those agencies' "Indian representational" duties resulted in a substantial watering down of the federal trust relationship with the Indian peoples.²⁸

Part Six of my essay critiques Justice Ginsburg's opinion in *Navajo Nation*. I argue that her opinion misconceives the appropriate and complementary relationship between the federal trust duty and the contemporary policy of Indian self-determination. I conclude my essay with a brief sketch of a recommended judicial synthesis of these two ageless doctrines of federal Indian law.

II. EXPLORING THE MARSHALLIAN ROOTS OF THE TWIN CONCEPTS OF THE FEDERAL TRUST DUTY AND INDIAN SELF-DETERMINATION

Option one requires us to examine the history of the federal trust doctrine. My goal is to trace, and hopefully thereby explain, the contemporary Supreme Court's conceptual distinction between two aspects of the federal trust duty: the "generalized" Indian trust relationship that creates no enforceable legal rights against the United States and the "specific" Indian trust relationship that may create enforceable legal rights in the Indian peoples.²⁹ I criticize this distinction as reifying those anti-Indian biases and prejudices of the late nineteenth century and as fundamentally at odds with the contemporary congressional policies that are strongly supportive of Indian self-determination.

A. *Why Indian Advocates Rightfully Seized on the Federal Trust Doctrine as the Appropriate Means to Ensure the Indian Peoples' Cultural and Political Survival*

The contemporary Supreme Court's schizophrenic distinction between the "generalized" federal trust duty on the one hand and the "specific" federal trust duty on the other derives, in my mind, directly from the anti-Indian policies and precedent of the late nineteenth century. Indian advocates understandably reject this schizophrenic distinction as fundamentally irreconcilable with Chief Justice Marshall's trilogy of Indian law opinions. His opinions, after all, are the common doctrinal source of both the contemporary federal trust duty and Indian self-determination doctrines. Indeed, Marshall viewed these two doctrines as inextricably and perpetually linked as the opposite sides of the same doctrinal coin. It is no surprise that the traditional Indian rights today agitate for a restoration of a federal trust doctrine that takes full account of Marshall's twin conceptions of the historic federal-Indian relationship.

My historical critique of today's schizophrenic federal trust doctrine argues that the judicial development of the now two hundred year long federal-Indian relationship

28. Professor David H. Getches and others questions whether the Court, in *Nevada v. United States*, 463 U.S. 110 (1983), reasoned that "a lesser standard necessarily applies to the Indian trust duty when the [Interior] Secretary has to serve competing legitimate public interests." See David H. Getches et al., *Federal Indian Law: Cases and Materials* 342-43 (4th ed., West 1998).

29. What I characterize as the contemporary Supreme Court's "two-track" theory of the federal trust duty doctrine originated in what is now known as the *Mitchell* line of decisions. See *Mitchell II*, 463 U.S. 206; *U.S. v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*").

should have reflected the unfolding of these twin Marshallian principles. A “full blooded” federal trust duty doctrine should have developed that would have either obviated or mitigated the ravages inflicted by the federal government’s anti-Indian policies of the late nineteenth century. Such a “hard muscled” federal trust doctrine would have recognized and responded to the following social and political realities that characterized the federal-Indian relationship of that era:

1. *The growth of federal power over the internal affairs of the Indian peoples:* Federal power over the legal and political status of the Indian peoples grew steadily more intrusive during the late nineteenth century so as to eventually encompass virtually every facet of Indian life within Indian country.³⁰
2. *The deepened vulnerability of the Indian peoples to federal power:* The Indian peoples’ deepened vulnerability to this growing federal power over their lives and resources during the late nineteenth century rendered them legally and practically dependent on the “good faith” of the federal government to exercise that power in their best interests.³¹
3. *Federal agencies’ wrongful and largely unregulated exercise of a diffuse and broad discretion over the Indian peoples’ lives and resources:* Congress’s de jure and de facto delegation of its Indian trusteeship power to so-called “Indian” agencies during the late nineteenth century created a bureaucratically-led “shadow” government that effectively displaced the traditional self-governing institutions of the Indian peoples within Indian country.³²

But the federal judiciary, far from inhibiting or channeling the overweening growth of this federal power over the Indian peoples, actively abetted and aided its growth by crafting judicial principles that rendered it impervious to the Indian peoples’ legal or political challenges. Furthermore, the contemporary Supreme Court’s schizophrenic federal trust doctrine remains wedded to the admittedly failed, and congressionally repudiated, anti-Indian policies of that era. Why the Supreme Court remains wedded to the federal plenary power doctrine that arose during that era requires us to re-explore the sad and tortuous history of the Indian allotment and forced assimilation era.

30. I earlier explained the federal government’s anti-Indian policies of the 1880s to the 1930s in these terms:

The federal government’s resulting war on tribalism from the 1880s to the 1930s resymbolized the complex, life-affirming, cultural and social practices of diverse Indian peoples as the major road block to their assimilation into American society. But freeing up Indian lands for non-Indian use, rather than emancipating individual tribal members from the clutches of superstition and communal land holding, was the real goal of the 1880s Indian reform movement.

Cross, *supra* n. 25, at 908 (footnotes omitted).

31. Professor Getches concludes that, during the late nineteenth century, “[a] consensus developed—among non-Indians, at least—in favor of assimilation as the only politically viable alternative to the strong push for the wholesale destruction of Indian culture and Indian reservations.” Getches et al., *supra* n. 28, at 184.

32. See *id.* at 166-71 (quoting H.R. Comm. Indian Affairs, *Hearing on H.R. 7902*, 73d Cong. 428-85 (1934)).

B. *A Brief Digression Criticizing Chief Justice Marshall's Failure to More Completely Define His Twin Conceptions of the Federal Trust Duty and Indian Self-Determination*

The three trust generating factors—federal power over Indian lands and resources, the Indian peoples' vulnerability to that power, and the inexorable growth of an overweening federal administrative discretion over many aspects of Indian life—compelled Chief Justice Marshall to analogize the historic federal-Indian relationship as like “a ward to his guardian.”³³ Marshall emphasized Indian treaty-making and diplomacy as the means of reconciling and regulating the twin concepts of Indian autonomy or self-determination and the federal guardianship power over the Indian peoples.³⁴ While he failed to set definitive substantive limits to the federal government's guardianship power over the Indian peoples, he nonetheless articulated a clear concept of Indian self-determination and autonomy as an ideational standard requiring both the state and federal governments to respect and honor the inherent rights of the Indian peoples. He thereby compelled the states to do so in his opinion in *Worcester v. Georgia*.³⁵ Conceivably, he could have extended his *Worcester* treaty supremacy principle so as to bind future Congresses as well, thus using the Indian treaty's negotiated terms and principles to flesh out the legally enforceable content of the trust-based relationship between the Indian peoples and the federal government.³⁶

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

34. Marshall's attitude toward Indian treaty making is clearly expressed in his remarks regarding the Treaty of Holston between the Cherokee Nation and the United States:

This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.

Worcester, 31 U.S. at 556.

35. 31 U.S. 515.

36. I earlier criticized, in a slightly different context, Marshall's failure to determinatively define the Indian peoples' legal and political relationship to the United States:

Pragmatically, Marshall's tribe served as a protean policy device, content-empty and to be filled in by future federal governments as the tribe's guardian. By revisioning the tribe's role as America's ward, future federal guardians could resolve any emerging contradictions or paradoxes created by the American people's changing attitudes towards the Indian peoples and their need for more Indian land. This device supported the American people's growing conviction that the dwindling tribes should not be entitled to assert exclusive sovereignty over vast expanses of hunting and roaming lands that could easily accommodate thousands of non-Indian farmers, ranchers and future industrialists.

Cross, *supra* n. 25, at 901-02 (footnote omitted).

III. HOW THE SUPREME COURT TRANSFORMED MARSHALL'S FEDERAL GUARDIANSHIP IDEAL INTO FEDERAL PLENARY POWER OVER INDIAN AFFAIRS

A. *The Demise of Marshall's Twin Conceptions of the Historic Federal-Indian Relationship*

Rather than judicially develop Marshall's twin conceptions of the federal-Indian relationship, the Supreme Court of the late nineteenth century actively undermined those conceptions by enlarging, without any apparent constitutional limit, the federal government's power over the Indian peoples' lives and resources. This judicial enlargement of federal power over the Indian peoples culminated in the Supreme Court's 1886 decision in *United States v. Kagama*.³⁷

The *Kagama* Court upheld the Indian Major Crimes Act of 1885,³⁸ not on the basis of Congress's delegated power under the Indian Commerce Clause as asserted by the United States, but as the exercise of its extra-constitutional guardianship power over the Indian peoples. Without any hint of irony, Justice Miller's opinion in *Kagama* converted Chief Justice Marshall's "Indian protectorate" analogy into a license for Congress's exercise of an extra-constitutional power not subject to judicial review or limitation:

It seems to us that [the Major Crimes Act] is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. 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*. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.³⁹

The Supreme Court later baldly restated Congress's extra-constitutional guardianship power over the Indian peoples, describing it as "plenary" in character, in its 1903 decision in *Lone Wolf v. Hitchcock*.⁴⁰ Justice White's opinion for the Court rejected Lone Wolf's claim that the "tribal consent" provisions of the 1867 Treaty of Medicine Lodge⁴¹ judicially constrained Congress's power to unilaterally allot the Kiowa and Comanche's treaty-established lands.⁴² The *Kagama* and *Lone Wolf* decisions effectively ended any hope of continuing Marshall's tribal sovereignty doctrine as an effective check on federal governmental overreaching into the lives and rights of the Indian peoples.

37. 118 U.S. 375 (1886).

38. 23 Stat. 362, 385 (1885).

39. *Kagama*, 118 U.S. at 383-84 (third emphasis added).

40. 187 U.S. 553 (1903).

41. *Treaty with the Kiowa and Comanche Tribes of Indians*, 15 Stat. 581 (1867).

42. *Lone Wolf*, 187 U.S. at 561.

B. *How the Supreme Court's Re-conception of the Federal-Indian Trust Relationship Facilitated the Late Nineteenth Century Rise of the "Indian Administrative State"*

The Supreme Court's reformulation of Marshall's twin conceptions underlying the federal-Indian trust relationship likewise facilitated Congress's de jure and de facto delegation of an almost judicially unchecked regulatory discretion over the Indian peoples' lives and resources. This discretion was given first to the BIA and then later to a virtual "alphabet soup" of federal regulatory and land management agencies—the ACOE, the BOR, the F&WS, the Environmental Protection Agency (EPA), among others.⁴³

With the Supreme Court's acquiescence, if not active support, the so-called "Indians' agency"—the BIA—was empowered during the late nineteenth century to establish the "Indian administrative state." Through the exercise of its delegated regulatory powers, the BIA eventually established a "shadow" government to extend federal control over virtually every aspect of Indian life within Indian country.⁴⁴ It was, ironically, the bureaucratic result of this new reality of Indian life—the Indian peoples' vulnerability to the BIA's capricious and arbitrary power to withhold treaty or statutory guaranteed Indian food or clothing rations to ensure Indian compliance with its regulations—that led the *Kagama* Court to accede to the extra-constitutional reality of federal plenary power over the Indian peoples.⁴⁵

The BIA of that era plausibly interpreted its administrative "trust duty" to the Indian peoples, endorsed by both congressional and judicial acquiescence, as to "kill the Indian so as to save the [potential American citizen] within."⁴⁶ By the end of the nineteenth century, virtually all of the BIA's regulatory powers and resources were directed toward that goal. How and why the Indian peoples survived that era of unbridled BIA rule in Indian country has long baffled Indian historians, sociologists, and ethnographers. I certainly don't know the answer to that question, but I do know that it wasn't the result of the judicial enforcement of the federal trust duties and responsibilities the BIA may have owed to the Indian peoples.⁴⁷

IV. HOW THE ACCUMULATED CONGRESSIONAL AND ADMINISTRATIVE ABUSE OF INDIAN PEOPLES' RIGHTS COMPELLED THE MODERN SUPREME COURT TO REDISCOVER MARSHALL'S TWIN CONCEPTIONS OF THE FEDERAL-INDIAN RELATIONSHIP

A. *Early Judicial Rethinking Regarding the Plenary Power Doctrine*

The Supreme Court did act creatively in the early twentieth century so as to rediscover Marshall's twin conceptions of the federal trust and Indian self-determination

43. See generally Wood, *supra* n. 17, at 139-49.

44. See generally Getches et al., *supra* n. 28, at 142-48.

45. See *id.* at 153-58.

46. Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 UALR L. Rev. 941, 944 (1999) (internal quotations and footnote omitted).

47. See Cross, *supra* n. 25, at 916-19.

doctrines. The Court could no longer ignore the all-too-evident and deepened vulnerability of the Indian peoples to the unchecked discretion of the federal Indian agencies over their lives and property. The accumulated administrative abuses heaped on these dependent peoples forced the Court to resurrect Marshall's long-disregarded federal guardianship doctrine.⁴⁸

Appropriately enough, this new judicial understanding of the federal trust duty arose in the context of an Indian takings case. Justice Butler, in his 1938 opinion for the court in *United States v. Shoshone Tribe*,⁴⁹ resurrected Marshall's characterization of the Indians' "right of occupancy . . . [to be] as sacred and as securely safeguarded as is fee simple absolute title."⁵⁰ In holding that the Shoshone Tribe was entitled to just compensation for the federal taking of one-half of its reservation as a resettlement site for another tribe of Indians, Justice Butler seemingly restricted the federal government's hitherto unlimited guardianship power over the Indian peoples. He rejected the federal government's *Lone Wolf*-based defense to the tribe's action, saying the federal government's *Lone Wolf* power "to pass laws regulating alienation and descent and for the government of the tribe and its people upon the reservation detracts nothing from the tribe's ownership, but was reserved for the more convenient discharge of the duties of the United States as guardian and sovereign."⁵¹

B. How the Supreme Court "Hit the Political Wall" in Its Effort to Rethink the Plenary Power Doctrine

The *Shoshone* decision seemingly heralded the revival of a judicially revitalized federal trust doctrine. Such a revitalized doctrine must be powerful enough to take account of the deepened vulnerability of the Indian peoples due to the unwanted history that had accumulated from failed Indian policies. Such a doctrine would reject that failed history by judicially ending those twin evils that had spawned it: the judicially unchecked growth of federal power over the Indian peoples coupled with the arbitrary exercise of increasingly pervasive administrative discretion wielded by the BIA, and now other federal agencies, over virtually all aspects of Indian economic, political, and cultural life in Indian country.⁵²

But there was to be no new Chief Justice Marshall on the Court, no jurist strong and principled enough to revive Marshall's twin conceptions of the federal-Indian relationships so as to compel the modern revision of the Court's clearly wrong-headed *Kagama* and *Lone Wolf* decisions of the late nineteenth century era. Instead, the legacy of the *Shoshone* Court's failed promise is our inheritance of the modern Supreme Court's schizophrenic conception that the federal trust doctrine reenacts the federal plenary power doctrine in the guise of its "generalized" and "specific" federal trust duty distinctions.

48. See generally Getches et al., *supra* n. 28, at 328-70.

49. 304 U.S. 111 (1938).

50. *Id.* at 117.

51. *Id.* at 118.

52. See Cross, *supra* n. 27, at 466-72.

Why the *Shoshone* Court's legacy remained unfulfilled is best explained by Dean Nell Jessup Newton's analysis of the Indian law jurisprudence of the late 1940s and 1950s.⁵³ She cites several intervening political events as disrupting further development of an Indian rights focused jurisprudence that began with the *Shoshone* decision. Newton cites Congress's enactment of the Indian Claims Commission Act⁵⁴ and the Indian Tucker Act⁵⁵ in 1946 as adversely influencing, if not effectively preempting, the future judicial development of an independent, judicially monitored, federal trust doctrine.⁵⁶

These two federal jurisdictional acts—generally opening the federal courts to Indian breach of trust and related takings claims, but on stringent jurisdictional conditions—fundamentally altered the future judicial course of the potential development of an adequate and independent federal trust doctrine premised on common law legal and equitable principles. The exercise of Congress's plenary power over the Indian peoples—expressed as an act of “congressional grace” in allowing eligible Indians access to federal courts—required the eligible Indian plaintiffs to accept onerous jurisdictional conditions such as, in the Indian Claims Commission (ICC) context, the “no interest” rule and the “money damages only” remedy.⁵⁷

Although Newton does not say this directly, those contingent historical and political events help explain today's deformed and deficient federal trust and fiduciary duties doctrine. How these events squelched the further judicial growth of an independent, judicially monitored, federal trust relationship with the Indian peoples is evidenced, in my mind, by the Supreme Court's 1955 opinion in *Tee-Hit-Ton Indians v. United States*.⁵⁸ Justice Reed, writing for the Court's majority, held that federal taking of aboriginal land titles imposed no just compensation liability on the federal government. Most commentators regard that decision as highly deferential to the federal government's asserted plenary power over Indian affairs and as seeking, as part of that deferential attitude, to limit the United States' financial liability for the uncompensated federal takings of valuable Indian aboriginal interests in Alaska and elsewhere.⁵⁹

Newton seemingly criticizes the federal courts' Indian breach of trust claims jurisprudence, developed in the context of the ICC Act's unique jurisdictional constraints, as subordinating the Article III judiciary to a subservient role in determining the legal parameters of federal liability in the Indian breach of trust claims context.⁶⁰ It

53. See Nell Jessup Newton, *Indian Claims in the Court of the Conqueror*, 41 Am. U. L. Rev. 753 (1992).

54. 60 Stat. 1049 (1946).

55. *Act of Mar. 3, 1887*, ch. 359, 24 Stat. 505, 505-08 (1887) (codified as amended in scattered sections of 28 U.S.C.).

56. Newton observes that one could ask, “why it is necessary to focus on the law created in these ancient claims, if the Indian Claims Commission is no longer in existence.” Newton, *supra* n. 53, at 776. She answers her own question as follows: “The answer is that the formalistic rules developed in Indian Claims Commission cases, especially those rules limiting liability and setting the boundaries of the permissible, continue to be cited and relied on today, even by the Supreme Court.” *Id.* (footnote omitted).

57. See *id.* at 763-65.

58. 348 U.S. 272 (1955).

59. See Cross, *supra* n. 27, at 473-77.

60. Newton illustrates her point by arguing:

Because the Indian Claims Commission Act was designed to obviate the need for further special jurisdictional acts, the Court of Claims reasoned that Congress intended that clause 5 [of the ICC

is not surprising, then, that today's Indian trust and fiduciary law subsists in a seeming state of judicially suspended animation—half alive and half dead. It hangs suspended, halfway between the old “mother may I sue you” Indian breach of trust jurisprudence of the ICC era and the modern conception of an active, affirmative Indian trust and fiduciary law that seeks to divine and protect the best interests of today's Indian peoples.⁶¹

V. HOW THE SUPREME COURT'S AMBIVALENT ATTITUDE TOWARD THE FEDERAL TRUST DUTY HAS RESULTED IN ITS DRAMATIC UNDER-ENFORCEMENT IN THE MODERN FEDERAL INDIAN LAW CONTEXT

A. *How the Contemporary Supreme Court's "Two-Track" Conception of the Federal Trust Doctrine Fails to Ensure "Fair and Honorable" Dealings between the Federal Government and the Indian Peoples*

Given that it was the Supreme Court's endorsement of the federal plenary power doctrine in the late nineteenth century that resulted in the contemporary subjection of the Indian peoples' remaining lands and resources to the broad regulatory discretion of a myriad of federal agencies, one might think that the Court would be motivated to reimpose in the contemporary era a “full blooded” trust doctrine that synthesizes Marshall's twin conceptions of the historic federal trust duty and Indian self-determination doctrines. But you would be sorely mistaken if you were to think that way. Instead, the modern Supreme Court has embarked on a “two track” approach to re-conceptualizing Marshall's historic federal trust doctrine that allows it to “have its cake and eat it too.” In its new “cake eating” mode, the Supreme Court amiably agrees, at the level of “track one” of the federal trust doctrine, with the following common law formulation of fundamental trust and fiduciary principles as declared by Justice Mason of the Australian High Court:

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.⁶²

See, the contemporary Supreme Court would likely say, we do recognize today Marshall's historic conception of the federal-Indian relationship as imposing a

Act] could only encompass the same kinds of claims brought earlier [under the special Indian jurisdictional acts]. Conveniently ignoring the many cases upholding the Department of Interior's administrative power to govern Indians without the need for statutory authority, the Court of Claims held that a claim by a tribe seeking compensation based on actions undertaken by the Government had to rely on a “treaty, agreement, order or statute which expressly obligated the United States to perform [any] services.”

Newton, *supra* n. 53, at 778 (quoting *Gila River Pima-Maricopa Indian Community v. U.S.*, 427 F.2d 1194, 1198 (Ct. Cl. 1970)) (footnotes omitted).

61. See Cross, *supra* n. 27, at 473-77.

62. *Hosp. Prods. Ltd. v. U.S. Surgical Corp.* (1984) 156 C.L.R. 41, 96-97 (Austl.).

“generalized” trust duty on the federal government to be “fair and honorable” in its dealings with the Indian peoples.

But in its “second track” mode of “having its cake,” the Court holds that the Indian peoples lack any enforceable legal rights under Marshall’s historic scheme unless and until Congress specifically confers statutory or regulatory entitlements to bring legal actions to enforce the federal government’s “generalized” trust or fiduciary duty to be “fair and honorable” in its contemporary dealings with the Indian peoples.

B. How the Mitchell I & Mitchell II Decisions Instantiate a “Two-Track” Federal Trust Doctrine that Undermines Marshall’s Twin Conceptions of the Historic Federal-Indian Relationship

The contemporary Supreme Court, in its two *Mitchell* decisions, created a “two track” federal trust doctrine that judicially reifies the long suspect legal principles underlying the federal plenary power doctrine while doing relatively little to promote the contemporary congressional policy of Indian self-determination. Even worse, it enables the Supreme Court to commend Justice Mason’s cited circumstantial factors as establishing, a la Marshall’s twin conceptions of the historic federal-Indian relationship, a “general trust relationship” between the federal government and the Indian peoples.⁶³

But, as the Supreme Court declared in *Mitchell I*, the wronged Indian party must establish more, much more it turns out in light of *Navajo Nation*, than the mere existence of this “generalized or bare” historical trust relationship. In *Mitchell I*, the Court concluded that the Indian timber allottees had not established the BIA’s liability under the General Allotment Act for its alleged mismanagement of the allottees’ trust assets. Because the “allottee, and not the United States, was to manage the land”⁶⁴ under the General Allotment Act, the Act created only a “limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.”⁶⁵

But upon remand to the lower court, the Quinault plaintiffs cited the court’s attention to the Indian Timber Management Act. This so impressed the Court of Claims that it held that the statute created an enforceable “specific trust relationship” between the Indian plaintiffs and the United States.⁶⁶ On review, the Supreme Court agreed with the lower court’s holding, stating:

In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.⁶⁷

63. See Getches et al., *supra* n. 28, at 331.

64. 445 U.S. at 543.

65. *Id.* at 542.

66. *Mitchell v. U.S.*, 664 F.2d 265 (Ct. Cl. 1981).

67. *Mitchell II*, 463 U.S. at 224.

C. *Why Indian Advocates Were Surprised by the Supreme Court's "Two Track" Reformulation of the Federal Trust Doctrine*

The Supreme Court's relatively few Indian breach of trust decisions, prior to the two *Mitchell* decisions, gave no hint of its coming "two-track" reconception of the federal trust doctrine. Indeed, Indian advocates may have thought there was just a "single track" duty as evidenced by the Supreme Court's earlier rationale and holding in *Seminole Nation v. United States*.⁶⁸

In *Seminole Nation*, individual tribal members, analogous to the Quinault allottees, were entitled by treaty stipulation to receive direct per capita payments from the interest accrued on a tribal trust fund. But instead of paying this money to individual tribal members, the federal government paid it to non-Indian creditors and to the corrupt tribal treasurer. Borrowing from standard trust law, the Court analogized the federal government to "a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money"⁶⁹ What is clear from the *Mitchell II* and *Seminole Nation* decisions, read together, is that as a matter of federal Indian trust law, the BIA or any other similarly situated federal agency charged with specific fiduciary duties by law, must structure its organizational exercise of its discretion so as to be consistent with the governing statutory directives.⁷⁰

D. *The Lower Federal Courts' Struggle to Operationalize the Two-Track Trust Logic of the Mitchell I & Mitchell II Decisions*

Making sense of the Court's "two-track" trust duty logic defies easy articulation or paraphrase. Prior to the Court's decision in *Navajo Nation*, the lower courts seemed to interpret that logic in the following practical terms:

1. Unlike the common law created and defined doctrine of trust and fiduciary duties, the federal trust duty is clearly subject to overriding congressional control and definition. Therefore, absent some governing federal statute, treaty, or authorized regulatory provision that creates, defines, and imposes a trust obligation on a federal obligation to specific Indian beneficiaries, a federal court may not, by resort of its inherent equitable powers, create and impose such trust or fiduciary obligations on any federal agency.⁷¹
2. But a federal court may use common law trust and fiduciary principles to supplement the "law of the trust" that is independently established by a specific treaty, statute, or regulatory provision. Judge Lamberth's importation of supplementary common law trust and fiduciary principles to inform and develop the statutory trust purposes Congress itself imposed on the Interior and Treasury departments illustrates this principle.⁷²

68. 316 U.S. 286 (1942).

69. *Id.* at 296.

70. See Getches et al., *supra* n. 28, at 334-35.

71. See *Pawnee v. U.S.*, 830 F.2d 187, 192 (Fed. Cir. 1987).

72. See *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999).

But while these two “doctrinal sideboards” plausibly interpreted the two-track logic of the *Mitchell* decisions, it became clear to the Supreme Court that the lower courts were applying its new federal trust doctrine in a practical manner that opened the courts too widely to Indian breach of trust claims against the federal government. Even though the lower courts routinely required Indian plaintiffs to establish a “context specific trust relationship[]”⁷³ before they would impose any fiduciary obligations on the federal government, the Court considered that far too lax a liability standard for assessing fair and honorable dealings between the paramount sovereign and its Indian wards.⁷⁴

Lower federal courts struggled to fairly apply this two-track standard in a manner that took into account the Indian peoples’ practical dependence on the good faith dealings of the United States. For example, the Federal Circuit Court of Appeals, in *Pawnee v. United States*, held that the Indian plaintiffs established only a general trust relationship between themselves and the federal government. Because they failed to cite the government’s breach of any specific statute or federal regulation regarding the administration of the Indian plaintiffs’ oil and gas interests, they had no breach of trust claim against the federal government.⁷⁵

The federal statutes and regulations that “place[d] the Secretary . . . at the center of the leasing of [plaintiffs’] mineral lands”⁷⁶ served, under that court’s application of the two-track logic, to “define the contours of the United States’ fiduciary responsibilities.”⁷⁷ What did the *Pawnee* court have to say about the application of common law principles of trust and fiduciary law that should independently obligate courts to protect the best interests of the Indian peoples—the admittedly dependent wards of the federal government?

The *Pawnee* court held it was not free to “establish different or higher [fiduciary] standards”⁷⁸ because to do so would require the court to invade “a function solely of Congress or its delegates.”⁷⁹ Because, in the court’s estimation, the cited statutes and regulations did not sufficiently obligate the government to pay the Indian plaintiffs royalties based on the highest market value for that trust resource, the court was not free to “establish different or higher standards.”⁸⁰

Interestingly, the *Pawnee* court makes no mention of its decision’s potential impact on the affected Indian peoples’ capacity for self-determination, although this matter arose under the 1938 Indian Mineral Leasing Act and its implementing regulations. Assuming that Indian mineral development bears directly on the affected Indian peoples’ capacity to achieve meaningful self-determination, it would seem that active judicial supervision of the federal government’s general trust obligation to prudently manage

73. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part).

74. *Id.*

75. *Pawnee*, 830 F.2d at 191.

76. *Id.* at 189.

77. *Id.* at 192 (quoting *Mitchell II*, 463 U.S. at 224) (internal quotations omitted).

78. *Id.*

79. *Id.*

80. *Pawnee*, 830 F.2d at 192.

those entrusted Indian resources should discipline the federal trustee to work diligently toward that common goal. For the federal courts to do so would be consistent with their historic solicitude for the Indians' interests, given their deepened vulnerability to both federal and private power in today's economic and technological setting where "information is power" and the Indian peoples lack meaningful access to either information or power.

Instead, the *Pawnee* decision reprises the "two-tier" federal trust duty analysis derived from the *Mitchell I* and *Mitchell II* decisions. Tribal plaintiffs must first show the existence of a "general trust relationship" between themselves and the federal government. Then, they must show the existence of a situation-specific trust relationship between themselves and the federal government as well as an actionable breach of that relationship.

My essay's focus is on the impact of these decisions on the federal government's contemporary trust obligation to promote Indian self-determination, not necessarily on the legal ability of the Indian peoples to obtain a money damages remedy against the federal government. My concern is that the Supreme Court will "throw out the baby of Indian self-determination" in order to cool the "bath water" of potentially untold Indian breach of trust claims that may arise in the Indian self-determination context. In my view, the Court's decision in *Navajo Nation* is a doctrinal preemptive strike designed to prevent Indian advocates from financially exploiting the likely multifarious instances of incompetent or indifferent federal Indian trust administrators who may fail to effectively or prudently promote the self-determination interests of the Indian peoples. Partly due to its traditional public fisc protecting responsibility in this regard, I argue that the Supreme Court, in its *Navajo Nation* decision, has radically reinterpreted the contemporary Indian self-determination policy. It judicially re-characterizes that policy as an additional federal jurisdictional barrier to Indian breach of trust claims. By subsuming the contemporary Indian self-determination doctrine into its 1950s era Indian jurisprudence, the Court emphasized its fisc protecting role via its stringent limitation on the Indian peoples' actionable claims against the federal government and risks reducing Indian self-determination to a near dead letter.

E. A Brief Digression on How the Supreme Court's Misperception of Indian Trust Agencies' Competing "Public Representational" Responsibilities May Allow Them to Disregard Their Trust or Fiduciary Duties to the Indian Peoples

The Supreme Court's 1993 decision in *Nevada v. United States*⁸¹ substantially re-worked the agency discretion component of the federal trust doctrine. The federal government sought belatedly in that matter to fulfill its trust duty to the Pyramid Lake Paiute Tribe.⁸² It did so by filing suit to reopen a 1913 Nevada water rights decree known as the "Orr Ditch" decree. In that earlier water rights litigation, the federal government had admittedly failed to claim, on behalf of the tribe, "sufficient waters of the Truckee River . . . [for] the maintenance and preservation of Pyramid Lake, [and for]

81. 463 U.S. 110 (1983).

82. See *id.* at 118.

the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish.”⁸³

But Justice Rehnquist, in his opinion for the Court, rejected the federal government’s admitted breach of trust as sufficient grounds for re-opening the Orr Ditch decree. He responded to the federal government’s argument, stating that “[w]hile [private trust and fiduciary principles] undoubtedly provide useful analogies . . . they cannot be regarded as finally dispositive of the issues . . . [particularly when] [t]hese concerns have been traditionally focused on the Bureau of Indian Affairs within the Department of the Interior.”⁸⁴ In Rehnquist’s mind, federal agencies, other than perhaps the BIA or IHS, clearly “cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing . . . conflicting interests without the beneficiary’s consent.”⁸⁵

Given the reality and complexity of today’s federal agencies publicly representing Indian and non-Indian interests that are potentially in competition, Rehnquist opined that the federal trust doctrine must be re-worked so as to accommodate the broadened public representational duties of agencies such as the BOR. Rehnquist makes this new context for evaluating the federal trust duty crystal clear: “The government does not ‘compromise’ its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.”⁸⁶

Given the Supreme Court’s new public representational context, does this mean that so-called “non-Indian” federal agencies—the BOR, F&WS, USFS, or NPS—have broad discretion in their treatment of the Indian peoples who, like other constituent groups, are entitled to fair public representation of their interests by those agencies, but only within the confines of their general statutory and regulatory mandates?⁸⁷ In the absence of some particular statutory, treaty, or regulatory provision singling out affected Indian peoples for agency “trust duty” treatment, I am afraid that may be the case.⁸⁸

But achieving tribal self-determination will require this “alphabet soup” of federal agencies to do much more than implement, consistent with governing executive orders, cursory tribal consultations with those Indian peoples who may be severely affected by their proposed projects and programs. Indeed, current psychological research concludes that such anemic, and potentially insincere, means of empowering hitherto powerless groups may do more harm than good. Ms. Shauhin Talesh uses federal agencies’ “tribal consultation” processes as an example of how to disempower people:

Learned helplessness has been applied in . . . the federal government’s consultations with Native American tribes. Despite the proliferation of tribal consultation requirements by federal statutes and policies, Native Americans’ suggestions and requests have been repeatedly “disregarded, discounted, misunderstood, or ignored when they are solicited.”

83. *Id.* at 119 (quoting App. to Pet. Cert. at 155a-56a, *Nev.*, 463 U.S. 110) (internal quotations omitted).

84. *Id.* at 127.

85. *Id.* at 128.

86. *Nev.*, 463 U.S. at 128.

87. *See id.* at 141-42.

88. *See Navajo Nation*, 263 F.3d 1325.

Consequently, the Native Americans have developed a somewhat submissive, passive approach to such negotiations because their suggestions are consistently ignored. After years of failed negotiations, tribes begin to develop a “learned helplessness” response, after years of being taught that whatever they say, the only thing worth spending energy on is learning to cope with the imposition of unacceptable alternatives.” In response, the government may “interpret the resulting tribal non-responsiveness as intransigence, or hostility (appropriately), and may in the end make decisions in reaction to those interpretations instead of in reaction to tribal suggestions (inappropriately).” This situation leads to feelings of lack of control, passivity, and submissiveness which, in turn, are likely to cause further damage to Native American interests.⁸⁹

Doubtless, there have been many successful tribal-federal consultations that have resulted in the alteration of federal projects and programs so as to genuinely accommodate Indian concerns and interests. But, insofar as federal agencies retain the ultimate discretion to disregard the Indian peoples’ legitimate self-determination interests, such government-to-government consultations are not an adequate substitute for a judicially supervised and enforced federal trust duty to realize those self-determination goals.⁹⁰

VI. REINTERPRETING THE FACTS AND ISSUES AT STAKE IN *NAVAJO NATION*: READING THE FEDERAL TRUST DUTY AND INDIAN SELF-DETERMINATION DOCTRINES AS COMPLEMENTARY AND MUTUALLY REINFORCING CONCEPTS

A. *My Plan and Rationale for Analyzing Navajo Nation*

My basic argument, so far, has been that Marshall’s original twin concepts of the federal trust duty and Indian self-determination co-exist in a fundamental means-end relationship: the shared goal, as reflected in America’s “constitutional” documents of federal Indian law—its Indian treaties, Indian trade and intercourse legislation, and Marshall’s Indian law opinions—asserts the federal trust duty as the means to ensure the continued cultural and social survival of the Indian peoples. To restore Indian self-determination as both the practical and logical goal to be realized by a revitalized federal trust doctrine forces me to confront the Supreme Court’s recent decision in *Navajo Nation*. That decision, in my estimation, seeks to judicially sever the twin concepts of Indian self-determination and the federal trust duty by judicially restating them as inherently antagonistic and incompatible goals of contemporary federal Indian law.

In responding to this challenge, I borrow from Professor Paul McHugh’s critique of the contemporary New Zealand judiciary’s inability to reconcile its inherited common law conception of national sovereignty with the Maori peoples’ lawsuits to enforce “treaty principles,” particularly the Maori peoples’ right of self-determination as

89. Shauhin A. Talesh, *Breaking the Learned Helplessness of Patients: Why MCOs Should Be Required to Disclose Financial Incentives*, 26 L. & Psychol. Rev. 49, 83-84 (2002) (quoting Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 Am. Indian L. Rev. 21, 28 (1999-2000)) (footnotes omitted).

90. *Id.* at 83.

arguably established by the Maori version of the 1840 Treaty of Waitangi.⁹¹ That judiciary's rock solid commitment to its late nineteenth century common law conception of an "indivisible sovereignty"⁹² vested in the contemporary New Zealand government precludes it from giving legal credence to the Maori peoples' claims that they, like the Indian peoples of America, possess inherent and treaty-recognized rights of self-governance.⁹³

McHugh concludes that only the fundamental reconstruction of the inherited "common law mind"⁹⁴ of New Zealand's judiciary will enable it to "constitutionally" view the Maori version of the 1840 Treaty of Waitangi as a legal document on par with New Zealand's other sources of constitutional legitimacy.⁹⁵ He does not hold out much hope for the success of such a project, and he counsels the Maori peoples to politically bypass the unresponsive New Zealand judiciary and take their case for self-determination directly to the New Zealand Parliament and people.⁹⁶ I apply McHugh's conception of the reconstructed judicial mind in a reverse sense in arguing for the contemporary American judiciary's restoration of Marshall's twin "constitutional" conception of the federal trust and Indian self-determination doctrines. Contrary to the New Zealand experience, it was the United States Supreme Court's late nineteenth century rejection and subordination of the Indian peoples' original sovereignty, in favor of its federal plenary power doctrine, that vaulted the federal government into its present day role in federal Indian law. The Court's recent decision in *Navajo Nation*, in my estimation, mechanically restates that doctrine in the guise of federal sovereign immunity to suit in the context of the Indian breach of trust litigation.

My focus on the Indian self-determination component of that decision may require a brief explanation and a personal disclaimer. Frankly, I am not that interested in whether Indian peoples may recover money damages from the federal government for its alleged breach of its trust obligations to the Indian peoples. I don't believe that money can ever compensate for the accumulated wrongs inflicted by the federal government on the Indian peoples.

However, I do care very much about establishing the appropriate judicial regard and understanding of the complementary roles to be played by Marshall's twin conceptions of the Indian self-determination and the federal trust duty in the modern conception of federal Indian law. For these reasons, I focus on the Supreme Court's reevaluation of the Indian self-determination doctrine. I especially analyze this decision's potential for the judicial jettisoning of its role as the Indian peoples' last line of defense to the potential abuse of the federal guardianship power.

91. See P.G. McHugh, *Tales of Constitutional Origin and Crown Sovereignty in New Zealand*, 52 U. Toronto L.J. 69 (2002).

92. *Id.* at 82.

93. See *id.* at 82-86.

94. *Id.* at 78.

95. See *id.* at 78-82.

96. See McHugh, *supra* n. 91, at 98-99.

B. *The Basic Facts of the Navajo Nation Decision*

The facts of this case are relatively straightforward. The Navajo Nation entered into a lease agreement in 1964 with the predecessor in interest to Peabody Coal Company for coal mining on tribal lands. The coal company agreed to pay a per ton royalty rate of \$0.375. The Interior Secretary was authorized to adjust the royalty rate to a "reasonable" level on the twentieth anniversary of that lease. As that adjustment date approached, the tribe discovered the market price of coal had risen and the royalty was then equivalent to about two percent of the gross proceeds. No one disputed that the existing royalty rate was well below the prevailing market-based royalty rates.⁹⁷

Tribal negotiations with the coal company were unsuccessful in resolving the adjusted royalty rate and other pending issues relating to the potentially amended coal leases. So the tribe asked the Interior Department to resolve the royalty rate issue and set a fair market value for the tribe's amended royalty rate. The Bureau of Mines analyzed the fair market value of the Navajo coal and recommended a royalty rate of twenty percent as the new rate in the amended coal leases. The lower level officials of the BIA adopted this recommended royalty rate and the Navajo Area Director notified the coal company of its proposed decision.

But the coal company appealed that decision to Mr. John Fritz, the Deputy Assistant Secretary for Indian Affairs. He affirmed the decision to require a twenty percent royalty rate in any amended Navajo coal leases. Fritz's decision was later withdrawn by Donald P. Hodel, the Interior Secretary. Both the Navajo people and the coal company were informed by Fritz "that a decision on th[e] appeal is not imminent[,] and [the Secretary] urge[d] them to continue with efforts to resolve this matter in a mutually agreeable fashion."⁹⁸ However, the tribe was not informed that there had been "numerous contacts" between lobbyists for the Peabody Coal Company and Mr. Hodel during this time period. These contacts had resulted in a secret secretarial decision in favor of the Peabody Coal Company.⁹⁹

The tribe sued, claiming that the Secretary's action was in the best interests of the Peabody Coal Company, not the Navajo people as required by the federal trust duty. The federal appeals court agreed with the tribe, holding that *Mitchell II's* federal "control and supervision" requirement over Indian trust assets was met in this case, and therefore Hodel's action in "suppress[ing] and conceal[ing]" the decision of the Deputy Assistant Secretary [for Indian Affairs]"¹⁰⁰ had violated the fiduciary's fundamental duty of loyalty to its beneficiary.¹⁰¹ That breach of trust by the federal government, the lower court held, "is subject to remedy by assessment of damages resulting from the breach of trust."¹⁰²

97. *Navajo Nation*, 537 U.S. at 495-96.

98. *Id.* at 497 (quoting App. 117) (internal quotations omitted).

99. *Id.* at 498.

100. *Id.* at 501 (quoting *Navajo Nation*, 263 F.3d at 1332).

101. *Id.*

102. *Navajo Nation*, 537 U.S. at 501-02.

C. *A Brief Summary of the Oral Arguments in Navajo Nation*

Reconstructing the “judicial mind” on a given legal topic sometimes occurs in the oral argument phase of a case that presents hard questions for judicial resolution. Personally, I am not sure whether the oral arguments in *Navajo Nation* really offered the counsel for the Navajo Nation a fair chance to educate the court about the proper relationship between the federal trust duty and Indian self-determination doctrines. By contrast, I believe the counsel for the federal government effectively exploited the Navajo Nation’s breach of trust claim against the United States for \$600 million in damages. He used that claim as an opportunity to re-characterize the Indian self-determination doctrine as a practical factor to be weighed in the Court’s threshold jurisdictional determination as to whether the federal government owes any trust or fiduciary duties to the affected Indian people in a particular context. For this reason, I briefly cite the exchange between the Court and the respective counsels during the oral argument in this case.

The Supreme Court agreed to hear the government’s appeal from the Federal Circuit’s decision and set the matter for oral argument on December 2, 2002.¹⁰³ Mr. Edwin Kneedler, Deputy Solicitor General, presented the oral argument on behalf of the United States. He invited the Court to rule against the Navajo Nation on the grounds that the Interior Secretary had not abused his agency’s regulatory discretion over Indian trust resources and that the tribe had failed to demonstrate any vulnerability to whatever missteps taken by the Secretary in the procedural administration of regulatory duties in this matter. Mr. Kneedler’s basic argument to the Court is summed up in his opening statement: “Because there was no violation of any act of Congress or regulation of an executive department, much less one that could fairly be interpreted as mandating the payment of damages by the Government, there is no cause of action in this case under the Tucker Act.”¹⁰⁴

He reiterated his basic assertion in response to Justice O’Connor’s question whether Secretary Hodel’s private conversations with lobbyists for the Peabody Coal Company provided the basis for a breach of trust suit by the Navajo Nation. “No” was his emphatic answer.¹⁰⁵ At best, he replied, these facts may provide the tribes with an APA-based action to set aside the coal lease in question, but the tribe has declined to take that action.¹⁰⁶

His narrow view of the federal trust duty in this instance, Kneedler argued, was occasioned by two factors. First, broad discretion was vested in the Interior Secretary by the 1938 Indian Mineral Leasing Act. Second, the Navajo Nation exercised the lead and determinative role in negotiating the Peabody coal lease at issue.¹⁰⁷ These two factors, in his mind, distinguished this case legally and factually from the federal “control and supervision” trust duty standard established in *Mitchell II*. Unlike the BIA timber managers in *Mitchell II*, the Interior Secretary was clothed in this instance with broad

103. *See id.* at 488.

104. Oral Argument at 4, *Navajo Nation*, 537 U.S. 488 (available in 2002 WL 31741814).

105. *Id.* at 5.

106. *Id.* at 4-6.

107. *See id.* at 18.

discretion to “‘flesh-out’ [via regulations] the regime for . . . approval of [Indian mineral] leases.”¹⁰⁸

Given that the Secretary’s regulations established only a minimum royalty payment requirement, the fact that he ultimately approved a tribally negotiated royalty rate of 12.5 percent meant he had clearly exceeded the lower bound of the trust responsibilities to the affected Indians.

But it was Kneedler’s tribal self-determination argument that seemed to attract the most attention from the Justices. Given that the IMLA’s goal was to promote direct tribal negotiations with private development interests, Kneedler explained that the Secretary understandably sought to promote such tribal negotiation opportunities through his adoption of minimal regulatory standards. Such a regulatory strategy helped ensure that tribal negotiations would proceed without undue federal interference or involvement. He encapsulated, in paraphrase, the Secretary’s “pro-self-determination” stance as follows: “It is clearly up to the tribal negotiators and lessee to go beyond these minimums if they so choose.”¹⁰⁹

But one unidentified Justice directly challenged Kneedler’s “the tribe did it” argument by questioning whether mere regulatory compliance with minimal trust duty standards relieved the Secretary of any independent fiduciary duties over and above this regulatory minimum: Doesn’t the Secretary of Interior have to meet the common law fiduciary duty of “reasonable, prudent care no matter what the regs [say]”?¹¹⁰ Kneedler disagreed, contending that *Mitchell II*-type liability arises only from an express statutory direction to the Secretary to “[assure] a particular amount of income for the tribe under the circumstances.”¹¹¹ He pointed out that any such express statutory direction was clearly absent in this case.

The Justice sought to inject, with some humor, a *Mitchell II*-type analogy. Suppose, the Justice asked Kneedler, we equate the Peabody lobbyists who met with the Secretary to “anti-tree termites” let loose by BIA foresters to “eat away” the ethical timber that supports the federal trust duty? Kneedler replied, without humor, that the Justice’s hypothetical “anti-tree termites” would pose an immediate threat to a real physical asset. For that reason such federal behavior would likely constitute a breach of the trust duty even in the absence of a statutory directive to refrain from such behavior. By comparison, Kneedler continued, the complained of *ex parte* communications between the Secretary and the lobbyists for Peabody Coal posed only a remote and ultimately meaningless procedural threat to the Navajo’s coal resource.¹¹²

When it was the turn of Mr. Paul Frye, legal counsel for the Navajo Nation, he had been boxed in by Kneedler’s legal arguments. The Court’s majority seemed to accept Kneedler’s characterization of the Secretary’s admittedly shabby actions as actually promoting the Navajo Nation’s exercise of its self-determination by requiring it to return to the negotiating table with Peabody Coal. If one accepts Kneedler’s characterization of

108. *Id.* at 17.

109. Oral Argument at 18-19, *Navajo Nation*, 537 U.S. 488 (available in 2002 WL 31741814).

110. *Id.* at 20.

111. *Id.*

112. *See id.* at 23-24.

the effects of the Secretary's actions as having the effect of actually promoting the Navajo Nation's lead role in negotiating its coal lease with Peabody Coal, then it is plausible to argue that any procedural missteps by the Secretary were subsumed into his regulatory approval of the coal lease the tribe freely negotiated with Peabody Coal Company.

Therefore, many of the Court's questions to Frye focused on the tribe's role, not the Secretary's role, in managing and controlling the lease negotiations with Peabody Coal Company. One Justice asked Frye, given the IMLA's language, whether Secretary Hodel had not been obligated to take "reasonable" account of the impact of the proposed twenty percent royalty rate on both Peabody Coal Company and the Navajo Nation.¹¹³ But it was Justice Ginsburg's questions about the tribe's negotiation of an eight percent severance tax on coal to be mined by Peabody Coal under the amended lease that truly confused the federal trust issue with the tribe's independent exercise of sovereign taxing powers over tribal mineral lessees. By adding together the 12.5 percent royalty rate approved by the Secretary and the tribally negotiated eight percent severance tax, Ginsburg asked Frye, didn't the tribe succeed in negotiating a better deal via self-determination than if the Secretary had unilaterally imposed the twenty percent royalty recommended by lower level federal officials?¹¹⁴

My purpose in re-hashing the oral argument is not to critique how well the respective counsel did in presenting their arguments to the Court. Each of them did as well as they could in light of their resources at hand. My purpose is to show how the tribal self-determination doctrine was seized on by the Court to avoid the tribe's breach of trust claim in this context. Kneedler's "the Indian tribe did it" argument seemed to be met with great receptivity by those members of the Court who desired to further narrow the reach of the federal trust doctrine. By re-characterizing the federal trust duty as merely a procedural obligation to comply with minimal regulatory requirements of secretarial review and approval over tribally negotiated mineral lease agreements, Kneedler sought to shift the financial and practical risks of tribal development to those Indian peoples who seek to use the development of their mineral resources as one means of realizing their economic self-determination.¹¹⁵

D. How the Application of My Proposed New Judicial Canon of Construction May Have "Reconstructed" Justice Ginsburg's Opinion in Navajo Nation

The final paragraph of Justice Ginsburg's opinion in *Navajo Nation* illustrates the ultimate judicial result of the fundamental misapprehension by the Court's majority of the complementary character of the federal trust duty and Indian self-determination doctrines:

However one might appraise the Secretary's intervention in this case, we have no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act. The judgment of

113. See *id.* at 39.

114. Oral Argument at 43-45, *Navajo Nation*, 537 U.S. 488 (available in 2002 WL 31741814).

115. See generally *id.* at 3-27.

the United States Court of Appeals for the Federal Circuit is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.¹¹⁶

Ironically, while the three dissenting justices explicitly call for a “balanced standard”¹¹⁷ that appropriately interprets the “tension between IMLA’s two objectives”¹¹⁸ of “greater tribal responsibility”¹¹⁹ and the Secretary’s obligation to “ensure that negotiated leases ‘maximize tribal revenues,’”¹²⁰ they fail to express any such standard beyond a few platitudinous remarks about the need for a “modest standard[]”¹²¹ that mediates this supposed tension. Beyond criticizing the Court’s majority for “giv[ing] the whole hog”¹²² to the “interest of tribal autonomy”¹²³ expressed in the IMLA, the dissent says little about how to reconcile the supposed tension between the federal trust duty and Indian self-determination. Indeed, the dissent seems to agree generally with the majority’s view that these two doctrines are at war with one another. The dissent agrees that there is a “zero sum” relationship between the two when Justice Souter writes, “The more stringent the substantive obligation of the Secretary, the less the scope of tribal responsibility.”¹²⁴ The converse of Justice Souter’s principle—the greater the tribal responsibility assigned by statute, the less the scope of the federal trust duty—is doubtless true as well.

Why am I practically troubled by the dissent’s seemingly reasonable call for a “balanced standard” that mediates the supposed tension between the federal trust duty and the Indian self-determination doctrine? Because the “zero sum” analysis of any issue practically and logically excludes any possibility of a balanced standard that will supposedly resolve the tensions presented therein.¹²⁵ Post *Navajo Nation*, Indian advocates are advised by the Supreme Court to embark on an ultimately fruitless and disheartening quest for the “balanced standard” that will supposedly resolve, when all has been said and done, what is an irreconcilable “zero sum” conflict.

But the escape from what I consider to be a false and contrived conflict between these two doctrines—designed to further dampen Indian breach of trust suits that may open the federal government to potentially open-ended liability for the bad acts of administrative officials—is relatively simple and will further the joint and “non-zero sum” interests of both the Indian peoples and the federal government.¹²⁶ I apply below

116. 537 U.S. at 514.

117. *Id.* at 518 (Souter, Stevens & O’Connor, JJ., dissenting).

118. *Id.* at 517.

119. *Id.*

120. *Id.* (quoting *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985)).

121. See *Navajo Nation*, 537 U.S. at 518 (Souter, Stevens & O’Connor, JJ., dissenting). Justice Souter, for example, characterizes “[t]he Secretary’s approval power . . . [as] a significant component of the Government’s general trust responsibility.” *Id.* at 516 (emphasis added).

122. *Id.* at 518.

123. *Id.*

124. *Id.*

125. Robert Wright makes the cogent point that “common conceptions of justice and social equality” don’t just “magically prevail ‘in the end’ without extra guidance.” Wright, *supra* n. 1, at 84-85. His logic applies directly, in my mind, to the need for a “full blooded” federal trust doctrine that forces the federal Indian agencies to engage in meaningful “government-to-government” relations with the Indian peoples so as to actively promote the goals of Indian self-determination.

126. *Id.*

my proposed standard to reanalyze the issues raised in this matter. This standard seeks to reinforce the common “non-zero sum” interests of the Indian peoples and the federal government, thereby avoiding the internecine and irreconcilable conflict needlessly generated by the Supreme Court’s decision in *Navajo Nation*.

Applying my new proposed non-zero sum approach to the issues presented in *Navajo Nation* is neither radical nor innovative in character. At level one, it simply recapitulates the well established concept that Congress, not the federal courts, should, as the Indian peoples’ trustee, determine the nature and contours of contemporary Indian self-determination policy. At level two, it takes seriously Congress’s contemporary Indian self-determination policy so as to give a “non-zero sum” interpretation to the issues raised in *Navajo Nation*.

I embody this “non-zero sum” principle in a new Indian canon of judicial construction. This new canon is, itself, the practical and logical corollary of Congress’s declared “non-zero sum” approach to Indian self-determination. Element one of Congress’s approach encourages the Indian peoples to engage in self-help efforts to achieve their particular vision of economic or social self-determination. Element two of its approach assures the Indian peoples that the needed technical or financial support will be forthcoming from the federal government to assist them in their self-determination efforts.

The judicial adoption of my proposed new Indian canon of construction would substantially promote Congress’s declared “non-zero sum” approach to Indian self-determination. First, it would restore Indian self-determination to its rightful place in federal Indian common law as the “mirror image” doctrinal complement to Marshall’s original “Indian protectorate” concept of the federal trust duty.¹²⁷ Second, it would provide the essential “judicially-backed” incentive to the federal trustee to be an active, engaged manager who consciously shapes his discretionary choices, *ex ante*, so as to select those projects, activities, or investments that will promote the best interests of his wards—the Indian peoples. Third, it will promote “non-zero sum” collaboration and responsibility-sharing agreements between the federal government and the Indian peoples for new and truly innovative self-determination undertakings. Because the Indian peoples will not risk the loss of their trustee’s informed and active help and support, given their choice to participate in these new joint undertakings, the goal of Indian self-determination will be substantially furthered. Third, a judicially backed “non-zero sum” approach to Indian self-determination may well dampen the number of future instances where federal administrators, due to their possible inefficient or negligent behaviors, expose the federal government to Indian breach of trust claims. This is because responsibility-sharing arrangements in the “non-zero sum” context are based on shared information flows, mutual transparency of intent and purpose within joint decision making matrices, and the parties’ orientation to maintaining a long-term

127. Referring to the Indian peoples, Marshall held that “weak state[s], in order to provide for [their] safety, may place [themselves] under the protection of one more powerful, without stripping [themselves] of the right of government, and ceasing to be . . . state[s].” *Worcester*, 31 U.S. at 561.

relationship that seeks to avoid any disruptions based on short run misunderstandings or conflicts between the parties.¹²⁸

My proposed Indian judicial canon of construction would require federal courts to presume that Indian self-determination statutes preserve the historic rights Indians have traditionally enjoyed under the federal trust relationship, unless Congress clearly expresses its intent to the contrary within the “four corners” of a given Indian statute. This canon would apply to all self-determination statutes, including the 1938 Indian Mineral Leasing Act as it was so characterized by the Supreme Court in *Navajo Nation*. If my proposed Indian canon of construction had been employed by the Court’s analysis in *Navajo Nation*, I believe its decision would have been different in the following regards.

First, Justice Ginsburg would decide the “expert analysis” issue differently. Through Justice Ginsburg’s opinion, the Court held that Interior Secretary Hodel was free to disregard the Bureau of Mines’ expert assessment of the appropriate market value of the Navajo coal reserves because no express statutory or regulatory provision required him to conduct an independent expert analysis of those Indian resources.¹²⁹ Under my proposed “non-zero sum” analysis, Justice Ginsburg would have held, as Judge Schall held in the lower court’s concurrence, that Secretary Hodel breached his fiduciary duty to be adequately informed about the market value of the Navajo’s coal reserve so as to make a decision on the royalty rate issue that helped promote the joint, “non-zero sum” interests shared by the federal and Indian governments in realizing the economic self-determination goals of the Navajo people.¹³⁰

128. Robert Wright could have been speaking about the long and troubled federal-Indian relationship when he asks us to assess the movement from the “zero sum” to the “non-zero sum” society over the very long term:

As we’ve seen, in the process of expanding, non-zero-sumness has brought not only more respect for more people, but more liberty for more people. The point isn’t just—as thinkers as Adam Smith have been saying since the eighteenth century—that free markets are best operated by free minds. The point is that the ongoing evolution of information technology heightens this synergy, underscores it, makes something rulers can less and less afford to ignore.

The world remains in many ways a horribly immoral place by almost anyone’s standard. Still, the standards we apply now are much tougher than the standards of old. Now we ask not only that people not be literally enslaved, but that they be paid a decent wage and work under sanitary conditions. Now we ask not only that dissidents not be beheaded en masse, but that they be able to say whatever they want to whomever they want. It is good that we thus agitate for further progress, and all signs are that this agitation goes with the flow of history. Still, it is hard, after pondering the full sweep of history, to resist the conclusion that—in some important ways, at least—the world now stands at its moral zenith to date.

Wright, *supra* n. 1, at 208 (footnotes omitted).

129. See *Navajo Nation*, 537 U.S. at 511.

130. Non-zero sumness is viewed by Robert Wright as an inherent “self-regenerating” source that reinforces our natural tendency to cooperate and work together for our mutual benefit:

Non-zero-sumness is a kind of potential. Like what physicists call “potential energy,” it can be tapped or not tapped, depending on how people behave. But there’s a difference. When you tap potential energy—when you, say, nudge a bowling ball off a cliff—you’ve reduced the amount of potential energy in the world. Non-zero-sumness, in contrast, is self-regenerating. To realize non-zero-sumness—to turn the potential into positive sums—often creates even more potential, more non-zero-sumness. That is the reason that the world once boasted only a handful of bacteria and today features IBM, Coca-Cola, and the United Nations.

Wright, *supra* n. 1, at 339.

Second, Justice Ginsburg would decide the issue of Secretary Hodel's ex parte contacts with the lobbyist for Peabody Coal differently under my proposed Indian canon of judicial construction. Justice Ginsburg actually held that Secretary Hodel was free to meet with whomever he wants, absent an express statutory or regulatory prohibition against his doing so.¹³¹ Under my proposed "non-zero sum" analysis, Justice Ginsburg would hold that Secretary Hodel's setting aside of the expert-recommended twenty percent royalty rate for the Navajo coal, based on his clearly disloyal private contacts with the coal company's lobbyist, would have constituted a breach of trust as held by the lower federal court.

Third, Justice Ginsburg would decide the issue regarding the Senate Report's express language exhorting Secretary Hodel to manage the Navajo's coal resources so as to "give the Indians the greatest return from their property,"¹³² differently under my proposed Indian canon of judicial construction. Justice Ginsburg actually held that this cited report language was inapplicable to the case because it "overstate[d]"¹³³ the Secretary's fiduciary duties and because its use was an effort to impose an "extratextual"¹³⁴ criteria of analysis to the Secretary's actions. Under my proposed "non-zero sum" analysis, Justice Ginsburg would hold Secretary Hodel in breach of his fiduciary obligations to the Navajo people for failing to use his discretionary power to secure a financial return commensurate with the expert-determined market value of the Navajo's coal resources.

VII. CONCLUSION

The judicial adoption of my proposed "non-zero sum" analysis, embodied in my proposed Indian canon of judicial construction, would achieve a reasonable and practical synthesis that restores Marshall's twin conceptions of Indian self-determination and the federal trust duty to their rightful, respective roles in contemporary federal Indian law. I hope my brief essay arguing for the reconstruction of the "judicial mind" regarding the federal trust duty in an age of tribal self-determination advances the academic discussion of this issue.

131. See *Navajo Nation*, 537 U.S. at 513.

132. *Id.* at 516 (Souter, Stevens & O'Connor, JJ., dissenting) (quoting Sen. Rpt. 75-985, at 2 (1937)) (internal quotations omitted).

133. *Id.* at 511-12 n. 16.

134. *Id.*

