Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law

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I. Introduction

Since the inception of the United States, the American Indian tribes have occupied a distinct and unique seat at the table of jurisprudence. Aside from the Constitutional sources through which the federal government assumes authority over the Indian tribes, other doctrines have evolved to inform this special relationship and to shape the contours of American Indian law generally. Perhaps the most widely recognized of these extra-Constitutional sources of power is the plenary power. Necessarily arising as a result of the supremacy of Congress over all other legislative institutions, both state and tribal, the plenary power emerged as a formidable opponent to tribal interests. Congress referred to the power as a justification for questionable acts in its dealings with the American Indians, while the courts applied the doctrine mechanically and without much consideration. With neither group really appreciating the effect of such a power, the tribes have endured decades of a power virtually left unchecked. This distinct status, therefore, has amounted to a heavy burden.

The trust doctrine, on the other hand, was described earlier in the nation's history and represented a different perspective on federal-tribal relations. This original relationship, grounded in sovereignty and a respect for the law of nations, attempted to recognize and develop a model in which the Indian tribes could exist quite separate and apart from the dominant society, yet fall under the protection of the United States as domestic nations.

Most recently, a new federalism has emerged in the American legal landscape, in which the authority of the federal government over the states has been significantly curtailed. Areas in the law which in the past have been regarded as reasonably well-settled have been scrutinized and re-interpreted. This larger movement in American jurisprudence leaves the American Indian tribes in a dubious and unenviable position as their status is necessarily affected by the shifts in the federal government's relationship with the states.

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This Note will examine the historical interplay between the trust doctrine and the plenary power and ultimately suggest alternative interpretations in which the interests of the federal government and the individual tribes might be conceived. Properly understood within the context of a government of enumerated powers, one may detect the shortcomings and inconsistencies of a purportedly absolute power in modern American society, particularly in light of the recent shift of authority away from the federal government. Moreover, an analysis of the trust doctrine will provide insight into a potential and wholly appropriate check on congressional and state authority.

II. Brief History on the Legal Status of American Indians

At this point, it would prove useful to outline the rather tortured history of American Indian law as a backdrop to aid in the consideration of the narrower context of the trust responsibility. From a purely academic standpoint, American Indian law poses some of the most intriguing and puzzling dilemmas available.

The various American Indian tribes flourished on this continent for thousands of years before the United States was even conceived. The initial relationship which the tribes enjoyed was grounded in the protection of the tribes by the sovereign U.S. federal government as the other European powers had done before. By occupying their own quasi-sovereign niche apart from the main government, tribes were permitted to govern themselves in relative peace and isolation.[1] The next phase of the tribal-federal relationship in the late 1800's, often referred to as the era of Allotment and Assimilation,[2] focused on dispersal whereby tribes were relegated to reservation life as their lands were divided and their social structures were replaced. In 1934, however, Congress passed the Indian Reorganization Act[3] which attempted to undo the damages of Allotment and Assimilation by reestablishing tribal governments, providing funds to recover lost lands, and setting up programs to encourage tribal economic development. With the passage of Public Law-280 in 1953,[4] the United States government took yet another tack in its position on how to handle Indian tribes as it began the Termination era.[5] This process sought to devolve responsibility for the tribes to the states, as tribes became federally "unrecognized" and thus ineligible for federal assistance.

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1. VINE DELORIA, JR., & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 3 (1983).
2. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 8-9, 19 (1987).
3. 25 U.S.C. §§ 461-79 (1994).
4. Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1953)).
5. DELORIA & LYTLE, *supra* note 1, at 15-21; WILKINSON, *supra* note 2, at 10-11.

Under the Nixon administration, however, the Self-Determination era[6] was entered as tribes regained their federally recognized status.[7] At present, some tribes fall under PL-280 state authority, others have regained their federal status, while still other tribes are attempting to become recognized.[8]

The most glaring characteristic of American Indian law is its indecisive and contradictory nature. For example, when dealing with a modern legal question a tribe might be faced with reconciling a treaty passed two centuries ago, a federal statute granting corporate status in 1936, a statute terminating a tribe's relationship with the federal government in 1954, and another recent statute restoring federal status to that same tribe in 1988. Which law governs?

The trust doctrine cuts across this history, however, and always plays a part in the relationship between the individual tribes and the federal government. While strong and effective in one context, the trust doctrine is weakened and almost nonexistent in another. The challenge, of course, is to create a trust doctrine that may pierce any historical context in order to be effectively applied in the modern era. By discovering the essential components of the trust responsibility the federal government holds in regard to the Indian tribes, the substance of the doctrine may be applied creatively and in such a manner as to uphold the fundamental reasons for its intended purpose—namely, tribal sovereignty.

III. Summary of the Nature of the Federal Trust Doctrine

A. Extra-Constitutional Origins

Under the vast mountain of law that addresses American Indian affairs rests a common principle that tribes maintain a *sui generis* legal and political status. Many scholars have described tribes as metaphorical "islands" within a larger ocean of American society, in which Indians exist in an insulated manner.[9] Because the U.S. Constitution only mentions American Indians twice, this status is commonly regarded as extra-Constitutional in nature.[10] Without much debate, the federal government assumed a special relationship

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6. In 1975, Congress passed the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, (codified as amended at 25 U.S.C. §§ 450-58hh (1994)), which was intended to provide tribes the opportunity to contract with governmental agencies for services and programs.

7. *Id.*

8. Six states assumed mandatory PL-280 juridsiction in 1953: Alaska (then a territory), California, Minnesota, Nebraska, Oregon, and Wisconsin. DELORIA & LYTLE, *supra* note 1, at 19.

9. *See, e.g.*, WILKINSON, *supra* note 2, at 122.

10. The U.S. Constitution mentions American Indians only twice: the so-called Indian Commerce Clause in art. I, § 8, cl.3, and the Treaty Power of art. II, § 2, cl. 2. The treaty power was abolished with little comment in 1871. Act of March 3, 1871, Ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C § 71 (1994)).

with the Indian tribes early in the history of the United States, relying in part on English and international law regarding native peoples and establishing new doctrines through subsequent treaty and case law.[11]

Also, the trust doctrine represents a major component of American Indian law as it establishes a relationship between the federal government and the individual tribes based primarily on notions of sovereignty. Implicitly drawn from the relative status of the United States as the supreme sovereign, the tribes retain their own powers of self-government while other affairs are assumed by a protectorate federal government. Perhaps more importantly, the trust relationship also represents a positive duty borne by the federal government to protect the tribes, serve their best interests in given situations, and uphold the general obligation under a standard of good faith.

B. Judicially-Interpreted Doctrine

The judiciary has always assumed the largest role in interpreting the trust doctrine, attempting to define its meaning, establishing its scope, and applying its mandates. Mary Christina Wood, a noted scholar on these issues, describes the federal trust doctrine as a "creature of the judiciary . . . used to harness actions taken by the other two branches of government, and as a basis for compensating wrongs committed by those branches against the Indian people."[12] As a federal common law doctrine, the trust responsibility occupies an important niche as it provides for judicial oversight of congressional, but more particularly executive, action.[13]

C. Adoption by Other Branches

Although early on the trust doctrine existed mainly in the rhetoric of the judiciary, the Executive and Congress adopted the tenets of the trust responsibility as seen in the Indian Trade and Intercourse Acts[14] and Northwest Ordinance[15] discussed *infra*. Within the last thirty years, federal

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11. *See infra* Part IV.

12. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L.R. 1471, 1495 (1994).

13. *But see* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3, 62 (1987) (characterizing trust doctrine as a "creation of the 1970's").

14. Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 792 (repealed in part) (codified as carried forward and amended at 18 U.S.C. §§ 1152, 1160, 1165 (1960), 25 U.S.C. §§ 177, 179-80, 193-94, 201, 229-30, 251, 263-64 (1902)). *See generally* FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 (1962).

15. Northwest Ordinance of 1787, art. III, 1 Stat. 50 (1789).

endorsement of the trust responsibility has increased dramatically, adding moral and political authority to the doctrine.[16] Most recently, President Clinton publicly reaffirmed his administration's support of the trust obligation towards the American Indian tribes.[17] So while a creature of the judiciary, the trust doctrine has evolved into a responsibility that all three branches have recognized as intrinsic in their relations with the various native tribes.

D. Nature of Federal-Tribal Relationship

Depending on the issues presented in a given suit, the branch of government involved, and the form of relief sought, the trust doctrine may be cast in a number of different ways. Characterized in its most general form, the trust obligation is regarded as a "special relationship."[18] Such an obligation necessitates only adherence to broad moral principles to follow tradition in regard to Indians, and perhaps to "do the right thing." A more specific responsibility under the trust relationship "resembles" that of a guardian and ward.[19] Case law, however, provides no real standard of behavior for the federal government to follow when the doctrine is cast merely as an analogy. A stronger obligation lies when courts hold the government to an actual guardian-ward duty.[20] The courts will often grant relief to a tribe under such a scheme where the government must follow standards set down outside of Indian law. The most demanding duty may be found when the federal government assumes a fiduciary relationship with a tribe.[21] Fiduciaries, of course, are held to exceedingly high levels of responsibility in any area of the law, and the federal government once in that role may not avoid its obligation.[22]

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16. President Nixon relied heavily on the trust doctrine in support of the new national policy of Self-Determination: "This . . . must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support." President Richard M. Nixon, Special Message on Indian Affairs, 1970 PUB. PAPERS 564-67 (July 8, 1970), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 256-58 (Francis P. Prucha ed., 2d ed. 1990). *See* 25 U.S.C. § 450a (1982) (codifying Self-Determination policy).

17. Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936, 936-37 (Apr. 29, 1994).

18. Fort Sill Apache Tribe v. United States, 477 F.2d 1360, 1366 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 993 (1974).

19. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

20. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

21. Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975).

22. Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256-57 (D.D. C. 1972).

IV. Historical Background of the Trust Doctrine

A. Judicial Origins

1. The Marshall Trilogy.—Under Chief Justice John Marshall, three of the earliest Supreme Court decisions concerned American Indian matters.[23] Regarded as the Marshall trilogy, these cases more importantly laid the foundation for the trust doctrine as the relative relationship between the federal government and the Indian tribes was established. The first case, *Johnson v. M'Intosh*,[24] dealt with an ejectment action between a non-Indian plaintiff who bought land from a tribe and a non-Indian defendant who challenged the conveyance when he purchased the same parcel through a federal government issuance. The Supreme Court held that the local Indians may be regarded as occupants, protected in the possession of their tribal lands by the federal government, yet prohibited from transferring the title to others.[25] As a leader in an emerging nation seeking legitimacy in the international arena, Marshall was clearly concerned with the supreme sovereignty of the federal government over the states and tribes; the tribe retained its separate status, but had to necessarily comport with the federal mandate.

In *Cherokee Nation v. Georgia*, Marshall developed his notions of the federal-tribal relationship when he wrote a classic passage:

> [The tribes] may, more correctly, perhaps, be denominated domestic dependent nations . . . . Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
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> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . . .[26]

Such a status created an insulatory space for tribes as the Court effectively barred the state of Georgia from enforcing its laws on tribal land and prevented any state seizure of Cherokee land guaranteed to the tribes through

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23. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation*, 30 U.S. at 1; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

24. *M'Intosh*, 21 U.S. at 543.

25. *Id.* at 574.

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

federal treaties. Acutely aware of the struggle over federalism, Marshall recognized that Georgia was not simply challenging the authority of the federal government over Indian affairs, but rather was making a cloaked challenge of federal supremacy in general. The initial model, therefore, was one of federal and state antagonism in which the tribes unfortunately sat in the middle. The protection of the federal government under this scheme was not so much intended for the safety and peace of the state citizens, but rather to insulate and protect the tribes from non-Indian aggression.

In the final case of the Marshall trilogy, *Worcester v. Georgia*,[27] the Supreme Court again elaborated on the trust responsibility of the federal government in regard to American Indians as it focused on the legal and moral principles underlying the relationship. "[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection."[28] Faced with Georgia's prosecution of white missionaries on Cherokee land, Marshall reaffirmed the duty of the federal government to protect the tribes from non-Indian intrusion as well as the obligation to recognize the retained sovereignty of the tribe: "This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[29]

2. Marshallian Trust Doctrine.—The Marshallian conception of the trust responsibility relies on certain principles which informed the federal-tribal relationship in fundamental ways. Primarily, Marshall recognized a relationship of mutual obligations between the Indians and the government. While not going as far as strict contract law, the Supreme Court effectively upheld the notion that the federal government and the individual tribes bear certain obligations to each other. The Court explicitly rejected the idea that the treaty and statutory authority granting Congress the exclusive right to regulate trade with the Indians meant any sort of a surrender of autonomy.[30] Thus, the trilogy reveals the first limitation on federal authority over Indian affairs, the sovereign power notwithstanding. Secondly, a theory of guardianship as posited under *M'Intosh* would allow for the tribes to maintain their property rights of possession and occupation as non-citizens even in the

27. 31 U.S. (6 Pet.) at 515.
28. *Id.* at 560-61.
29. *Id.* at 555.
30. *Id.* at 553-54.

face of state and individual encroachment.[31] With the insertion of the law of discovery and conquest,[32] which placed the federal government above all others, Marshall enhanced the separate and insulatory status of the sovereign American Indian tribes.

3. U.S. Policy Approach.—By drawing on the international law of nations in these three decisions,[33] Marshall achieved two results. First, the decisions placed the United States on a new level, legitimized by a judicial holding of its own government. And secondly, while more clearly an endorsement of federal authority over tribes and a concomitant limit on the states in a newly-emerging federalist nation, Marshall's opinions also guaranteed the autonomy of the American Indian tribes. This early trust doctrine was a dynamic model in which the federal-tribal relationship was founded in a manner that embraced a strong tribal separatism. Professor Wood characterizes this relationship as a "sovereign trusteeship," in which the tribes were to be neither subjugated nor exploited and the federal government bore the burden of ensuring that protection.[34] Under this model, the tribes and the federal government shared relatively similar ground, as the sword of federal authority over the states was created and the shield protecting the tribes was recognized.

Congressional action also demonstrated a relationship in which the federal government did not exercise absolute authority. Under the Indian Trade and Intercourse Acts (as applied directly in *Johnson v. M'Intosh*), federal prohibitions and limitations were leveled against non-Indians encroaching on tribal lands, whether for settlement or commercial purposes.[35] In 1787, Congress passed the Northwest Ordinance which established a broad federal policy in regard to expansion, and in part concerned the duty to protect

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31. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1219 (1975).

32. *M'Intosh*, 21 U.S. at 567-68:

> Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives. The sovereignty and eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits. The subjects of the discovering nation must necessarily be bound by the declared sense of their own government, as to the extent of this sovereignty, and the domain acquired with it. Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state.

33. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 Harvard Indian Law Symposium 191 (1990) (reprinted in ROBERT N. CLINTON, ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 1257, 1262-64 (3rd ed. 1991).

34. Wood, *supra* note 12, at 1498.

35. These prohibitions were passed on July 22, 1790, 1 Stat. 137. *See supra* note 14.

tribes:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in justified and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.[36]

Despite numerous structural, political, and normative changes in American Indian law that rendered the "sovereign trusteeship" of limited interpretive value, which will be discussed *infra*, modern courts still apply this basic idea.[37]

One should be careful, however, not to construe the "sovereign trusteeship" as some sort of endorsement for tribalism or its ramifications. Marshall was surely not politically correct before his time, as his language in regard to the American Indians should make clear.[38] The model, while it has its applications in the modern scheme of tribal affairs, remains steeped in the historical context that held Indians in a far different regard than at present. After all, the necessary foundations for this federal-tribal-state relationship and the subsequent trust responsibility remains premised in the doctrine of discovery and conquest.

B. Interpretive Judicial Shift

At the close of the nineteenth century and in the early years of the twentieth century, a marked shift in judicial interpretation of the federal trust doctrine occurred as the relationship between the government and the tribes changed. With two cases, the United States Supreme Court adopted a new

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36. Northwest Ordinance of 1787, art. III, 1 Stat. at 52.

37. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-40 (1985) (recognizing a federal common law right to a cause of action under the Trade and Intercourse Act to prohibit a transfer of Indian land to a local government). *See also* Seneca Nation v. United States, 173 Ct. Cl. 917 (1965) (upholding the Indian Trade and Intercourse Act and finding a "special relationship" that amounted to a federal responsibility to protect and guard tribes from unfair dealings).

38. *See, e.g.*, *M'Intosh*, 21 U.S. at 569 ("The statutes of Virginia, and of all the other colonies, and of the United States, treat them [the Indians] as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government.").

perspective which closely mirrored executive and legislative action[39] and, in doing so, established a troublesome interpretive model which still informs modern trust analysis. These two cases, *United States v. Kagama*[40] and *Lone Wolf v. Hitchcock*,[41] interpreted the trust doctrine as a substantive theory through which the federal government could justify a significant leap in authority, transforming the obligation into an independent source of preemptive federal authority. "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. . . ."[42]

Quite understandably, the roots of this shift lie in American history. It is well established that the whole nature of the American Indian-federal government relationship changed dramatically in the second half of the nineteenth century, as military subjugation was employed to pursue federal policy goals of Allotment[43] and Assimilation.[44] Through powers of force and division, the government pushed even further to "civilize" the Indian people in order to end traditional modes of life and force the tribes into the template of Western culture (as seen in educational, religious, social, political, and economic areas).[45] In *Tee-Hit-Ton Indians v. U.S.*,[46] Justice Reed commented in somewhat ironic fashion on the infamous treatment of Indians in American history:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conquerors' will that

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39. *See* DELORIA & LYTLE, *supra* note 1, at 6-7 (relating President Andrew Jackson's policy of westward expansion through removal and relocation of the tribes along the way). *See also* Indian Removal Act, 4 Stat. 411 (1830) (congressional plan for executing westward expansion).

40. 118 U.S. 375, 384-85 (1886).

41. 187 U.S. 553, 564-65 (1903).

42. *Kagama*, 118 U.S. at 384.

43. The Allotment Era, marked by the passage of the Dawes Act of February 8, 1887, ch. 19, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1994)), witnessed the break-up of traditional tribal cultures and their replacement with the "benefits" of western civilization. Although designed in part to protect the then-present individual Indian land holdings, the open "unused" land was distributed for white settlement. *See, e.g.*, DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 111-15 (2d. ed. 1986).

44. The Assimilation policy necessarily represented the second-half of the Allotment programs as American Indian religions, dances, and languages were suppressed in favor of western culture and civilization, typically through forced education of the native children. *Id.* at 121-22.

45. *See* DELORIA & LYTLE, *supra* note 1, at 8-12.

46. 348 U.S. 272 (1955).

deprived them of their land.[47]

By 1880, the relationship had devolved to one of necessary dependence, and the notions of tribal sovereignty advanced under Marshall appeared outmoded, if not altogether irrelevant. The federal government stepped up to fill the gap and appointed itself as the ultimate arbiter. In the first case of this federal power play, *United States v. Kagama*,[48] the Supreme Court pronounced:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States . . . dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. . . . It [the power] must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[49]

In this suit, the Court upheld as constitutional the application of the Major Crimes Act[50] to Indian reservations,[51] a stance which had been flatly rejected by the Supreme Court three years previously in *Ex Parte Crow Dog*.[52] Unmistakably, the decision set a new tone in federal relations with the tribes, in that it represented an unforeseen assertion of absolute power of the government over Indian affairs. By neglecting and ignoring more than a century and a half of precedent, the new doctrine undermined virtually all notions of tribal autonomy and sovereignty. The *Kagama* opinion thus relegated the various Indian tribes to the status of moral and legal non-beings. Despite the fact that the federal government created the situation in which the Indians found themselves, *Kagama* paradoxically recast the trust doctrine in an inherently discriminatory and paternalistic manner. This assertion of absolute authority effectively created in Congress an inherent power over tribes based on an involuntary relationship of dependency, relative

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47. *Id.* at 289-90.
48. 118 U.S. at 375.
49. *Id.* at 383-85.
50. 18 U.S.C. § 1153 (1994).
51. *Kagama*, 118 U.S. at 383.
52. 109 U.S. 556 (1883). It is clear that Congress passed the Major Crimes Act as a direct jab at the *Crow Dog* Court which expressly prohibited the exercise of federal or state criminal jurisdiction on Indian land when one tribal member murdered another. Ultimately, the Indian went unpunished and the American public was outraged. DELORIA & LYTLE, *supra* note 1, at 11; CLINTON, ET AL., *supra* note 33, at 36-38.

sovereignty, and the duty of "protection."

In *Lone Wolf v. Hitchcock*, the second major case which firmly established Congress' plenary power over tribal affairs in the "absolute" sense, the Supreme Court aggressively removed Kiowa and Comanche treaty rights in support of the federal Allotment program. The Court concluded that:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . .
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> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.[53]

At the turn of the nineteenth century, the legislative and executive branches of the federal government also construed the trust doctrine as little more than part and parcel of the "White Man's Burden."[54] Perhaps more importantly, it has been argued that during this era the federal government treated the trust responsibility as a temporary measure.[55] As the federal government advanced policies which sought to destroy traditional ways of life and impose Western models, no future relationship between the tribes and the government was considered. In light of the allotment programs and their ilk that were designed to "civilize" the Indians, Congress intended to destroy any long-term relationship between the federal government and the tribes, and with it, the trust responsibility.

In contrast, Marshall conceived of the unenunciated (yet implicit) plenary power as the means to achieve the end of the federal trust responsibility. Under this "sovereign trusteeship" model, the plenary power authorized Congress to take the necessary steps in order to fulfill the federal government's ultimate responsibilities to the tribes. The *Kagama-Lone Wolf* position, however, inverted the model so that the trust doctrine informed the

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53. *Id.* at 565-66.

54. *See supra* notes 43, 44. The legislative branch's endorsement of this policy is apparent from the Allotment and Assimilation statutes; the executive branch's animosity toward the tribes' authority during this period is clear from accounts of military subjugation discussed *supra*.

55. *See* Chambers, *supra* note 31, at 1227 n.66.

trumping plenary power of Congress. That is, the plenary power subsumed the trust doctrine which became no more than a rarely-enforced good faith standard. As the "guardian-ward" relationship replaced the "sovereign trusteeship" model, the plenary power (granting mock deference to the trust responsibility) became a sword for Congress to use against the tribes, while the Indians were left with only the fragments of a shield.

V. Disposition and Critical Analysis of the Trust Doctrine

In order to obtain a thorough appreciation of the federal trust doctrine, it remains crucial to critically analyze both the legal and normative shortcomings of the virtually reciprocal interpretive approaches of the doctrine in American Indian law. Several factors contribute to the entrenchment of the negative implications of both approaches, each of which must be treated as independent obstacles in an attempt to reconceive the trust responsibility in accordance with modern American Indian legal, political, and moral status.

A. Multiple Strands in the Law

Without doubt, the law remains confused in regard to the direction and application of the federal trust responsibility as a result of its tumultuous history. As the Marshall trilogy and the *Lone Wolf-Kagama* position represent polarities in perception and approach, numerous positions rest in the expanse, none of which has satisfactorily addressed the potential meaning and scope of the trust doctrine. Faced with at least two disparate strands of analysis, each with divergent legal and normative premises, courts find themselves in a difficult position of choosing a path or at least splitting the difference and contributing even more to a convoluted area of law. This lack of consistency contributes in part to the lack of a judicial understanding, and even worse to the occasional judicial misunderstanding. Again, in light of this new federalism, one must exert caution to not limit the analysis to only the polar positions. The mix has grown more complex as the *Seminole* decision will inevitably inform future claims and scholarship.

B. Problems Associated With the Plenary Power

1. Questionable Basis for its Adoption.—The *Kagama* and *Lone Wolf* decisions reflect an abrupt jump in the overall scope of congressional authority over Indian affairs. As noted scholar Robert N. Clinton notes, "The late nineteenth century emergence of the doctrine of federal plenary power over Indians surfaced at precisely the time necessary to justify the blatantly illegal

actions taken to implement America's new colonialist impulse."[56] Most academics and courts agree that the area of Indian law is fraught with vacillation and incoherence. Thus, if one accepts the premise that federal policy of a given era dictates the necessary conception, application, and resolution of Indian legal concerns, then reliance or emphasis on this period of American jurisprudence seems suspect.[57] Moreover, the law must be understood not in a vacuum, but in relation to the complex web of federal stances and actions, judicial interpretations of those actions, and the executive administration of those actions. If those circumstances change—as they have surely done since at least 1970 with the inception of the era of Self-Determination—then the judiciary should reflect this shift in like manner.

Mary Christina Wood sees the dependence on *Kagama* as unfounded and ultimately a problematic bump in the road of American Indian jurisprudence; nevertheless, she argues that such a dilemma remains surmountable with a complementary shift in recognizing and accommodating the policies of Self-Determination. However, one may argue that she does not give enough credence to the usage and application since that time.[58] It appears that the "guardian-ward" model unfortunately is here to stay, unless it is overturned, modified, or simply ignored by the judiciary.

Despite noble efforts to simply knock down the plenary power as an unenumerated congressional assumption of authority that is Constitutionally invalid,[59] it does not appear likely that the federal government or the courts will question its existence.[60] After all, even in *Morton v. Mancari*, an opinion that supported the distinct status of American Indians, the Supreme Court has construed the plenary power as "drawn both explicitly and implicitly" from the Constitution.[61]

The challenge, therefore, becomes one of accommodation; that is, to accommodate by working within the framework of the trust doctrine while seeking to redefine those attributes of the plenary power that interact with it. Quite reasonably, the implications of the trust doctrine and the plenary power could foreseeably undergo further transformation—either back into a

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56. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 104 (1993).

57. *Id.* at 129.

58. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978) ("Congress has plenary authority to limit, modify, or eliminate the powers of [native] self-government . . . ."); Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 501 (1979) ("It is well established that the Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes.").

59. *See* Comment, *Federal Plenary Power in Indian Affairs After* Weeks *and* Sioux Nation, 131 U. PA. L. REV. 235, 247-50 (1982).

60. *See e.g.*, *Santa Clara*, 436 U.S. at 56-57; *Yakima*, 439 U.S. at 501.

61. 417 U.S. 535, 551-52 (1974).

Marshallian "sovereign trusteeship" which Wood argues would ultimately comport with the tribes' present status as exceedingly similar to their status in the earliest days of American Indian jurisprudence, or into a new form of sovereign status in the modern era of Self-Determination that recognizes the shortcomings of an ill-founded reliance on the plenary power.

2. Questionable Interpretations of the Plenary Power and Trust Doctrine.—Further confusion arises when the trust doctrine and plenary power are treated synonomously or as tautological derivatives of one another. Consider the problems that arise when the plenary power and trust doctrine are conflated: "Even as reconceptualized by the *Kagama* Court, the trust doctrine is at most a corollary to plenary power, constituting not plenary power itself, but rather the fiduciary duty inherent in exercising that power."[62] Despite any confusion of the two issues, judges should hesitate to discard the trust doctrine as ineffective. Even worse, if the trust relationship continues to be regarded as a mere component of the plenary power, and that power encounters substantial limitation, would courts regard the trust responsibility as similarly limited? In order to apply the trust doctrine in a meaningful way, one must treat the doctrine as a separate, distinct obligation that would not decrease in applicability or weight in the face of a limitation on congressional authority.

Moreover, such a restriction on Congress where the plenary power is reasonably qualified might also result in a corresponding rise of congressional accountability under the trust theory. Thus, as Wood writes, "The trust responsibility should be recognized as a doctrine of federal restraint, not permission," and therefore, "[an] important source of protection for Indian rights."[63] The difficulty presented, of course, rests on a successful reinterpretation of the trust doctrine that imposes positive legal duties on the federal government, regardless of the type of relief available.

C. Lack of Substantive Relief

Another obstacle in reconstructing the trust doctrine in accord with modern legal and normative principles is represented by the lack of substantive relief available to American Indian tribes for a breach of the federal trust responsibility. For the most part, in cases involving proprietary obligations such as timber management or tribal investments, the federal government has successfully been held to stricter standards of behavior in light

62. Wood, *supra* note 12, at 1504 n.147.
63. *Id.* at 1507-08.

of its role as a fiduciary or formal trustee.[64] Under these circumstances, numerous courts have held the trust doctrine to be a basis for an actionable claim.[65]

In areas involving non-proprietary obligations, however, it appears that the courts have proven extremely reluctant to find or imply any enforceable standard against the federal government.[66] Resulting from the lack of a coherent doctrine, at present, Congress has only been held to a moral or political obligation in regard to enforcement of the trust doctrine. The problem is exacerbated for American Indian tribes when little or no relief exists to address federal interference with tribal autonomy and other issues pertaining to sovereignty, which of course strike at the heart of the federal trust relationship with the American Indians. Although the trust duty specifically extends to the protection of specific tribal interests (e.g., land base preservation, resource management, and fiduciary matters), the duty to protect American Indian culture and way of life remains only a vague and general duty. Even in the face of current reaffirmations of this duty to uphold the trust responsibility in all areas of the federal government, moral principles provide the only source of guidance and resolution.[67]

VI. A Proposal, Its Rationale, and Modern Problems that Impact Its Likelihood of Success

A. Proposal to Reassess the Trust Doctrine

Modern policies and recent judicial interpretations present an opportunity to accord the trust doctrine a newly charged status as a more tribally-oriented paradigm for legal analysis. Although such a proposition remains debatable, the basic tenets and arguments to follow offer a sound basis in which the federal trust responsibility might be conceived in a new light. To modify an old adage, let us not lose a glimpse of the forest by

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64. *See* Gila River Pima Maricopa Indian Community v. United States, 9 Cl. Ct. 660, 677-78 (1986) (private trust law determines liability for breach of fair and honorable dealing with tribes in the presence of elaborate control of trust resources); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (government breached its fiduciary obligation to tribe by dispersing treaty annuity payments to tribal officials known for mismanagement); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256-57 (D.D.C. 1972) (Secretary of Interior breached his fiduciary duties when a decision on water conservation and appropriation was arbitrary and unrelated to available data and thus an abuse of discretion).

65. *See, e.g.*, Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980) ("[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . . .").

66. *See supra* Part III. D. and notes 64-65.

67. *See, e.g.*, Douglas Jehl, *Clinton Meets Indians, Citing a New Respect*, N.Y. TIMES, Apr. 30, 1994, at 10 (reporting President Clinton's meeting with over 300 tribal leaders in a renewed pledge to uphold his own executive obligation).

looking only at the trees. In other words, due to a modern interpretation of the trust doctrine, the holdings of American Indian case law, its canons of construction, and normative guidelines offer an alternative approach. Such an approach establishes a more dialectical model in which the interests of the federal government and the individual tribes would be considered, thus maintaining the integrity and sovereignty of all parties and upholding a longstanding, albeit occasionally neglected, tradition of mutual respect.

Under a model in which the trust responsibility is cast in terms of the "guardian-ward" relationship rather than the "sovereign trusteeship" model, the opportunity for substantive redress remains, at best, illusory and clearly confined to proprietary matters. However, by analyzing the federal-tribal relationship under a new interpretive scheme (whether through Wood's "sovereign trusteeship" or an alternative method), a new construction of the trust doctrine may emerge. This conception would override the effects of *Kagama* and *Lone Wolf* and establish an approach that comports with original intent, avoids the whole nasty historical problem, yet complements the present context of American Indian policy and status. The dilemma, of course, is to achieve these results under the spectre of a weakening federal government. If the plenary power of Congress should be further limited, then the tribes would seem fortunate to achieve any significant protection under either model. Tribes, therefore, must remain insistent that the federal government uphold the essential elements of the trust responsibility in order to withstand a shift of power to the states.

B. Rationale of Proposal

1. Constitutional Limits on Congressional Plenary Power.—Perhaps the most defined and clearly articulated source of authority in which American Indian interests will be guaranteed protection against federal neglect of the trust responsibility is the U.S. Constitution. Numerous portions of the Constitution directly apply to those non-proprietary concerns which presently lack federal protection—namely culture and religion.[68] Moreover, these rights may be asserted by individuals and occasionally by the entire tribe:

> Equal protection and due process principles are designed to protect the individual from the community and not a community's right to govern itself free from a larger community (the majority). The constitutional guarantee of free exercise of religion, however, can be invoked to

68. U.S. CONST. amends. I, V.

> protect community as well as individual values by protecting a "traditional way of life [involving] deep religious conviction, shared by an organized group, and intimately related to daily living."[69]

The religious freedoms of American Indians protected under the First Amendment remain ambiguous at best. Most recently, Congress has reaffirmed the right of American Indians to practice certain religions and provided them with a strong political endorsement[70] in order to overcome past lapses in Free Exercise protections.[71] This area of law has created its own contentious debate apart from the issues dealt with herein.

In light of the vast importance American Indians place on their tribal lands, and especially in light of the perpetual shrinkage of their land base, the Fifth Amendment offers a significant constraint on the federal government through takings actions. Justice Cardozo, writing for the Supreme Court in *Shoshone Tribe v. United States*,[72] determined that even if *Lone Wolf* stands for the proposition that "[p]ower to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty,"[73] this power cannot justify the taking of lands without just compensation. Cardozo noted that "[s]poilation is not management."[74]

One of the most unique facets of American Indian law is reflected in the distinct status American Indian tribes enjoy under the law. Under *Morton v. Mancari*,[75] discussed *supra,* the Supreme Court determined that Indian tribal membership constitutes a political classification, thus distinguishing preferential hiring practices of Indians from other racial groups. This special status thus removed the case from strict scrutiny (under a typical race-based analysis) and the Court found the practice rationally related to the congressional distinct obligation to Indian tribes. In light of the new federalism, however, it appears that this special status has been challenged. Nevertheless, the fact remains that under the Constitution, American Indians may obtain some respite as fundamental aspects of their rights are preserved-

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69. CLINTON, ET AL., *supra* note 33, at 215 (*quoting* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972)).

70. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994), and, most recently, American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a (1994).

71. Namely, the American Indian Religious Freedoms Act, *id.*, which was passed in 1978 under the Carter administration and remained a notorious example of toothless legislation and empty rhetoric until it was amended in 1994.

72. 299 U.S. 476 (1937).

73. *Id.* at 497.

74. *Id.* at 498.

75. 417 U.S. 535 (1974).

rights which remain unshakable by the states. Thus, the Constitutional limitations placed on the plenary power represent the clear parameters to which all congressional action must adhere. There remain, however, certain areas which are not as clear in regard to the limits of congressional authority over Indian affairs.

2. Canons of Construction.—Despite the fact that Congress exercises the plenary power on a regular basis without the constraints imposed upon the executive branch, to be discussed in detail *infra*, the federal government as a whole is limited by certain judicial exceptions. Particularly when dealing with the harsh consequences of the *Lone Wolf* and *Kagama* decisions, the power of Congress oftentimes appears unlimited; however, courts have interpreted Indian law to require limitations that even Congress may not avoid. Over time, these exceptions have established the basic canons of construction which inform any legal analysis concerning American Indian legal matters.

These canons of construction form the fundamental framework for most legal analysis of American Indian affairs. In *Menominee Tribe v. United States*,[76] the Supreme Court held that the common interpretive canon that ambiguous statutory or treaty language is to be read in favor of the Indians was justified because of the presumption that Congress intends to adhere to its trust reponsibility.[77] Other canons include the judicial resistance to imply an abrogation of treaty rights, which typically requires an express congressional action abrogating the affected rights,[78] and the notion that through retained sovereignty, tribes may exercise their sovereign governmental powers unless expressly prohibited or preempted from doing so.[79]

3. Current Standard of Review.—As has already been posited, the law must remain careful not to conflate the plenary power with the trust responsibility of the federal government. In a now famous passage, one commentator has noted that

> [i]t is . . . reasonable to interpret the plenary power in light of that [trust] responsibility. Indeed, the [Supreme] Court so reasoned when it held in *Delaware Tribal Business Comm. v. Weeks*, that plenary power must be

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76. 391 U.S. 404 (1968).

77. *Id.* at 411-13. *See* Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Choate v. Trapp, 224 U.S. 665, 675 (1912).

78. *See, e.g.*, United States v. Dion, 476 U.S. 734 (1986) (finding abrogation of treaty right to hunt eagles due to the provision for a licensing system under the Eagle Protection Act).

79. *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679 (1993) (stating the correct rule, then incorrectly applying it to a treaty case involving tribal regulatory jurisdiction of federally-seized lands).

> rationally related to the trust responsibility. . . . The argument here follows logically from *Weeks*: because the autonomy principle is an element of the trust doctrine, no exercise of plenary power that contravenes that principle can be rationally related to the effectuation of the trust. In this weak sense, the autonomy principle can be said to limit Congress as well as the courts.[80]

Albeit a low level of scrutiny, rational relationship review remains applicable to congressional exercises of plenary power. Because no other standard of review has been imposed on Congress in the past, this review marks demonstrable progress, in that the authority of Congress does not remain wholly unchecked.

4. Enforcement Against Executive Branch.—With the development of the trust doctrine came an understanding that the executive branch and its numerous administrative bodies do not enjoy any plenary power that might be reserved to Congress. Rather, as a separate entity, the executive branch is charged with different duties and obligations in relation to Indian tribes. Congress, in its plenary power, passes a statute, and the executive branch carries out that program or policy. Within this charge rests a duty, which remains enforceable even today. This duty has been described in numerous ways, each with its own level of obligation to the tribes and consequential scrutiny from the judiciary. Quite apart from any congressional responsibility, tribes have proven successful in holding the executive branch to a more stringent level of accountability than that to which the legislative branch is held under the trust doctrine; an overview of this responsibility and its standards is useful here.

At its most demanding level, the Executive and its numerous subordinate entities maintain a fiduciary relationship to the American Indian tribes that is strictly enforceable. For example, in *Lane v. Pueblo of Santa Rosa*, the Supreme Court held that the guardian-ward relationship requires the Secretary of Interior to dispose of lands held by a Pueblo tribe in a more exacting fashion than other public land acquisitions.[81] The Court reasoned that in light of numerous takings of Indian land in violation of the Fifth Amendment, any lower standard would remain untenable. "That would not be an exercise of guardianship, but an act of confiscation."[82] In *Cramer v. United States*, a

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80. Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 437 n.71 (1984) (citations omitted).

81. 249 U.S. 110, 113 (1919).

82. *Id.* at 113.

second example that informs the fiduciary relationship between the Executive and the American Indian tribes, the Supreme Court interpreted an ambiguous statute granting general jurisdiction for equitable relief in favor of Indian occupants in order to prevent the patenting of such lands to third parties.[83]

> To hold that . . . they acquired no possessory rights to which the government would accord protection would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation. The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.[84]

In a third holding, the Court affirmed *Lane* and *Cramer* in *United States v. Creek Nation*, pursuant to a specific jurisdictional statute where the Creeks won a money damage award for the taking of tribal lands without just compensation as a result of a flawed federal survey.[85] The Court added:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.[86]

Moreover, the Supreme Court has held that where a treaty required the United States to pay funds to tribal members, the federal government was to be judged "by the most exacting fiduciary standards" as it was held liable for paying the money instead to a tribal government that was well-known for misappropriating funds.[87]

In a more recent holding, a federal district court held that in a suit filed against the federal government that attacked the allocation of water users in a given watershed based on a "judgment call" from the Secretary of the Interior, the department had failed to fulfill its fiduciary role to protect tribal

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83. 261 U.S. 219 (1923).
84. *Id.* at 229.
85. 295 U.S. 103 (1935).
86. *Id.* at 109-10.
87. Seminole Nation v. United States, 316 U.S. at 296-97.

water rights.[88] Moreover, the Secretary was required to explain his conclusions for water apportionment through detailed requirements established by the court.[89] This case differs from the previous ones in that there was no specific statute which the federal government was violating as the tribal fishing industry suffered due to increased salinity and impeded spawning. Rather, the Court based its decision on the general trust responsibility to the tribe, stating that as a trustee the Secretary bore a higher obligation to protect tribal interests.[90]

The modern Supreme Court has attempted to refine the executive trust responsibility by defining the duty in terms of proprietary obligations. In *United States v. Mitchell*,[91] which overturned a previous decision of the same case,[92] the Court held:

> [A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and trust corpus (Indian timber, lands, and funds). . . .[I]t naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.[93]

Courts have recognized, however, that the federal government occasionally may not be capable of meeting its most demanding obligations to the Indian tribes. Although the trust responsibility has been invoked to compel the federal government to litigate in protection of tribal lands or resources,[94] the Supreme Court has also held that the federal government "cannot follow the fastidious standards of a private fiduciary" in regard to potential conflicts of interest.[95]

Occasionally, courts will apply the trust doctrine as a backdrop to the interpretive framework within which American Indian legal analysis operates. The Supreme Court struck down an administrative practice of limiting certain Bureau of Indian Affairs ("BIA") benefits to Indians on reservation land, when the plaintiffs lived only fifteen miles from the reservation and

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88. Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256-57 (D.D.C. 1972).
89. *Id.* at 256.
90. *Id.* at 256-57.
91. 463 U.S. 206 (1983).
92. United States v. Mitchell, 445 U.S. 535 (1980).
93. *Mitchell*, 463 U.S. at 225-26.
94. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).
95. Nevada v. United States, 463 U.S. 110, 128 (1983).

maintained close economic, political, and social ties. Because other BIA services remained available to reservation and off-reservation Indians, and moreover, the regulation had never been formally published, the practice was held invalid.[96] In addition, in a Ninth Circuit federal case, the trust doctrine informed the decision to find a federal duty to provide for medical care to an Indian child when the state, which purportedly had the primary obligation, refused to do so.[97] It is important to note that this case goes beyond the typical resource management/fiduciary context, upholding medical care as properly under the trust responsibility despite its nonproprietary nature.

5. Necessary Limitations on Government, Generally.—Finally, an argument may be made to reinterpret the plenary power as necessarily less than absolute in scope and authority. First and foremost, it is clear that the American experience tells us that the U.S. government is one of enumerated powers. It must always be so while in accordance with the Constitution, which mandates a separation of powers through checks and balances. No other power in any of the three branches of American government enjoys an unqualified existence. Logic dictates that because the plenary power is not enumerated, it is not permitted.[98] In the alternative, it may be implied from another area of law, possibly the trust doctrine. If this is the case, then the trust doctrine, not the plenary power, is the actual source of federal authority. As has been noted *supra*, however, the courts have actively resisted any casting off of the plenary power.[99] The argument has appeal, nevertheless, as it intuitively exposes the inconsistencies in the current state of the law and offers a clean resolution.

VII. New Federalism

A. *The* Seminole *decision*

On March 27, 1996, the United States Supreme Court handed down one of the most provocative decisions in modern history. This singular decision effectively demonstrates that the clouds of new federalism may very well slow a future comprehensive consideration and utilization of the federal trust doctrine. In *Seminole Tribe of Florida v. Florida*,[100] a deeply divided Court

96. Morton v. Ruiz, 415 U.S. 199, 236 (1974).
97. McNabb v. Bowen, 829 F.2d 787 (9th Cir. 1987).
98. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.")
99. *See supra* note 58.
100. 116 S. Ct. 1114 (1996).

held that, regardless of congressional plenary power over tribal affairs, the Indian Commerce Clause did not grant Congress the power to abrogate the states' Eleventh Amendment sovereign immunity as the Seminole tribe brought suit against Florida under the Indian Gaming Regulatory Act ("IGRA").[101] IGRA, as it is commonly labeled, maintains in part that a state must negotiate in good faith or face suit in federal court in order to compel performance as the tribes establish gaming activities on their lands.[102] When Florida failed to do this and the Seminole tribe brought suit, the state responded by claiming that Congress did not possess the authority through the Indian Commerce Clause to abrogate the states' sovereign immunity from suit without its consent.

More specifically, the Supreme Court held that even though Congress clearly expressed an intent to waive the states' sovereign immunity to suit and notwithstanding the congressional plenary power over Indian affairs, a tribe could not force a state into federal court without the state's consent.[103] In doing so, the Court expressly overruled *Pennsylvania v. Union Gas*,[104] where an arguable plurality opinion found that Congress' power to abrogate stemmed from the states' cession of their absolute sovereignty when they transferred the plenary power to regulate commerce to Congress.

Moreover, the Court went further to hold that the tribe could not pursue a claim under the theory of *Ex Parte Young*, which decided that regardless of an Eleventh Amendment bar on a claim against a state, an individual seeking injunctive relief in order to end a continuing federal law violation could pursue a state official in the alternative.[105] The Court decided that in light of a detailed remedial scheme provided by the IGRA, the judiciary should not disregard the forms of redress provided by Congress in favor of a broader claim under *Ex Parte Young*.[106]

Justice Stevens' dissent, on the other hand, rests on the notion that sovereign immunity properly understood is a creature of common law, and thus should only serve as a presumption against federal abrogation rather than as a constitutional bar.[107] The doctrine, Justice Stevens posits, is perhaps more analogous to comity, which merits respect and deference yet hardly domination over the plenary power of Congress.[108] He concludes by arguing that, "for this Court to conclude that time-worn shibboleths iterated and

101. Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. § 2701 (1994)).
102. 25 U.S.C. § 2710(d)(7) (1994).
103. 116 S. Ct. at 1124-26.
104. 491 U.S. 1 (1989).
105. *Seminole*, 116 S. Ct. at 1132-33 (citing *Ex Parte* Young, 209 U.S. 123 (1908)).
106. *Id.*
107. *Id.* at 1137.
108. *Id.* at 1142.

reiterated by judges should take precedence over the deliberations of the Congress of the United States is simply irresponsible."[109]

Perhaps even more embittered in his thirty-seven page dissent is Justice Souter, joined by Justices Ginsburg and Breyer. After an intense historical discussion of sovereign immunity under the common law, Souter concludes that not only may individuals haul states into federal court in order to uphold a federal right, but in suggesting otherwise, the majority denies "text, precedent, [and] history."[110] Moreover, Justice Souter envisions a straightforward *Ex Parte Young* application; for him, the analysis should end at that point as the Seminole pursue their claim against Governor Lawton Chiles. He argues that the potential which *Young* holds should not be discarded, for it "marks the frontier of the enforceability of federal law against sometimes competing state policies."[111] For Souter, the majority simply threw away a possible remedy that was never clearly intended to be precluded by the IGRA remedial scheme, much less regarded as an exercise of "judicial creativity."[112]

B. *Impact of New Federalism on American Indian Law*

Although the majority attempted to narrowly limit the scope of its decision, by opting for more of a bright-line rule where the sovereign immunity of the states may only be narrowly curtailed, the Court has in a sense redefined federalism, and thus American Indian law. The implications of such a holding are, of course, far-reaching. As Justice Stevens noted in his dissent, the majority decision "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."[113]

A significant dilemma posed by the *Seminole* decision is the unanswered question: Where does this leave the tribe? The Court only hinted at recourse through the Secretary of the Interior,[114] who will most likely have to redraft IGRA to comport with the holding. On a broader level, however, it is reasonable to conclude that the tribes will be affected in some fashion almost necessarily when the fundamental relationship between the states and the federal government undergoes such a substantial shift. This decision perhaps

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109. *Id.* at 1144.
110. *Id.* at 1185.
111. *Id.* at 1180.
112. *Id.* at 1181.
113. *Id.* at 1134.
114. *Id.* at 1122 n.4 (merely echoing the court of appeals' conclusions on the matter).

marks the end of a simple dialectical exchange between the tribes and the federal government, for a third party has entered the relationship. Because a state previously possessed little influence over Indian affairs, the role of the states—now a factor to be considered in American Indian law—presents unknown consequences. When the underlying premise of Indian law—the trust responsibility—is shaken, many questions arise which remain unanswered.

Another point to consider is that the *Seminole* decision is arguably not really about American Indians. Rather, the case concerns the broader scheme of federalism in which the major players are the states and the federal government. While the dispute in *Seminole* purports to concern itself with the interests of the Seminole people, in reality it seems that those interests were lost in the fray. Whether *Seminole* is conceived of as a conflict of interest in which the attorney (the federal government) lost sight of her client's interest (Indian gaming) or as a sad commentary in which American Indians remain objects caught in the middle, the fact remains that the real damage is done not to the Court, or to the government, but to the tribes. Tribes remain at least somewhat dependent on the federal government to defend their rights in the federal courts; this is, after all, one of the basic tenets of the trust responsibility. So, in the wake of this decision, one should consider the responses of Congress to this development. Such analysis, though, lies outside the scope of this Note.

Perhaps most importantly, however, this decision affects the plenary power of Congress over Indian affairs. While Congress has not lost any authority over the tribes themselves, it was indeed struck a blow as its apparent authority was severely limited. In the past, congressional authority over interstate commerce went unquestioned,[115] even endorsed, by the judiciary. This is no longer the case as *Seminole* overturned seemingly well-settled doctrine. It remains to be seen whether other well-settled tenets will be challenged successfully in the courts, or even if more questionable doctrines unfavorable to the states will undergo attack. Owing no duties to the states, the tribes rely in good measure on the federal government for support, and at present that support is tenuous. If tribes face similar losses in the future, they would do well to point to the trust doctrine as a reminder of the obligation held to them by the federal government.

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115. *But see* United States v. Lopez, 115 S. Ct. 1624 (1995) (invalidating the Gun-Free School Zones Act as violative of the Commerce Clause).

C. *Unanswered Questions and Creative Approaches*

The opportunity to adopt an approach which recognizes the trust responsibility as a viable check on federal authority, however, continues to meet with resistance in the judiciary, the federal government, and perhaps even the general populace. In fact, in addition to *Seminole*, several recent Indian law cases point to a given direction that could prove detrimental to the fundamental elements of the entire federal-tribal relationship. In their holdings, these courts have managed to either poorly interpret[116] or circumvent[117] the mandates of adminstrative procedure as well as statutory and judicial authority.[118] This unfortunate turn of events appears to have resulted from a lack of understanding concerning the federally recognized special status of Indian issues. Whether out of ignorance, benign neglect, or in a conscious attempt to remove American Indians from the political calculus, this shift results in a removal of the special status properly held by tribes. Recognized for over two-hundred years in this country by all three branches of government, the sovereignty of American Indian peoples is threatened by these most recent indicators.

This phenomenon is also readily demonstrated in the recent political discourse which advocates a form of populism by eschewing big government for local governance. Ultimately, the underlying criticism of Indian law rests not necessarily with the area of law itself, but rather with a struggle between states and the federal government as posited *supra*. In this fight over federalism, however, American Indians feel the pinch perhaps worst of all as they remain dependent on the federal government for the recognition and preservation of their sovereign status. Historically owing no obligation to the states, tribes potentially face a political future which will deemphasize the federal government and where the states might reciprocally bear no obligation to the individual tribes. This state rights movement, particularly evident in the western states, brings into question the status of American Indian tribes and their individual members.

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116. *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679 (1993) (stating the rule, then applying it to a treaty case involving tribal regulatory jurisdiction of federally-seized lands).

117. *See, e.g.*, South Dakota v. United States Department of Interior, 69 F.3d 878 (8th Cir. 1995) (declaring 25 U.S.C. § 465, which provided for the acquisition of land for Indian tribes under the 1934 Indian Reorganization Act, to be an unconstitutional delegation of congressional authority; the case was actually up for appeal on a jurisdictional matter when Judge Loken decided to rule further on an issue not even before the court), *cert. granted and judgment vacated*, 117 S. Ct. 286 (1996).

118. *See, e.g.*, In re Bridget R., 49 Cal. Rptr. 2d 507, 535 (Cal. App. 1996) (declaring an application of the Indian Child Welfare Act, 25 U.S.C. § 1901, unconstitutional in the absence of significant social, cultural, or political relationship with the tribe), *cert. denied*, 117 S. Ct. 693 (1997).

Coupled with the public ignorance of the special status of American Indians, tribes also must prepare for future misapplications of precedent and doctrine. It is ironic that this country has returned full circle to the Marshall trilogy where the federal government must concern itself not with the protection of citizens from the Indians, but rather with the encroachment of the states into areas of Indian concern. The scope of the state rights movement, after all, deals with the authority of states to affect the internal health, safety, and welfare of the individual tribes, not with the curtailment of Indian power over the general non-Indian citizenry. Such a scenario reflects not only the lack of enthusiasm for the federal trust doctrine, but also seems to challenge the more presumptively solid authority of Congress to exercise plenary power in regard to Indian affairs.

This recent tide of legal and political unpleasantries, however, has been met with some creative resistance on the part of a sympathetic judicial minority and a burgeoning academic presence. In recent cases involving the exercise and regulation of tribal hunting and fishing treaty rights, two federal courts have seized the opportunity to reestablish proper doctrinal analysis, while also advancing novel interpretive approaches. In *Reich v. Great Lakes Indian Fish & Wildlife Commission*, the Seventh Circuit, with Judge Richard Posner writing for the majority, held that because tribes represent a parallel sovereign, Indian game wardens should enjoy the same exemption to the Fair Labor Standards Act overtime regulations extended to state and local governments.[119] Posner inserted the issue of comity, reasoning that because treaties and statutes share a legal equivalency, a deference to tribal sovereignty would be proper.[120] The Seventh Circuit went beyond the typical recognition of rights by characterizing off-reservation treaty rights as just as central and important to the tribes as occupancy rights on the reservation.[121] Posner, therefore, utilized a political and rights-based approach, rather than an approach based strictly on geography. In *Mille Lacs Band of Chippewa Indians v. Minnesota*, federal district judge Diana Murphy pierced the dense historical facts to uphold an 1837 treaty guaranteeing hunting, fishing, and gathering rights, despite an 1850 Executive Order and a subsequent 1857 treaty that arguably extinguished those rights.[122] In this hotly contested suit, Judge Murphy applied straightforward canons of construction to interpret the ambiguities of the treaties in favor of the tribe, thus upholding their rights as established long ago.

On the academic front, scholars nationwide have continued to gather

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119. 4 F.3d 490 (7th Cir. 1993).
120. *Id.* at 494-95.
121. *Id.* at 494.
122. 861 F. Supp. 784 (D. Minn. 1994), *appeal dismissed*, 48 F.3d 373 (8th Cir. 1995).

support for American Indian rights. Philip P. Frickey offers a new vision of Indian law that incorporates both historical and modern interpretive models so as to provide for increased coherence and sensitivity to a most misunderstood and maligned area of jurisprudence.[123] Rather than dismissing the historical inconsistencies underlying Indian law, Frickey draws mainly from the Marshall trilogy to develop a more sophisticated understanding of the nature and status of the tribes with respect to the federal government. Such an approach, he argues, ultimately comports with modern Supreme Court interpretive approaches as it upholds perhaps the most fundamental aspects of American Indian law.[124] Another leader in this field, Mary Christina Wood, focuses mainly on the legal enforcement of the trust responsibility in the area of environmental issues.[125] She has extensively compiled, analyzed, and offered criticism to many of the contemporary environmental issues facing American Indian tribes.

VIII. Conclusion

Notwithstanding the negative implications of the most recent developments, the federal trust doctrine offers great hope as a potential source of limiting the federal government in a more realistic manner. By reevaluating the paradigms within which federal Indian law operates, new models become available. A critical assessment of the modern status of the various American Indian tribes should indicate that the law needs clarification, particularly with respect to the strands of analysis employed in analyzing the nature of the federal-tribal relationship. While relying in part on outmoded and morally questionable premises, the judiciary as well as Congress and the Executive have managed to place the Indian tribes in a precarious position. This unenviable position offers some tangible and practical hope, however, as the federal trust doctrine might emerge as the mechanism through which tribes may regain the recognition and respect they deserve. It remains particularly frustrating for the American Indian people to live on a fence of uncertainty, where they may face yet another form of political invisibility on one side, while the other side offers autonomy and opportunity. Perhaps the challenges

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123. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

124. *Id.*

125. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994) (referred to as Trust I); 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 (1995) (Trust II); Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVT'L L. 733 (1995) (Trust III).

that the modern legal landscape present will stir the vigilance necessary to maintain the continued existence of our indigenous sovereign entities, and in doing so, preserve a most unique facet of American jurisprudence.