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ROBERT LAURENCE*

A Paradigmatic, Comparative, Private-Law Perspective on the Federal Trusteeship

Dedication

For Toby Grossman, long-time Senior Staff Attorney at the American Indian Law Center, mentrix to many who passed through those offices and friend to all who did so. She was my most constant reader, and while I did not often satisfy all of her lofty criteria of good writing and good analysis, I was a better writer for having tried.

ABSTRACT

The trust responsibility that is the topic of the present Symposium was established early on to be a status-based matter of public law governing the relationship between the United States and the various tribes and their members. The benefits of this trusteeship, as well as its detriments, are manifest and are discussed with insight and expertise by the other articles in the Symposium. In this article, Professor Laurence takes a look from the unusual perspective of private, not public, law. In an even greater departure from traditional dogma, Professor Laurence uses not private trust law, but private contracts law to serve as the basis of his perspective, in particular finding that there is – or ought to be – a standard of enhanced good faith in all transactions between the government (and private parties) and the tribes and their members. Using a comparison from Australian Aboriginal law, the article concludes not with a replacement model for the present trust responsibility, but with what insights, if any, can be gained from looking at an old problem from a markedly new perspective.

INTRODUCTION

By almost every measure, the word “model” is preferable to “paradigm.” It is shorter, more easily pronounced, more widely

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understood, and clearer of meaning.¹ Except this: as an adjective, “paradigmatic” is superior to the alternatives deriving from “model.”² But what do I mean by the “paradigmatic perspective” of my title? To suggest that I have in mind a new model of the federal trusteeship is to suggest a grander mission than I have, for I know that what I suggest is not an analytic model of the entire field. Rather, I hope to add an unusual look as part of a broader search for a new model of the trusteeship that is represented by this Symposium.

As the title goes on to suggest, that new perspective is both comparative and private. Regarding the notion of comparative law, the origins of this article lie in a series of communications that I had with Professor Paul Martin, Director of the Agricultural Law Centre at the University of New England in Armidale, New South Wales, followed by a most enjoyable stay in Armidale during the month of June 2005. Professor Martin shared a problem with me that the Centre has been working on, which is described below and involves the protection of Aboriginal intellectual property. For reasons that I will discuss, Professor Martin’s proposed solution to the problem involved the creation of a private trust relationship, but as I thought through the problem, I found myself thinking of a contractual solution. Thus, the present article will propose a private-law take on an issue that has always been thought of as a public-law concern and will do so by looking at some issues as they arise in Australia.

I begin, though, with a statement of the problem.

THE AUSTRALIAN PROBLEM

It has become a common phenomenon for European-Australians to interview Aboriginal Australians, seeking what would be known in the West as intellectual property. This could be, for example, a white anthropologist seeking historical information from an Aborigine. Other examples might include medical experimenters seeking information about traditional drug regimes or metallurgists seeking information

1. My much-loved 1969 edition of the *American Heritage Dictionary of the English Language* shows that the origins of the word “paradigm” lie deep in the study of the structure of language and gives the first definition as “[a] list of all the inflectional forms of a word taken as an illustrative example of the conjugation or declension to which it belongs.” Only as the second definition is “[a]ny example or model” given. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 950 (William Morris ed., 1969).

2. The *American Heritage Dictionary* gives no adjectival forms of “model,” and the made-up alternatives – “model-like” or “modelaic” – will not do.

about the location of valuable deposits of natural resources.³ The question is how best to protect the interests of the informant, both against the interviewer and against downstream recipients and users of the information.

Having already called such information “intellectual property” not once, but twice, I note the potential hazards of the commodification of knowledge. Western legal tradition, of course, finds nothing particularly remarkable about treating information as a commodity, but it hardly goes without saying that not all non-Western cultures agree. And among those cultures that do not, some would find it offensive to traditional values, ways, and closely held beliefs to treat information as private property, while others might find it merely oddly Western. I am hardly an expert on Aboriginal ways, but Professor Martin presented the problem to me, seeking an approach that avoided this Western commodification.

Modern trade-secrets law might be used to protect such information but seems to threaten the same kind of difficulty, that of forcing non-Western concepts of information into handy Western legal pigeonholes. Of course, in the end I will be discussing various Western concepts of contracts, but perhaps because contract law is transaction-based and not property-based, there will be a diminished chance of advancing the well-known principles of cultural chauvinism. We shall see.

I begin with a brief overview of American Indian law, followed by an even briefer overview of Australian Aboriginal law.

THE BASIC PRINCIPLES OF AMERICAN INDIAN LAW

There are seven basic principles of American Indian law as established by the domestic law of the United States, ignoring for present purposes both the ancient and evolving body of tribal law and the recently emerging body of international law.⁴

3. As one of many examples, see Sandy Guy, *Back to the Roots: Aboriginal Know-How Tops Up the Top End's Herbarium*, AUSTRALIAN WAY, July 2005, at 61 (Qantas in-flight magazine).

4. The material for this section is largely drawn from Robert Laurence, *The Basic Principles of American Law as It Applies to American Indian Tribes*, 6 Y.B. OF N.Z. JURISPRUDENCE 35 (2002–2003).

1. Tribes Are Governments

Tribes are much more than mere private voluntary organizations.⁵ Tribes do the kinds of things that governments do: they tax,⁶ they regulate,⁷ they adjudicate both civil⁸ and criminal disputes,⁹ they incarcerate,¹⁰ and they enforce judgments.¹¹ Tribes may, and do, exercise the powers of governments, often against non-consenting individuals. The recognition of this power by the federal courts is not absolute, and certain exercises of power—especially with respect to non-Indians—are not recognized by the United States as legitimate,¹² so the governmental status of the tribes under the domestic law of the United States is not as extensive as is, say, its recognition of the sovereign status of Australia. Nevertheless, the first basic principle of American Indian law remains uniquely true: tribes are governments, and they act in that capacity on a daily basis with the approval of the dominant society.

2. Tribal Sovereignty Is Inherent and Does Not Derive from the United States

Historically, the proposition that tribal sovereignty is inherent and does not derive from the United States is unassailable: the tribes are more ancient than the United States itself. As the Supreme Court in *McClanahan v. Arizona State Tax Commission* admonished, "It must always be remembered that the various Indian Tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."¹³ Indeed, it would be illogical for a younger government to be the source of the sovereignty for an older government.

The inherency of tribal sovereignty was definitively established by the Supreme Court in *United States v. Wheeler*.¹⁴ In that case, the tribal defendant, Wheeler, had been prosecuted, convicted, and incarcerated

5. See, e.g., *United States v. Mazurie*, 419 U.S. 544 (1975).

6. See, e.g., *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130 (1982).

7. See, e.g., *South Dakota v. Bourland*, 508 U.S. 679 (1993).

8. See, e.g., *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, 23 Indian L. Rep. 6104 (Rosebud Sioux 1996). The legitimacy of this exercise of tribal civil adjudicatory power was rejected in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998). See generally Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

9. See, e.g., *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989).

10. *Id.*

11. See, e.g., *Eberhard v. Eberhard*, 24 Ind. L. Rep. 6059 (Cheyenne River Sioux Ct. App. 1997).

12. See *infra* notes 32–36.

13. 411 U.S. 164, 172 (1973).

14. 435 U.S. 313 (1978).

by the Navajo Tribal Court on charges of contributing to the delinquency of a minor. He then was re-prosecuted by the federal government, this time for statutory rape, based on the very same acts of consensual intercourse with a minor. Under the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, such a dual prosecution would be prohibited if the tribal prosecution were tantamount to a federal prosecution.¹⁵ But under the judicially established "dual sovereign doctrine," two prosecutions of the same underlying acts by different sovereign powers do not offend the Constitution.¹⁶ The Court held that the Navajo power to prosecute Mr. Wheeler did not derive from the United States, so the second prosecution was valid.¹⁷ The Navajo Tribe was declared to be a sovereign independent of the United States and Mr. Wheeler went to jail for the second time, in a decision that all, save him, consider a great victory for the concept of tribal sovereignty.

3. *The U.S. Constitution Does Not Bind Tribal Activity*

Our Constitution, generally speaking, accomplishes these ends: (1) it creates and grants powers to the federal government,¹⁸ (2) it limits the power of the states,¹⁹ (3) it protects the states from federal overreaching,²⁰ and (4) it protects individuals from the improper exercise of both state and federal power.²¹ It is not the case that the Constitution is silent regarding Indian tribes;²² however, the Supreme Court held in

15. U.S. CONST. amend. V, cl. 2.

16. Double Jeopardy and the *Wheeler* case are discussed in more detail in Robert Laurence, *Dominant-Society Law and Tribal Court Adjudication*, 25 N.M. L. REV. 1 (1995). In particular, it is noted there that the analysis changes if the first prosecution is in federal court and the second prosecution in tribal court, due to the application of Principle 3. See discussion *infra*.

17. *Wheeler*, 435 U.S. at 323.

18. U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes").

19. See, e.g., U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation").

20. See, e.g., U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

21. See, e.g., U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"); U.S. CONST. amend. XIV, § 1, cl. 3 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

22. Indians are expressly mentioned two times in the Constitution: Article I, § 8, cl. 3 contains the Indian Commerce Clause, empowering Congress "to regulate commerce... with the Indian Tribes." Article I, § 3, cl. 1 of the original Constitution, as amended by Amendment XIV, § 2, cl. 1, apportions the House of Representatives by population, "excluding Indians not taxed." These latter provisions have no modern importance, for Indians are now taxed like everyone else, at least under federal law.

the case of *Talton v. Mayes*²³ that the specific provisions of the Fifth Amendment do not limit the activities of Indian tribal governments as they do the federal government and, through the Fourteenth Amendment, the state governments.²⁴

It can be seen that this principle flows most directly from Principle 2. Why *would*, in fact, the organic document creating the United States in 1789 apply to governments a thousand years older than the one being created? The tribes did not join in the drafting of the Constitution, nor did they ratify it; they are referred to in it as entities with which the United States has external relations. Their members are excluded from the enumeration that apportions Congress. The Constitution only provides its protections to people who are facing action by the federal or the state governments. Thus, *Talton v. Mayes* makes eminent sense and has stood the test of time; it is still good law.

4. *The U.S. Congress Has Plenary Power over Tribal Affairs*

Begin with this most basic proposition: No Act of Congress has ever been held by the U.S. Supreme Court to be invalid as beyond the constitutional power of Congress to act. For example, Congress was permitted by the Court to enact a criminal code for Indian country in *United States v. Kagama*²⁵ and, in fact, had been practically invited to do so by the Court in *Ex parte Crow Dog*.²⁶ Likewise, the Court has accepted without dispute the validity of the Indian Civil Rights Act,²⁷ which imposes a Bill-of-Rights regime on tribal governments.²⁸ The Court has recently stricken key provisions of the federal Violence Against Women

23. 163 U.S. 376 (1896).

24. *Id.* The specific provision of the Fifth Amendment at issue in *Talton v. Mayes* dealt with the requirement of indictment by grand jury. Bob Talton had been convicted of murder by the Cherokee tribe without the full protection of the Fifth Amendment. He sought habeas corpus in the federal courts, which refused to order him released. The Supreme Court affirmed and Bob Talton was hanged by the Cherokees.

25. 118 U.S. 375 (1886). *Kagama* upheld the constitutionality of the Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)).

26. 109 U.S. 556 (1883). In *Crow Dog*, the Court ordered the defendant released from federal custody because the murder of one Indian by another in Indian country was not a federal crime. The Court said, "To justify such a departure [from prior precedent], in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find." *Id.* at 572. Congress responded by enacting the Act of Mar. 3, 1885, whose constitutionality was upheld in *Kagama*. See *supra* note 25.

27. 25 U.S.C. §§ 1301-1303 (2000 & Supp. 2006). Section 1301 of the Indian Civil Rights Act contains relevant definitions. Section 1302 is the substantive provision of the statute and imposes on the tribes some, but not all, of the protections of individuals contained in the Bill of Rights and the Fourteenth Amendment. Section 1303 contains a habeas corpus provision allowing one to attack one's incarceration by a tribal court.

28. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Act²⁹ and the Gun-Free School Zones Act³⁰ as beyond the power of Congress to enact, but few Indian-law scholars doubt the validity of a hypothetical Violence Against *Indian Women Act* or Gun-Free *Indian School Zones Act*.

We begin to see here the complexity of the field. The congressional plenary power, a power without subject-matter limitation, places a sizeable qualification next to Indian nationhood and the sovereignty of the tribes becomes quasi-sovereignty at best. Indeed, for some, the recognition under federal law of the plenary power of Congress spoils the federal recognition of sovereignty that is found in the first three basic principles.³¹ From a logical perspective, the plenary power is inconsistent, if not frankly contradictory, with notions of tribal sovereignty. But from a public policy perspective, while the two are perhaps at odds, they are no more so than many other policies that are at odds in a diverse, vibrant society. Much like a well-tuned piano, which has to be strung with strong, conflicting forces in order to make music, the conflict between the plenary power, on the one hand, and the concept of tribal sovereignty on the other, can be seen as the force that holds American Indian law together and does not pull it apart.

However, in the past 25 years, the Supreme Court has added another force that threatens to upset the dynamics of the balance just described, as it has created, under the federal common law, a plenary power running to the courts themselves that they may use to divest tribes of sovereign power. This process began in 1978 with the case of *Oliphant v. Suquamish Indian Tribe*,³² where the court held, in a poorly reasoned case, that an Indian tribe has no power to prosecute a non-Indian for on-reservation activity. *Duro v. Reina*³³ extended the *Oliphant* holding to prevent the prosecution of Indians who are not members of the prosecuting tribe. *Montana v. United States*³⁴ extended *Oliphant* to civil matters, restricting under the common law a tribe's ability to regulate the on-reservation activities of non-Indians. *Strate v. A-1 Contractors*³⁵

29. 18 U.S.C. § 922(s)(2), declared unconstitutional by *Printz v. United States*, 521 U.S. 898 (1997).

30. 18 U.S.C. § 922(q)(1)(A), declared unconstitutional by *United States v. Lopez*, 514 U.S. 549 (1995).

31. See Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219. My response came in Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988).

32. 435 U.S. 191 (1978).

33. 495 U.S. 676 (1990).

34. 450 U.S. 544 (1981).

35. 520 U.S. 438 (1997).

divested the tribes of civil adjudicatory authority over tort actions between two non-Indians, and in *Nevada v. Hicks*³⁶ tribes were denied the power to adjudicate a civil controversy between a tribal member and off-reservation game wardens.

It is difficult to overstate the destructive nature of this trend of judicial diminishment of tribal sovereignty via a common-law judicial plenary power. Layer by layer, tribal power has been stripped away by the Supreme Court on its own, all in the face of Congress's ability to accomplish the same result democratically if it so wishes (which it apparently does not, never having accomplished the same diminishment legislatively). American Indians constitute less than one percent of American society, so their representation in the national political process is always problematic. Yet, through effective lobbying and through the perception by many that Indians hold a high moral ground due to the historical circumstances of their loss of the Continent, they have, of late, received a largely friendly reception before Congress. The common-law judicial diminishment of tribal power via the *Oliphant-Hicks* line of cases is not subject to these democratic processes,³⁷ nor does the present Supreme Court seem to find particularly relevant the high moral position. Neither the concept of tribal sovereignty nor the structure of American government is served well by the judicial activism represented by this aggressive common law.

5. Federal law – Constitutional, Statutory and Common Law – Works as a Barrier to the On-Reservation Application of State Law

Given the realities of American federalism, where so much of the corpus of the law flows from the states and not the federal government, it is not surprising that the competition between the states and the tribes for the control of reservation activity has been intense and long-standing. Indeed, both of the famous *Cherokee* cases, *Cherokee Nation v. Georgia*³⁸ and *Worcester v. Georgia*,³⁹ involved exactly that competition between the tribe and the state. The tribe was the nominal loser of the earlier case, as a majority of the Court held that the Cherokee Nation was not a "foreign nation" for constitutional purposes. However, the tribe won the moral and practical victory as four of the six Justices voting held with the principle of tribal sovereignty, a principle that is with us still. And in the second case, in which there was no tribe or individual Indian party, the

36. 533 U.S. 353 (2001).

37. Except to the extent that, being common-law determinations, they can be overruled by statute. See *United States v. Lara*, 541 U.S. 193 (2004).

38. 30 U.S. (5 Pet.) 1 (1831).

39. 31 U.S. (6 Pet.) 515 (1832).

tribe nevertheless won, as the Court declared the attempts by Georgia to regulate Rev. Worcester's activities on the reservation to be contrary to federal law and void. Here, though, the practical victory may have gone to the State of Georgia, first when President Andrew Jackson said, "John Marshall has made his law; now let him enforce it,"⁴⁰ and later when most of the Cherokees were removed from Georgia and North Carolina and re-settled in Oklahoma, a nineteenth-century ethnic cleansing that the Cherokees call "The Trail of Tears."

Fortunately, the second half of the twentieth century brought less dramatic battles between the states and the tribes, often fought out over the mundane issues of taxation. In the process of deciding these cases, the modern Court established a two-tiered analytical scheme. When a state attempts to apply its laws on-reservation, a court should first consider whether the state law runs afoul of conflicting federal law, including Indian treaties and statutes passed under Congress's plenary power. If it does, the state law is invalid pursuant to the Constitution's Supremacy Clause.⁴¹ If there is no direct or indirect conflict between state and federal law, there remains a federal common-law inquiry into whether the state action "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."⁴² Supremacy Clause analysis is much preferred by the Court to infringement analysis, but both remain as viable defenses to the application of state law on Indian reservations.

6. Treaties Are Enforceable, but Abrogable, Parts of the Supreme Law of the Land

Treaties between the Indians and the Europeans were a feature of the North American legal landscape from before the United States

40. There is some doubt whether President Jackson ever made the statement. See Anton-Hermann Chroust, *Did President Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of Its Injunction Against the State of Georgia?*, 4 AM. J. LEGAL HIST. 76 (1960). Even if the words were not his, however, the sentiment was, and *Worcester v. Georgia* threatened a grave constitutional crisis as the states and the central government battled for power in the early days of the Republic. See generally Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969). John Quincy Adams' appraisal of the situation was that "the nation is about to founder." See 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 544 (1919). The crisis was averted, however, as the main political actors stepped back from the brink and the Governor of Georgia was persuaded to pardon Rev. Worcester and release him, thereby making the case moot. See Burke, *supra*. The brink remained, however, until, in 1861, South Carolina fired on Fort Sumter and both sides fell into the chasm that we call the Civil War.

41. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *McClanahan v. Ariz. State Tax Comm'n.*, 411 U.S. 164 (1973).

42. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

existed, and the new nation continued the tradition.⁴³ By the time the practice of treaty making ended in 1871,⁴⁴ more than 350 treaties had been ratified.⁴⁵ Thereafter, formal treaties became unknown, but more than 70 agreements between tribes and the United States were entered into and were approved of by Congress, usually by way of legislation.⁴⁶

Treaties generally—that is without specific mention of Indian treaties—were made the “supreme law of the land” by the Constitution,⁴⁷ as well they should be as they are ratified by a supermajority of the Senate and proclaimed by the President. Many cases could be cited for the proposition that Indian treaties are an enforceable part of the federal law of the United States; *Worcester v. Georgia* comes immediately to mind as an early case applying a treaty between the United States and the Cherokee tribe.⁴⁸ Not only are Indian treaties enforceable, they are also subject to a generous set of canons of judicial construction that can be summarized by saying that Indian treaties are to be construed to the advantage of the weaker parties, who were negotiating in a language other than their own, generally using interpreters provided by the other side. Terms and conditions are to be read as the Indians are presumed to have understood them and ambiguities are to be resolved in favor of the tribes.⁴⁹

The law with respect to treaties is not, however, entirely favorable to the Indians. While the canons of construction remain formally in place, and while the Supreme Court continually gives lip service to them, one can point to cases where it is difficult to discern any particular mission to resolve ambiguities in favor of the Indians.⁵⁰ Even more markedly, the Supreme Court has held that treaties may be abrogated by one side acting alone, the reality of North American life being that it is always the United States that is the abrogating party. It was in the case of *Lone Wolf v. Hitchcock* that the Court refused to enjoin

43. See generally FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* (1994).

44. Treaty making was formally ended by the Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (2000)).

45. See PRUCHA, *supra* note 43, app. B. The constitutional ratification process implicates two branches of government. The Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur....” U.S. CONST. art. II, § 2, cl. 2.

46. See PRUCHA, *supra* note 43, app. C.

47. U.S. CONST. art. VI, cl. 2.

48. 31 U.S. (6 Pet.) 515 (1832).

49. See generally Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth” – How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975).

50. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

the implementation of an abrogating statute,⁵¹ and since the time of that case there have been many instances of the abrogation of Indian treaties, often via the diminishment of treaty-made reservations.⁵²

The Supreme Court decided in 1903 that Indian treaties were abrogable by the United States, but it was not until 1980 that the Court held that such abrogations may be compensable before the U.S. Claims Court. In *United States v. Sioux Nation*,⁵³ the Court established a “good faith test,” under which a treaty abrogation leads to a claim for monetary damages if the federal government made no good faith attempt to compensate the Indians for the abrogation at the time the treaty was breached. If a good faith attempt to compensate the tribe existed at the time of the abrogation, then the Court was willing to entertain the presumption that the government was acting as a fiduciary, under the seventh principle below, and managing the tribe’s property as it thought best. But, as Justice Cardozo had earlier written with his usual brief eloquence, “Spoliation is not management,”⁵⁴ and it is those abrogations that are compensable. In *Sioux Nation* itself, the Court, over Chief Justice Rehnquist’s strong dissent, held that the government had abrogated the treaty without good faith and affirmed the entry of the largest damages judgment ever entered against the United States.⁵⁵

7. The Federal Trusteeship, the Topic of the Present Symposium, Frames the Relationship between Tribes and the Federal Government

“Humanity,” Chief Justice Marshall wrote in *Johnson v. M’Intosh*,⁵⁶ “acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed.”⁵⁷ Here one finds the origin of the trusteeship between the United States and the conquered tribes. While one might wish that the word “wantonly” would be seen as surplusage, the Chief Justice seems to be suggesting that *all* conquest is inherently oppressive, but that restrictions, imposed

51. 187 U.S. 553 (1903).

52. See, e.g., *Yankton Sioux Tribe*, 522 U.S. 329; *Hagan v. Utah*, 510 U.S. 399 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. Dist. County Court*, 420 U.S. 425 (1975).

53. 448 U.S. 371 (1980).

54. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 498 (1937).

55. In a related case, the Court of Appeals for the Eighth Circuit held that monetary damages were the sole remedy for abrogation of a treaty and dismissed a quiet title suit against the current land owners of property taken via the abrogation of the treaty at issue in *United States v. Sioux Nation*. See *Oglala Sioux Tribe of the Pine Ridge Reservation v. United States*, 650 F.2d 140 (8th Cir. 1981).

56. 21 U.S. (8 Wheat.) 543, 589 (1823).

57. *Id.*

by humanity on the conqueror, keep the oppression within the pale. Marshall was more explicit in *Cherokee Nation v. Georgia*,⁵⁸ where he described the Indians' condition as being in "a state of pupilage,"⁵⁹ noting that "[t]heir relation to the United States resembles that of a ward to his guardian."⁶⁰

Nearly everyone is of two distinct minds regarding this guardian-and-wardship and it is contemplation of this conflict that is the aim of the present Symposium. Chief Justice Marshall's "state of pupilage" was demeaning, even if consistent with the kind of divine arrogance and effortless certainty in the superiority of European civilization that was common in America then and today. On the other hand, there is something that rings true in the notion that the United States owes a higher responsibility toward the Indians than mere good-faith, arm's-length dealing, a thought I will return to below. Having so commonly breached the solemn obligations of a treaty, usually in order to capture more tribal land to relieve the westward pressure applied by immigrants from Europe, and having so commonly used ruthless negotiation tactics in order to gain the Indians' consent to the treaty in the first place,⁶¹ a higher standard for the latter-day dealing with the

58. 30 U.S. (5 Pet.) 1 (1831).

59. *Id.* at 17.

60. *Id.*

61. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). In that case, Justice Sandra Day O'Connor, for the unanimous Court, quoted a communication from John J. Cole, an emissary from the federal government to the Yankton representatives, during a lengthy negotiation regarding the sale to the United States of lands guaranteed to the Yankton Sioux tribe by the Treaty of 1858, 11 Stat. 743:

I want you to understand that you are absolutely dependent upon the Great Father to-day [sic] for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes....Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.

Yankton Sioux, 522 U.S. at 346-47 (quoting S. Exec. Doc. No. 27, at 74 (53d Cong., 2d Sess. 1893-94) (transcribing Council of the Yankton Indians (Dec. 10, 1892))).

The issue before the Court in *Yankton Sioux* was whether the statute that followed those negotiations was intended by Congress to result in the diminishment of the Yankton reservation to merely the lands that remained with the tribe itself after the sale, or whether, on the other hand, the sale of the lands to the United States, ratified by Congress via statute, left the reservation boundary intact. The purpose of Justice O'Connor's quotation seems to be that, with the hard negotiating position taken by the United States, as exemplified by this communication, it was appropriate for the modern Court to interpret

tribes seems appropriate. Judge Cardozo defined that standard as, “[n]ot honesty alone, but the punctilio of an honor the most sensitive.... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.”⁶² And nowhere does this high standard seem more deserved than when the United States deals today with the tribes.

Although I shall, in due course, return to the subject of the trust responsibility and the search for a paradigmatic perspective, I will first briefly compare American Indian law and Australian Aboriginal law.

AUSTRALIAN ABORIGINAL LAW COMPARED WITH AMERICAN INDIAN LAW

“Aboriginal sovereignty over Australia has been denied in practice and in law.”⁶³ So wrote Garth Nettheim, who is Emeritus Professor of Law at the University of New South Wales. As authority, Professor Nettheim cited the case of *Coe v. Commonwealth*,⁶⁴ and indeed Justice Mason of the High Court in that case was very blunt:

In so far as the plaintiff’s case as pleaded rests on a claim of continuing sovereignty in the aboriginal people it is plainly unarguable. It is inconsistent with the accepted legal foundations of Australia deriving from British occupation and settlement and the exercise of legislative authority over Australia by the Parliament of the United Kingdom, involving the establishment by statutes of that Parliament of the colonial legislatures and subsequently the establishment of the Commonwealth of Australia and the States as constituent elements in the Federation.⁶⁵

the resulting sale and legislation as having been on the government’s most extreme terms. “Given the Tribe’s evident concern with reaffirmance of the Government’s obligations under the 1858 Treaty, and the Commissioners’ tendency to wield the payments as an inducement to sign the agreement, we conclude that the saving clause pertains to the continuance of annuities, not the 1858 borders.” *Yankton Sioux*, 522 U.S. at 347. Perhaps so, but it is more than a little difficult today to read Mr. Cole’s words to the effect that, if the Indians do not sign, then three fourths of them will starve the following winter and that will be alright with the government. Such a statement can give one a different perspective from which to view the Statue of Liberty’s lamp of welcome to the homeless downtrodden of Europe.

62. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

63. Garth Nettheim, *Australian Aborigines and the Law*, 2 LAW & ANTHROPOLOGY 371, 380 (1987).

64. (1978) 18 A.L.R. 592, *aff’d*, (1979) 24 A.L.R. 118.

65. *Id.* at 596.

"Unarguable." A strong word, indeed. And earlier in the same case, Justice Mason wrote the following, comparing Australian law to American law:

There is, in all this, no justification for the view advanced by the plaintiff's counsel that the plaintiff's case is that the aboriginal people constitute a community within the Australian nation and that this community is [] itself a sovereign nation. No doubt this submission is designed to take advantage of the concept of a "domestic dependent nation" mentioned by Marshall C.J. in *Cherokee Nation v. State of Georgia*. It is, however, a submission which is quite at odds with the case that is sought to be pleaded.⁶⁶

On appeal to the Full Court of the High Court, Justices Gibbs and Aickin supported Justice Mason, thus resolving the case. Justice Gibbs wrote,

[W]e were told in argument, it is intended to claim that there is an aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth; in other words, it is sought to treat the aboriginal people of Australia as a domestic dependent nation, to use the expression which Marshall CJ applied to the Cherokee Nation of Indians [in] *Cherokee Nation v. State of Georgia*....However, the history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ of the Cherokee Nation, that the aboriginal people of Australia are organized as a "distinct political society separated from others," or that they have been uniformly treated as a state. The judgments in that case therefore provide no assistance in determining the position in Australia. The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law

66. *Id.* at 595. I have by means of the empty square brackets removed the word "not" from the Court's opinion, thinking it misplaced, superfluous, and contradictory. Perhaps not, but in any event, with or without the "not," the Court's dismissal of the relevance of *Cherokee Nation v. Georgia* is clear.

of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.⁶⁷

It would appear, then, that the Australian precedents reject the dominant principle of American Indian law rather explicitly. There is, though, one wrinkle in the jurisprudence. In the famous case of *Mabo v. Queensland (No. 2)*,⁶⁸ the High Court for the first time recognized the concept of native title to land. Justice Brennan of the High Court wrote this: "The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land."⁶⁹

From an American perspective, the deprecating word "mere" is inappropriate, but even with it Justice Brennan's quotation supports the principle of Aboriginal sovereignty over the continent of Australia before European contact. And this principle, in turn, makes our Justice Thurgood Marshall's famous quotation apropos: "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."⁷⁰

This quotation does not answer all Indian law questions here in North America, nor does its application to Australia answer all Aboriginal law questions there. But as a statement of appropriate humility, made on behalf of the newcomers and their descendants, it has never been bettered. Furthermore, unlike the situation in New Zealand, where the Maori people are relative newcomers themselves to the island they call Aotearoa, in Australia the Aboriginal claim to sovereignty is very, very old—60,000 years is the present estimate⁷¹—thus pre-dating even the Indians of North America.

The argument could be made, then, that the *Mabo* High Court's mention of sovereignty is enough to bring Justice Marshall's humble observation into play, causing the doctrine of Aboriginal sovereignty to become part of the fabric of Australian law. However, the cases following *Mabo* appear to take a contrary position. For example, in a later stage of the *Coe* case mentioned above, Justice Mason wrote:

Mabo (No. 2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal

67. *Coe*, 24 A.L.R. at 128–29 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16).

68. (1992) 107 A.L.R. 1.

69. *Id.* at 41.

70. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172–73 (1973).

71. See BILL BRYSON, *IN A SUNBURNED COUNTRY* 185 (2000).

people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are "a domestic dependent nation" entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law. *Mabo (No. 2)* denied that the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of this country. *Mabo (No. 2)* recognised that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown. The principles of law which led to that result apply to the Australian mainland as the judgments make clear.⁷²

Mabo, then, is seen as setting Australian Aboriginal law on a course sharply different from American Indian law. And without the recognition of Aboriginal sovereignty, the first three listed principles of American Indian law disappear.⁷³

Regarding the fourth principle—the plenary power of Congress over Indian affairs—it was not until 1967 that the central government of the Commonwealth of Australia acquired any powers at all over Aboriginal affairs, and this was done by constitutional amendment.⁷⁴ Thus, the history of the competition between the central government and the states is nearly the opposite of that in the United States, where Indian affairs were assigned to the Congress from the earliest days and the States' role was limited, most substantially by *Worcester v. Georgia*.⁷⁵

In Australia, on the other hand, Aboriginal affairs were from the earliest days assigned to the States and Territories, with the Commonwealth government emerging as a major role player only in the 1960s. Thus, the fourth principle is much diminished in Australia, as, in turn, is the fifth principle. In short, the States play a much more prominent role in Australia than they do in the United States.

72. *Coe v. Commonwealth* (1993) 118 A.L.R. 193, 200.

73. As Professor Nettheim wrote, "It is, however, not always easy in the case of a community to disentangle powers of ownership from powers which may more appropriately be characterised as self-government." Nettheim, *supra* note 63, at 380.

74. *See id.* at 383.

75. 31 U.S. (6 Pet.) 515 (1832).

The sixth principle is easy to dismiss for there was never any treaty making with the Aboriginal clans, either by the British or, later, by the Australians.⁷⁶

That brings us, then, to the seventh principle, the trust responsibility, which is the topic of the present Symposium. Because the trust responsibility is the only one of the principles that has not been affirmatively rejected by Australian law, it is fertile ground for exploration. And, indeed, Professor Paul Martin, the lead investigator of the problem given at the outset, has taken a trust-approach as the best way to protect the aboriginal interests involved. I, too, will now turn there.

THE TRUST CONCEPT

The trust relationship can be created between parties who are members of particular groups, or it can be created contractually between individuals. It is the first situation that best describes the trust responsibility that lies between the United States and the Indian tribes. There are three ways that such a trust status might be created: constitutionally, by statute, or under the common law. The origins of the trusteeship that Chief Justice Marshall hinted at in *Johnson v. McIntosh*⁷⁷ and established in dicta in *Cherokee Nation v. Georgia*⁷⁸ does not appear to be constitutional, nor at that time was it statutory; rather it was a federal common-law doctrine, created by the Court, as common-law courts often do, to meet the needs of a changing world.⁷⁹ Later, of course, Congress created a statutory trusteeship in several contexts, most notably in the General Allotment Act.⁸⁰

This status is, of course, more than a little demeaning, especially when it is created by the operation of law between the dominant society (as trustee) and the subordinate society (as beneficiary). This debasement

76. Treaty making was going on between the United States and the Indian tribes at the time that colonization began in Australia, and, indeed, treaties were being made between the British and the tribes of British North America at the same time as well. But whether the British appraisal of the North American experience was that treaty making was a failed experiment, or whether the British appraisal was that the Aboriginal clans were less appropriate treaty partners than were the Indian tribes, or whether the British were open to treaties but the resistance came from the Aboriginal side, or whether this change in policy had to do (as much of early Australian history does) with the establishment of the penal colony, I do not know.

77. 21 U.S. (8 Wheat.) 543 (1823).

78. 30 U.S. (5 Pet.) 1 (1831).

79. See *United States v. Mitchell*, 463 U.S. 206 (1983).

80. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (formerly codified as amended at 25 U.S.C. §§ 331-333).

was perhaps best captured by the guardian-ward language of *Cherokee Nation v. Georgia*, based as it was on the observation that “[the Cherokees] are in a state of pupilage,”⁸¹ a sentence that it is impossible to read these days without squirming. Similarly, it is shocking to see Indians listed with “[a]ged [p]ersons; [c]onvicts; [s]pendthrifts; [and] [o]thers” in the fourth edition of *Williston on Contracts*.⁸² One of the driving forces behind the present Symposium is the desire to reformulate the trust responsibility in a way that removes the stigma of such a wardship.

A broad-based Australian trust responsibility toward Native Australians not having yet been established,⁸³ Professor Martin understandably turned to the creation of a private, contractual trust to serve the needs of the Aboriginal informant in the problem stated. However, there are some problems with such a solution. First, the property-law aspects of the privately created trust arguably represent, in the context of this particular problem, a commodification of knowledge. Such a result may be quite acceptable and ordinary in the context of Western law, but it may be quite contrary to the closely held beliefs, traditions and laws of non-Western aboriginal groups. Second, the existence of a trusteeship is still at least potentially demeaning, perhaps not to the extent of a trust via status, but nevertheless a trust created by contract is premised on the need by one party, the beneficiary, to have someone manage his or her affairs. Third, the contractual drafting that is required threatens an explosion of legal mumbo-jumbo, even in the context of protestations that the documentation must be in plain English. In my experience, “plain English” in a contract is not the “plain English” of the front page of a newspaper. Where I see most commonly these days “plain English” contracts is in the context of insurance policies and credit card agreements, which are both classic cases of contracts written by the stronger party to look after its interest first.

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

82. 5 WILLISTON ON CONTRACTS § 11:12 (Richard A. Lord, 4th ed. 1993).

83. In separate opinions in *Mabo v. Queensland (No. 2)* (1992) 107 A.L.R. 1, Justices Toohey and Dawson turned their attention to the existence, or not, of an Australian equivalent to the American federal trusteeship. Justice Dawson, dissenting, was strongly of the mind that no trusteeship exists in Australia:

But once it is accepted, as I think it must be, that aboriginal title did not survive the annexation of the Murray Islands, then there is no room for the application of any fiduciary or trust obligation of the kind referred to in [the Canadian case of *Guerin v. The Queen*, [1984] 2 S.C.R. 335] or of a broader nature.

107 A.L.R. at 129 (Dawson, J., dissenting). Justice Toohey was much more open to the existence of a trusteeship. *Id.* at 156-60 (separate opinion of Toohey, J.).

There is a further, hybrid kind of public-private trust occasionally found in American law, where a person opts into something like a trust arrangement privately, perhaps through contract. Having opted-in voluntarily, however, the relation becomes a status from which it is difficult or impossible to opt-out. An example would be an adoption, where the adopting parent voluntarily undertakes the responsibilities of parenthood, in what is essentially a court-sanctioned contractual arrangement. Following the adoption, however, the parent cannot merely determine to end the relationship, nor, in fact, can the parent and child together terminate the relationship without the State's permission. Likewise is the so-called "covenant marriage," where the parties voluntarily agree to bind themselves to a more difficult divorce procedure, and once having entered into that agreement, they may not withdraw merely because they are so inclined.⁸⁴ The Governor and First Lady of Arkansas recently made headlines by entering into a covenant marriage⁸⁵ and, indeed, the arrangement seems to be becoming more popular with 50-somethings, who have already learned each other's various quirks after 30 years of marriage, than it is with 20-somethings setting out on the adventure called marriage.

This generational difference is entirely sensible, and the Indian-law implication of the phenomenon is this: for some tribes, after a centuries-old relationship with the United States, the agreement to opt into a very structured and protective trusteeship might make sense, while for other tribes it may not. In Professor Martin's Australian problem, however, when the arrangement is between strangers, or virtual strangers, the creation by contract of a trusteeship difficult to terminate may threaten a lengthier "marriage" than either party—especially the weaker one—wants just now.

All of which leads me to propose a contract-law alternative to the trusteeship, with details to follow in the section below. But note first the transition from American Indian law, through Professor Martin's approach to the Australian problem, to my contract-law alternative, first to Professor Martin's approach, then back to American Indian law. Under the principles of American law discussed throughout this Symposium, a trust *status* exists between the United States and the tribes, that status coming into existence by operation of public law—constitutional, statutory, or common law—not by contract between

84. See, e.g., Ark. Code Ann. § 9-11-801 to 9-11-811 (2002 & Supp. 2005). See generally Chancey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U. ARK. LITTLE ROCK L. REV. 261 (2003).

85. See David Holman, *A New Covenant*, AM. SPECTATOR, Mar. 4, 2005, http://www.spectator.org/dsp_article.asp?art_id=7844.

individual persons or governments. That public law not existing in Australia, Professor Martin proposes the creation of a trust status between parties by private contract. Now, for reasons just given, I propose that we abandon—for Professor Martin’s problem initially, and perhaps more broadly—the trust concept entirely and seek to protect the various interests at stake through pure contract principles, principles that I now set out in more detail.

THE CONTRACTUAL OBLIGATION OF ENHANCED GOOD FAITH

A contract may impose explicitly on the parties an obligation of good faith in the performance of an agreement, and many do. Even if the contract does not do so explicitly, there is ample authority for the implied imposition of good faith upon the parties by operation of law. This is true whether the contract is itself expressly made or is an implied-in-fact contract whose terms are shown not verbally but by the surrounding circumstances.⁸⁶ This good-faith obligation could be imposed via a statute, instructing the courts to find and imply it in every contract of its kind, or it could be imposed via the common law.⁸⁷

There is also precedent for finding more than a standard, honesty-based obligation of good faith as implied in a contract. There are cases in which the standard is what I call *enhanced* good faith, where something more than honesty alone is required of the parties. Does this enhanced good faith reach the level of a fiduciary responsibility, defined by Judge Cardozo to be “the punctilio of an honor the most sensitive”?⁸⁸ Perhaps not, but perhaps this is just where we want to be with a contractual alternative to the trusteeship: some standard higher than simple honesty (though that would be enough in some egregious cases), but not so high as the potentially demeaning fiduciary standard.

Consider, if you will, the unlikely case (for this journal) of *Empire Gas Corp. v. American Bakeries, Co.*⁸⁹ Empire Gas entered into a contract with American Bakeries to convert the bakery’s fleet of delivery trucks to

86. If there is no contract at all between the parties, then restitution theory, sometimes known as unjust enrichment, *quantum meruit*, or “implied-in-law” contract, might still find that the party that has been enriched owes compensation to the party who provided the enrichment. See, e.g., *Am. Automated Theatres, Inc. v. Hudgins, Thompson, Ball & Assocs.*, 516 P.2d 565 (Okla. App. 1973). In situations such as these, restitution theory itself will take the good faith of the parties into consideration in arriving at an equitable determination.

87. See generally CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW* 441-77 (2003).

88. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); see *supra* note 62 and accompanying text.

89. 840 F.2d 1333 (7th Cir. 1988).

propane fuel and then to supply the fuel itself for the duration of the contract. This contract was a *requirements* contract, so-called because the quantity term was not set with precision, but rather in reference to the requirements of the buyer. While the contract stated an estimate of 3,000 conversion units, it was intentionally indefinite as to exactly how many units would be required or how much propane would be required following conversion. Some short period of time after entering into the contract, American Bakeries had second thoughts about the entire conversion, but instead of cancelling or terminating the contract (which it had no contractual right to do), it merely announced that it had decided not to convert and that its requirements were zero with respect to both the conversion units and propane. American Bakeries decided to continue using gasoline. Empire Gas sued, alleging that American Bakeries did not set its requirements at zero in good faith and was therefore in breach of contract. Verdict was for the plaintiff, and the holding was subsequently affirmed by the Court of Appeals.

The legal treatment of requirements contracts has a checkered past because of the indefiniteness of the quantity term.⁹⁰ The quantity term in a contract, of course, is the one term in which indefiniteness can be fatal. Nearly every other term—price, delivery date, delivery terms, and so forth—can be provided by a court if the parties leave it indefinite. For example, if the price is not given, the court in most cases can approximate the parties' intention by applying the market price.⁹¹ Or if the delivery date is indefinite, the court can guess that the parties intended a reasonable delivery date.⁹² But what is a reasonable *quantity*? For this reason, the courts have tended to require that the parties state the quantity with some precision, and the Statute of Frauds in Article Two of the Uniform Commercial Code states that no contract is enforceable beyond the quantity given in the writing.⁹³

But what if the parties, as in *Empire Gas*, designate the quantity by reference to what the buyer *needs*? Here the courts were ready to accept the indefiniteness of the quantity term *if* there were some enforceable limits on the ability of the buyer to manipulate its needs.⁹⁴ Generally speaking, these limitations came in two forms: First, the contract had to limit, expressly or by implication, the buyer's freedom to buy elsewhere, thereby reducing its needs to be satisfied under the

90. See generally 3 WILLISTON ON CONTRACTS § 7:7 (Richard A. Lord, 4th ed. 1992).

91. See U.C.C. § 2-305 (amended 2003).

92. See U.C.C. § 2-309(1) (amended 2003).

93. See U.C.C. § 2-201(1) (amended 2003).

94. See generally 3 WILLISTON ON CONTRACTS § 7:7 (Richard A. Lord, 4th ed. 1992).

requirements contract.⁹⁵ Second, the courts and later the statute imposed on the buyer the obligation that its requirements be set in *good faith*.⁹⁶ It is this mention of good faith that justifies the discussion of *Empire Gas*, working as I am toward an implied good faith standard in the contracts called for by Professor Martin's problem.

Section 2-306(1) of the Uniform Commercial Code states, "A term which measures the quantity by...the requirements of the buyer means such actual...requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior...requirements may be...demanded."⁹⁷ Here, then, is an expression of the statutory imposition of a good faith requirement into a contract, even in the absence of an express mention of good faith. Now, at the time when *Empire Gas* was decided, the term "good faith" had two definitions under the Uniform Commercial Code, a subjective one and an objective one. Subjectively, section 1-201(19) defined good faith as "honesty in fact in the conduct or transaction concerned." Here, the inquiry was not what the party *should* have done, but what it actually did, and whether that action was *actually* honest. However, in Article Two, and only with respect to merchants, section 2-103(1)(b) defined "good faith" more objectively as, "in the case of a merchant...honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."⁹⁸

However, in *Empire Gas*, the court had to deal with the bakery's substantial under-order of zero conversion units and zero propane, and the concomitant question of whether good faith—whether subjective or objective—was enough of a reason for the buyer to set its requirements at zero.

The majority of the Seventh Circuit panel, in an opinion written by Judge Posner, first determined that the proportionality requirement of the statute did not apply to under-orders in the same way that it applied to over-orders and, in fact, the statute did not put any proportionality requirement at all on an under-ordering buyer.⁹⁹ The court had a small

95. See, e.g., *Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117 (5th Cir. 1985).

96. U.C.C. § 2-306(1) (amended 2003).

97. *Id.* The statute at the same time speaks of contracts where the quantity is stated in reference to the seller's *outputs*, and it is the editing out of all of the parallel references to outputs contracts that creates all of the ellipses. U.C.C. § 2-306(2) (amended 2003) deals with the related question of exclusive marketing agreements.

98. Recent amendments to Articles 1 and 2 have resulted in the abandonment of the subjective test of good faith and the imposition on all parties, merchants or not, of the objective standard, now found in section 1-201(23).

99. *Empire Gas Corp. v. Am Bakeries, Co.*, 840 F.2d 1333, 1337-38 (7th Cir. 1988).

bit of section 2-306 text to hang its hat on: the natural reading of the word “demanded” at the end of the section seemed to suggest to the court that the clause regarding proportionality dealt only with those situations where the buyer was *demanding* that an amount greater than the stated estimate be tendered, and not where the buyer was *demanding* that an amount smaller than the stated estimate be tendered. There is certainly some sense behind this statutory construction, but if the reader thinks that it is a thin reed, then Judge Posner would agree, for he launched into a typical law-and-economics discussion of the differences between under-orders and over-orders to support the court’s construction of the word “demanded.”¹⁰⁰

Having done away with any notion that the bakery’s zero under-order was absolutely prohibited by section 2-306, the court then turned its attention to the question of what limits there were on such under-orders, and here it focused on the term “good faith” in the statute. Finding, for reasons that are not entirely satisfying, that neither the definition of subjective good faith in section 1-201(19) nor the definition of objective good faith in section 2-103 was adequate, the court interpreted the term “good faith” in section 2-306(a) to require that the buyer show what the court called a “valid business reason” for the substantial—in this case zero—under-order.¹⁰¹

I seem to have come a long way from the topic of this Symposium, dealing as it does with the trust responsibility the United States owes to the Indian nations. But I believe the digression is relevant, as I admire the way that the Seventh Circuit dealt with the good faith issues involved in the interpretation of section 2-306(a) and in particular the way it enhanced the good faith requirement from pure subjective or even objective good faith into something more—a valid business reason, whatever that is.¹⁰²

100. *Id.* at 1338.

101. The point of departure between the majority and the dissent was over where the burden of proof lay: did the plaintiff, who was the seller, have the burden of showing that defendant, who was the buyer, had no valid business reason for the under-order, or vice versa? The majority thought that the plaintiff/seller had the initial burden of showing that the defendant/buyer had the wherewithal to make the purchase, but that thereafter the defendant/buyer had to justify the under-order by showing a valid business reason. In *Empire Gas*, American Bakery had introduced no evidence at all of its reason for the under-order; therefore, the bakery lost. *Id.* at 1341. The dissenting judge thought that this was tantamount to placing the burden of proof on the defendant. *Id.* at 1342–43 (Kanne, J., dissenting).

102. Because American Bakeries had not attempted to justify its zero under-order at all beyond the proclamation that it needed no conversion units and therefore no propane, the Seventh Circuit never had to explain exactly what it meant by the phrase “valid business

It is exactly this enhanced good faith that I find so useful, first in solving Professor Martin's Australian problem, set forth initially, and more generally as a new paradigmatic perspective on the federal trusteeship here in the United States. I find helpful not so much the end result of the *Empire Gas* case, establishing a "valid business reason" test for substantial, disproportionate under-orders in requirements contracts, but the legal method used by the Seventh Circuit in reaching that result. That the good faith setting of the buyer's requirements in a requirements contract is insisted upon is itself an appropriate first step, emphasizing the otherwise indistinct setting of the important quantity term. But the ability of the court to justify the ratcheting up of "good faith" from subjective to objective and finally to enhanced shows, to me, the common-law system at its finest. It is exactly the ability of a court to move the law toward a situation unanticipated by the legislature that makes the common law work, and no disparagement of the process as "legislating from the bench" makes that work any less effective or valuable.

CONCLUSION

To conclude then, I must say that, as a commercial law teacher and not a property teacher, I prefer the notion of a contractually based solution to a property-based solution. It certainly cures the problem related to the commodification of information. And, it seems to me to be less potentially demeaning than the creation of a trust, express or implied. The public-private mix I mentioned above suggests that there ought to be a way to have the recipient of the information undertake the obligation of enhanced good faith in the contract with the provider, but to prevent the recipient from obtaining consent to withdraw from the obligation. The nature of the transaction would be essentially consensual and arms' length, but the protection for the weaker party would lie not in making the information given the object of a trust, but in the regulation of the behavior of the parties both inter se and with third parties.

Some part of the establishment of a standard of enhanced good faith might be undertaken first before the legislature; recall that the starting point for the Seventh Circuit in establishing the standard of enhanced good faith was with the mention of "good faith" in section 2-306(a). However, in Professor Martin's problem, the contractual

reason." There is considerable dicta in the case about what the phrase might be, but no holding, which was left to later cases.

approach does not *need* a statute, because, given willing recipients of the knowledge, the contract could create the enhanced obligation explicitly.

Between tribes and the federal government, the need for legislative action is greater than between individuals. If a tribe and the government are contracting, then there is no reason that the principle of enhanced good faith ought not to be imposed on both parties by the common-law courts without the necessity of a legislative first step. However, the straightforward application of the principles of enhanced good faith to the trusteeship as it presently exists over much land in Indian country is more problematic, if only for the fact that the present trust responsibility restricts the alienability of the land. Hence, the private, contractual, paradigmatic perspective that I propose here is, to some extent, dependent on the more elaborate rethinking of the trusteeship that my fellow contributors in this Symposium have proposed in their articles. Beyond that, it would depend upon the willingness of common-law judges to see and enforce the good-faith obligation. As I mentioned, there is ample precedence for that, even where the contract is not explicit regarding the obligation of good faith. I actually think that the contract that I foresee will be less cumbersome than the various trust proposals, just because it is easier to impose an obligation of good faith than it is to create a trust, even where there is a tangible trust corpus, let alone an intangible, intellectual property one. Furthermore, I suspect that the idea of good faith and fair dealing crosses cultural barriers more easily than does the idea of information as property subject to trust rules.

Afterword

Having begun this essay with thoughts of the late Toby Grossman, I am tempted to return to those thoughts at the end, for symmetry's sake, that being an obscure allusion that she would appreciate. But to dwell on the fact that this is one essay that she won't read is more morose than I want to be. To mention that I have tried to anticipate Toby's objections and speak to them is both presumptuous and self-serving. To observe that the last time I saw her was at the present Symposium would not be true; it was at the one before this one.

So, how do I end? I used to tease her about the fact that she took her margaritas with neither tequila nor salt, which made them, in my estimation, limeade. And she would remark that she liked them that way, and who cared about the name? Somehow I think that within that comment lies an observation about good faith and the trust responsibility that is worth remembering.