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I. INTRODUCTION

The relationship between the United States and the American Indians is marked by extreme shifts in the policy of the federal government toward the Indian Nations, from the forcible removal of "hundreds of tribes . . . from their ancestral lands" to "a commitment . . . to revive tribal governments." The history of that relationship developed out of a tension between the two doctrines that form the basis for the federal-tribal relationship: the "plenary" power over Indian affairs vested in the federal government by the United States Constitution and "special trust obligations" which impose strict fiduciary standards on the federal government's dealings with Indians.

The "trust doctrine" is rooted in Chief Justice Marshall's opinions in the "Cherokee Cases," Cherokee Nation v. Georgia and Worcester v. Georgia, where he described the relation of the Indian tribes to the United States as a "federal family" requiring "the care and protection of the parent for the minor." The "trust" is a form of "special relationship" between the two parties, creating a "dual sovereignty," each exercising their own governmental powers over Indian affairs. The federal government's power is "plenary" or "wide," meaning that the government has the power to regulate Indian affairs as it sees fit, subject only to the limitations imposed by the Constitution. The Indian tribes, on the other hand, have "special trust obligations," meaning that the government must act in the best interests of the tribes and must exercise a standard of care that is "fiduciary," or "trustee." This standard requires the government to act in a manner that is "good faith," "fair," and "equitable." The government must also be "accountable" to the tribes, meaning that the government must provide full and complete disclosure of information relevant to the tribes.

The "trust doctrine" is a central principle of federal-tribal relations and is reflected in the Constitution and in the laws and regulations that govern Indian affairs. The doctrine is based on the idea that the federal government has a "special relationship" with the Indian tribes and that the government must act in the best interests of the tribes. The doctrine has been used to justify a wide range of policies, from the establishment of reservations to the regulation of Indian affairs. The doctrine has also been used to challenge the government's actions, such as when the government attempts to divide or sell tribal lands without the tribes' consent.

The "trust doctrine" has been applied in a variety of ways, depending on the facts of each case. In some cases, the doctrine has been used to protect the tribes' rights and interests, such as when the government attempted to sell tribal lands without the tribes' consent. In other cases, the doctrine has been used to justify government actions, such as when the government attempted to regulate Indian affairs. The doctrine has been controversial, with some arguing that it is too strict and others arguing that it is too lenient.

The "trust doctrine" is a complex and controversial issue that continues to be debated in the courts and in Congress. The doctrine is likely to remain a central principle of federal-tribal relations for the foreseeable future, and it is likely to continue to be applied in a variety of ways, depending on the facts of each case.

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1. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 49 (1982 ed.).

2. There are three explicit Constitutional references to Indians: the Indian Commerce Clause, which authorizes Congress to "regulate Commerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3; the exclusion of "Indians not taxed" from population counts taken for the purpose of apportioning taxes and Congressional representatives, Id. art. I, § 2, cl. 3, amend. XIV, § 2. The Treaty Clause, art. II, § 2, cl. 2, which vests exclusive power to enter into treaties in the Federal Government, and the Property Clause, art. IV, § 3, cl. 2, which vests power "to dispose of and regulate 'the Territory or other Property belonging to the United States'" in Congress, along with art. I, § 8, cl. 18, the Necessary and Proper Clause, and art. VI, cl. 2, the Supremacy Clause, are additional sources of Federal authority over Indian affairs. COHEN, supra note 1, at 207-11.

3. COHEN, supra note 1, at 207.


5. 31 U.S. (5 Pet.) 515 (1832).
States as resembling "that of a ward to his guardian." This doctrine has proved to be a two-edged sword. For more than five decades following the Cherokee Cases, issues regarding the scope and meaning of the trust doctrine remained dormant. Then, for a period of about forty years, beginning with United States v. Kagama and ending with United States v. Candelaria, the trust doctrine was treated as an additional, independent source of federal power over Indian affairs. During this period, the trust relationship was used to expand the ability of the Federal Government to intrude into internal tribal affairs.

Until recently, however, the trust relationship has not been effective as a limitation on federal power. Early attempts by Indians to seek equitable relief for breach of fiduciary duty on the part of the executive branch often met with dismissal on grounds of sovereign immunity. The Court is now willing to find that the trust relationship imposes fiduciary duties on the actions of Executive agencies but remains hesitant to find the same duties imposed on Congressional action in Indian affairs. While the Supreme Court appears to have acknowledged a "general trust relationship" between the Federal Government and the Indians in United States v. Mitchell, the Court based its finding of a fiduciary duty on a statutorily created comprehensive timber management scheme. The Mitchell II Court also found an independent basis for the fiduciary duty "when the Government assumes such elaborate control over forests and property belonging to Indians."

If the trust doctrine is to operate as an effective limitation on Federal power over internal tribal affairs, it must be able to reach Congressional as

6. COHEN, supra note 1, at 220.
8. 118 U.S. 375 (1886).
10. COHEN, supra note 1, at 220.
11. See, e.g., Kagama, 118 U.S. at 283-84 (upholding, on the basis of the guardian-ward relationship, the Major Crimes Act, which extended Federal Jurisdiction to crimes committed by Indians against other Indians in Indian Country).
12. See, e.g., Naganab v. Hitchcock, 202 U.S. 473 (1906) (dismissing a Constitutional challenge to a statute authorizing the classification of land ceded to the United States by the Chippewas as forest land, on grounds that the classification would decrease the value of the land and thus reduce the size of the Chippewa's trust account and annual sales).
15. Id. at 225, (quoted in Kimberly T. Ellwanger, Money Damages For Breach of the Federal-IndianRelationship After Mitchell II — United States v. Mitchell, 59 WASH L. REV. 675, 685 (1984)).
well as Executive action. This will require a basis beyond a statutory
scheme or assumption of control over a specific area of Indian activity.
This article will explore the possibility of such a basis. In part II, I look at
the development of the trust doctrine in case law. In part III, I look at how
several commentators view the trust doctrine. In part IV, I will explore the
possibility of developing a broader basis for the trust doctrine based on an
application of social contract theory to the original understanding of the fe-
deral-Indian relationship as documented by Chief Justice Marshall in the
Cherokee Cases. I then discuss the implications of the resulting social con-
tract paradigm of the trust doctrine and describe how it should be applied.

II. THE DEVELOPMENT OF THE TRUST DOCTRINE

Authors of legal opinions, treatises, and law review articles generally
cite Cherokee Nation v. Georgia and Worcester v. Georgia, commonly
known as the "Cherokee Cases," as the source of the federal trust doctrine
in Federal Indian Law. In this section of the paper, I first set forth the
reasoning of the Court in these foundational cases. I then discuss the
evolution of the trust doctrine in subsequent Supreme Court cases. Finally,
I discuss how various commentators view the trust doctrine.

A. THE ACCEPTED FOUNDATION OF THE TRUST DOCTRINE: CHEROKEE
NATION AND WORCESTER

In Cherokee Nation, the Cherokees, identifying themselves as a
"foreign state, not owing allegiance to the United States, nor to any state of
this union, nor to any prince, potente or state, other than their own,"
sought an injunction against the enforcement of a Georgia state statute
annexing land that came within the boundaries of the Cherokee Nation's
territory as established by federal treaty, extending the laws of Georgia over
Cherokee land, and abolishing the laws of the Cherokee Nation. The
Cherokee Nation Court denied the Cherokees' request on the ground that the
Court lacked jurisdiction to hear the case, because the Cherokee Nation, not
being a foreign nation, lacked standing to bring the cause of action.

17. 31 U.S. (6 Pet.) 515 (1832).
18. See, e.g., Choctaw Nation v. United States, 397 U.S. 620 (1970); Felix S. Cohen,
Handbook of Federal Indian Law 220 (2d ed., 1932); Gail M. Lambert, Indian
Breach of Trust Suits: Partial Justice in the Court of the Conqueror, 33 Rut. L. Rev.
19. 30 U.S. at 3, 7.
20. Id. at 17. Justice Marshall undertook this inquiry into the status of the Cherokee
Nation because, under Article III of the United States Constitution, which enumerates the
Justice Marshall, finding that the Cherokee Nation was more properly described as a "domestic dependant nation" in a "state of pupilage" whose relationship with the United States resembled that of a "ward to his guardian," went on to note that the tribes "look to our government for protection; appeal to it for relief to their wants; and address the president as their great father." This language, with its emphasis on the dependant status of the Cherokees, is supportive of the power side of the trust equation: power born of paternalism. It developed into the plenary power doctrine about half a century later in Lone Wolf v. Hitchcock.

Worcester did not share Cherokee Nation's jurisdictional defect. The plaintiff in error in Worcester was a white missionary who had been indicted and convicted in the supreme court for the county of Gwinnett in the state of Georgia under a Georgia statute prohibiting whites from "residing within the limits of the Cherokee Nation without a license." As cases over which the Court has jurisdiction, the Court may hear only cases involving controversies "between a state or the citizens thereof and foreign states, citizens or subjects." Id. at 15. The Cherokee Nation had argued that, as individuals, the Cherokees were aliens who owed no allegiance to the United States and that a state composed of aliens must be a foreign state. Id. at 16. Marshall felt that this argument could not be taken at face value because of the unique relationship between the Indians and the United States. Id. Marshall's analysis of whether the Cherokee Nation was a foreign state for Article III purposes focused on the following factors: the "maps, geographical treatises, histories and laws" of the United States all considered Indian territory to be part of the United States; in their treaties with the United States, the Cherokees acknowledged that they are under the protection of the United States and that the United States alone could regulate trade with the Cherokees; that, if any nation attempted to acquire Indian land or "form a political connection" with the Indians, the United States would view it as an act of hostility; and that framers of the constitution did not include the Indians among those able to sue in the federal courts but did separately list them in the Commerce Clause, thus distinguishing them from foreign nations and the states of the union. 30 U.S. at 17-18. Justices Johnson, Id. at 20-31, and Baldwin, Id. at 31-51, concurred in the judgment but concluded that the Indians possessed no sovereignty, while Justice Thompson, joined by Justice Story, dissented, Id. at 50-80, viewing the Cherokees as a foreign nation.

21. Id. at 17. The Court also noted that, because the idea of appealing to the courts for redress would not have occurred to Indians at that time, it was understandable that Indians and Indian tribes were not included in the enumerated parties who might sue in Federal Courts. Id. at 18. The Court found additional support for its conclusion that the Cherokee Nation was not a foreign state in art. III, § 8 of the United States Constitution, which clearly distinguished between foreign nations and Indian tribes. Id.

22. 187 U.S. 553 (1903). Lone Wolf will be discussed infra at notes 66-67 and accompanying text.

23. 31 U.S. at 536.

24. 31 U.S. at 529. The Georgia statute at issue here, "an act to prevent the exercise of assumed and arbitrary power, by all persons, under the pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part
defendant before the state court, Worcester had pled that the Georgia statute was "repugnant to the treaties [between the United States and the Cherokee Nation], and unconstitutional and[,] therefore, void". This plea was overruled by the state court, which convicted and sentenced Worcester; Worcester appealed to the United States Supreme Court. The parties being properly before the Court, the Court went on to find that the questions of the validity and construction of the treaties between the United States and the Cherokee Nation and of the constitutionality of the Georgia statute were within the proper jurisdiction of the Court.

Chief Justice Marshall concluded that the Georgia statutes were repugnant to the constitution, treaties, and laws of the United States and were, therefore, void. His analysis began with a discussion of the history of the relationship between the Indians and Great Britain which set the stage for the Cherokee's understanding of the relationship the Hopewell and Holston treaties forged between the Cherokee Nation and the United States. He noted that the "settled state of things when the... revolution commenced" was based on the British policy that "considered them as a nation capable of maintaining relations of peace and war; of governing themselves, under her protection; and [made] treaties with them, the obligation of which she acknowledged." Treaties generally contained an

of the chartered limits of Georgia, occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory" was included among the statutes at issue in Cherokee Nation, all of which were passed in the same session of the Georgia legislature. See Cherokee Nation, 30 U.S. at 13.

25. Id. at 536.
26. Id.
28. 31 U.S. at 541.
29. Georgia had "repeatedly remonstrated the President" for the failure of the United States to extinguish Indian title over lands within the territory of Georgia in direct violation of the conditions of the 1802 act of cession by which Georgia ceded to the United States all land she had claimed with lay west of a designated line. 31 U.S. at 583, 586-87 (M'Lean, J., concurring). Georgia felt that the Government's pursuit of its goal of civilizing the Cherokees had increased the difficulty of extinguishing Indian title. Id. at 587. Justice M'Lean expressed sympathy with Georgia who "no doubt" enacted the laws at issue "under a conviction of right" and out of "a sense of wrong" because of the lapse of thirty years "since the time the federal government engaged to extinguish the Indian title, within the limits of Georgia." Id. at 595. M'Lean concurred in the judgment, however, because the Georgia laws under which Worcester was convicted were repugnant to the constitution, treaties, and laws of the United States. Id. at 596.
30. 31 U.S. at 555.
31. Id. at 548-49.
acknowledgment that the signatory tribe was "under the protection" of [the signatory power: Great Britain, another European sovereign, or the United States] and of no other power."32 The signatory power generally "interposed [their power] to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder."33 According to the understanding of both the British government and the Cherokee Nation, this protection was "an engagement [by the British] to punish aggressions on" their dependant ally, the Cherokee Nation.34 The Cherokees' understanding of their relationship with Great Britain carried over into their understanding of the relationship with the United States that was set forth in the Hopewell and Holston treaties.35

In his discussion of Article Nine of the Treaty of Hopewell, Justice Marshall noted that construing the words "the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs" as "a surrender of self-government" would be "a departure of [the words'] necessary meaning, and a departure from the construction which has been uniformly put on them."36 Justice Marshall asked:

Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? . . . It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade.37

This language laid the foundation for the canon of construction that treaties must be construed as the Indians would have understood them. In fact, the

33. 31 U.S. at 552.
34. Id. at 552.
35. Id. at 555.
36. 31 U.S. at 553-54.
37. Id. at 554.
Court in *Choate v. Trapp*,38 traced the "enlarged rules of construction [that] are adopted in reference to Indian treaties" back to Chief Justice Marshall.39

This understanding carried over to the treaty of Holston, negotiated in July 1791, when it became apparent that the treaty of Hopewell had failed to establish a lasting peace.40 In his discussion of the treaty of Holston, Chief Justice Marshall emphasized the mutuality of the agreements reached.41 He concluded that the treaty of Holston "explicitly recognize[d] the national character of the Cherokees, and their right to self government."42 Additionally, Chief Justice Marshall noted that a 1819 Congressional Act promoting "humane designs of civilizing the neighboring Indians . . . avowedly contemplate[d] the preservation of the Indian nations as an object sought by the United States."43 He concluded that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."44

Chief Justice Marshall next considered whether the 1819 Congressional Act was a proper exercise of Federal power. He based his affirmative answer on the Constitution's grant to Congress of the "powers or war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes."45 According to Chief Justice Marshall, such powers give Congress unrestricted power to regulate intercourse with the Indians.46 He concluded that the Georgia statutes were "repugnant to the constitution, laws, and treaties of the United States" in that they "interfered[d] forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, is committed exclusively to the government of the union," and are in

38. 224 U.S. 665 (1912).
39. Id. at 675 (quoting Blue Jacket v. Johnson County, 72 U.S. 737, 760 (1866)).
40. 31 U.S. at 554-55.
41. Id. at 555. Examples of this mutuality are article three's provision for the "perfectly equal" surrender of prisoners and the United States' acceptance, in article five, of the Cherokee Nation's concessions in "allow[ing] the United States a road through their country and the navigation of the Tennessee river . . . is an acknowledgment of the right of the Cherokees to make or withhold them." Id. at 556.
42. 31 U.S. at 556.
43. Id. at 557.
44. Id. at 557 (emphasis in original).
45. Id. at 559.
46. 31 U.S. at 561.
direct hostility with treaties . . . which mark out the boundary that separates the Cherokee country from Georgia, guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.47

Therefore, the Georgia statutes were void, and the Court reversed Worcester's conviction.48

Where Chief Justice Marshall's Cherokee Nation opinion emphasized in dicta the federal government's power pursuant to the guardian-ward relationship, his Worcester opinion, with its discussion of the Cherokees' understanding of the relationship they forged with the United States, sowed the seeds of a corresponding obligation on the part of the federal government. The former would germinate much sooner than the latter.


In United States v. Kagama,49 the Court cited Cherokee Nation and Worcester as "perhaps the best statement of [the Indians'] position."50 The plaintiff in error was Kagama, one of two Indians convicted of murdering another Indian belonging to the same tribe on the tribe's reservation land.51 Kagama asked the Court to rule on the constitutional validity of Major Crimes Act, which criminalized, under Federal Law, the murder of one Indian by another on reservation land and gave federal courts jurisdiction over that crime and under which Kagama had been indicted and convicted.52

Nearly three years before Kagama, and before the passage of the Major Crimes Act in 1855, the Court had found that the federal court did not have jurisdiction in Ex parte Crow Dog, a case presenting nearly identical facts.53 In Crow Dog, the federal district court based its exercise of jurisdiction over a Sioux Indian indicted for the murder of another Sioux on Sioux reservation land on the conclusion that section 2146 of the Revised

47. Id. at 561-62.
48. Id. at 562-63.
49. 118 U.S. 375 (1886).
50. Id. at 382.
51. Id. at 375-76.
52. Id. at 376.
Statutes, which excepts "crimes committed by one Indian against the person or property of another Indian" from the exercise of federal court jurisdiction over crimes committed in Indian Country, had been impliedly repealed.\textsuperscript{54} One of two provisions cited by the district court as effecting this repeal was included in an agreement with the Sioux ratified by act of Congress in 1877: "[C]ongress shall, by appropriate legislation, secure for [the Sioux] an orderly government; they shall be subject to the laws of the United States."\textsuperscript{55} The Supreme Court, however, viewed the pledge to secure the Sioux an orderly government as encompassing the "highest and best" "among the arts of civilized life . . . self-government, the regulation by themselves of their own domestic affairs."\textsuperscript{56} The Court also stated that the provision subjected the Sioux, as a dependant community rather than as individuals, not to the general laws of the United States but rather to those laws "which applied to them as Indians."\textsuperscript{57}

Justice Miller's opinion for the Court in \textit{Kagama} is devoid of any discussion of the possibility of exclusive tribal jurisdiction present in \textit{Crow Dog}. Miller stated that the Major Crimes Act was designed to make clear the Congressional intent to repeal section 2146.\textsuperscript{58} He went on to conclude that the Major Crimes Act was "within the competency of Congress,"\textsuperscript{59} offering the following in support:

These Indian tribes are the wards of the nation. They are communities dependent on the United States, — dependant largely for their daily food; dependant for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill

\textsuperscript{54} Id. at 562.
\textsuperscript{55} Id. at 566.
\textsuperscript{56} 109 U.S. at 568.
\textsuperscript{57} Id. at 569. The district court also cited a provision in an 1868 treaty with the Sioux that ""if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States . . . the Indians herein named solemnly agree that they will . . . deliver the wrong-doer to the United States to be tried and punished according to its laws."" Id. at 567. The Supreme Court concluded that interpreting this provision to apply to "a wrong committed by one Indian upon another of the same tribe" would be inconsistent with the preceding provision that, if the offender was "one of the Indians who are parties to the treaty" and the offender was not given over to the United States, "deduction is to be made from the annuities payable to the tribe, for the compensation of the injured person." Id.
\textsuperscript{58} 118 U.S. at 383. Miller pointed out that the \textit{Crow Dog} Court had admitted that "if the intention of congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid." Id.
\textsuperscript{59} Id. at 383.
feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.60

This characterization, focusing on an abject dependency of the tribes, stands in stark contrast to Chief Justice Marshall’s characterization of the Cherokee Nation as a “dependant ally” in Worcester.61 In fact, Justice Miller mentions neither the extensive analysis of the relationship between the Cherokee Nation and Great Britain, nor the discussion of how that relationship informed the Cherokees’ understanding of the relationship that the early treaties forged between the Cherokee Nation and the United States contained in Chief Justice Marshall’s majority opinion in Worcester. Instead, Justice Miller cites Justice Baldwin’s concurrence in Cherokee Nation as a “valuable résumé of the treaties and standards concerning the Indian tribes previous to and during the confederation.”62 Justice Baldwin presented a very different view of the effect of the treaty of Hopewell than was presented by Chief Justice Marshall:

[The Cherokees] contracted by putting themselves under the protection of the United States, accepted of the allotment of hunting grounds, surrendered and delegated to congress the exclusive regulation of their trade and the management of all their affairs, taking no assurance of the continued sovereignty, if they had it before, but relying on the assurance of the United States that they might have full confidence in their justice respecting their interests; stipulating only for the right of sending one deputy of their own choice to congress.63

This, like the tone of Justice Miller’s Kagama opinion, focuses on the power aspect of the tribal-federal relationship: the ward dependent on the guardian’s protection for survival, as opposed to Justice Marshall’s depiction of the weaker ally placing itself under the protection of the stronger against encroachments onto its land and sovereignty. However, Justice Miller’s recognition that a “duty to protect,” as well as power, arises out of the

60. Id. at 384.
61. See supra note 34 and accompanying text.
62. 118 U.S. at 382.
63. 30 U.S. at 45.
tribe's status as a ward does suggest an obligation, and perhaps a limitation, on that power.

This focus on the power side of the equation continued in *Lone Wolf*, in which Lone Wolf, on behalf of himself and the confederated Kiowa, Comanche, and Apache tribes, sought a permanent injunction against enforcement of an agreement\(^64\) providing for the cession of commonly held land.\(^65\) The Indians maintained that the cession was obtained fraudulently and in violation of article 12 of the Medicine Lodge Treaty, which required execution and signature by three-fourths of all adult males occupying the land to be ceded.\(^66\) Lone Wolf argued that Congress could not divest the confederated tribes of their interest in lands held by them in common by any manner other than that specified in the Medicine Lodge Treaty.\(^67\)

The Court rejected that argument as "ignor[ing] the status of the contracting Indians and the relation of dependency they bore and continue to bear toward the government of the United States"\(^68\) and noted that "[p]lenary authority of 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."\(^69\) Further, the Court articulated a presumption of "perfect good faith in [Congress'] dealings with the Indians."\(^70\) This presumption would appear to render hollow any obligation on the part of Congress that may be inherent in the guardian-ward relationship by foreclosing on any inquiry into Indian claims that Congress had not satisfied its obligation to the Indians.

*Lone Wolf*'s assumption of perfect good faith had been foreshadowed the previous year in *Cherokee Nation v. Hitchcock*.\(^71\) In *Hitchcock*, the Cherokees challenged the decision of the Secretary of the Interior, under authority granted him by act of Congress on June 28, 1889, to issue mineral

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\(^64\) Formal treaty making between the federal government and Indian tribes was brought to an end by the Appropriations Act of March 3, 1871, codified at 25 U.S.C. § 71. Agreements between the tribe and the federal government continued to be negotiated and then approved by both the Senate and House. *See COHEN, supra* note 1, at 107.

\(^65\) 187 U.S. at 560.

\(^66\) *Id.* at 561. The Senate, in response to an inquiry regarding whether the requisite signatures had been obtained, had been informed by the Secretary of the Interior that they had not. *Id.* at 557. Additionally, the Indians had sent a memorial to Congress protesting the agreement and requesting that it not be adopted. *Id.* at 558.

\(^67\) *Id.* at 564.

\(^68\) 187 U.S. at 564.

\(^69\) *Id.* at 565.

\(^70\) *Id.* at 568.

\(^71\) 187 U.S. 284 (1902).
and oil leases for deposits on land held in trust by the tribe.\textsuperscript{72} The Cherokees argued that this grant of authority to the Secretary was in direct conflict with the treaty of New Echota, 1885, which granted the Cherokees "the exclusive right to the use, control and occupancy of tribal lands."\textsuperscript{73} The Court, pointing to Congress's plenary power over the Indian tribes, rejected the Cherokee's argument.\textsuperscript{74} The Court's opinion included the following:

\begin{quote}
[T]he title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.\textsuperscript{75}
\end{quote}

Having recognized a trust obligation on the part of the government, however, the Court went on to say that it is not concerned with whether the Secretary's decision to grant the leases was wise or "calculated to operate beneficially to the interests of the Cherokees" because

\begin{quote}
[The power existing in Congress to administer upon and guard tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.\textsuperscript{76}
\end{quote}

In both \textit{Lone Wolf} and \textit{Hitchcock}, the Court recognized a trust relationship but rejected the attempt on the part of the Indians to appeal to the courts in order to hold the government accountable under that obligation.\textsuperscript{77} While the Court was not responsive to attempts by the Indians to hold the government accountable under the trust doctrine, it did recognize the government's power, under that doctrine, to act to protect Indian

\begin{enumerate}
\item \textsuperscript{72} 187 U.S. at 299.
\item \textsuperscript{73} Id. at 294.
\item \textsuperscript{74} Id. at 306.
\item \textsuperscript{75} Id. at 302 (quoting \textit{Senate Committee on the Five Civilized Tribes of Indians}, Sen. Rep. No. 377, 53d Cong. 2d sess. (1894)).
\item \textsuperscript{76} 187 U.S. at 308.
\item \textsuperscript{77} Justice White wrote both the \textit{Lone Wolf} and \textit{Hitchcock} opinions. There were no dissenters in either case.
\end{enumerate}
interests — as the government saw those interests and even in the face of the disagreement of the Indian whose interest the government sought to protect.

The power of the government to act to protect an Indian's interest regardless of whether the Indian shared the government's view of what that interest was is evidenced in *Heckman v. United States*. In *Heckman*, the government had sued to cancel conveyances of allotted lands, located on the Cherokee reservation and still held in trust by the government, in order to protect the Indian grantors from their own inability to manage their land prudently. The defendant challenged the court's ability to issue a final decree on grounds that the Indian grantors, who were necessary parties, were absent. Because the Indian grantors were precluded from alienating their land by Congressional Act, the Court concluded that "it could not, consistently with any principle, be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question."

C. DEVELOPMENT OF THE TRUST DOCTRINE AS A PROTECTION OF INDIAN INTERESTS

The government also acted on behalf of Indians in situations where the government's view of the Indians' interest coincided with that of the Indian. In *Cramer v. United States*, the government brought suit on behalf of three individual Indians, seeking cancellation of a land patent issued by the United States conveying land that the Indians had occupied continuously for nearly half a century to a railway company. The case came before the Supreme Court on the railway company's appeal from the judgment of the

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78. 224 U.S. 413 (1912).
79. Allotted lands were those held in trust for individual Indians by the government. The General Allotment, or Dawes, Act of 1887 provided for the allotment of tribal land to reservation Indians and permitted non-reservation Indians an opportunity of allotment on public domain lands. *Cohen*, supra note 1, at 130-31. The United States was to hold title to the allotted lands for a period of twenty-five years, which could be extended by the President, and the United States was authorized to negotiate the purchase of surplus lands with the tribes. *Id.* at 131. Allotment was seen as promoting the full participation by Indians in the American system which was inhibited by the differing white and Indian concepts of property. *Id.* at 131-32.
80. 224 U.S at 417.
81. *Id.* at 444.
82. *Id.* at 446.
83. 261 U.S. 219 (1923).
84. *Id.* at 225.
district court canceling the patent with regard to lands the Indians had either enclosed or improved and from the decision by the circuit court extending the cancellation of the grant to include the entire legal subdivisions encompassing the enclosed or improved land.\textsuperscript{85}

The act of Congress conveying the land had excluded lands “granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of.”\textsuperscript{86} The United States, as defendant, argued that the Indians’ land was not within this exclusion because the homesteading privilege had not been extended to Indians at the time the patent was granted.\textsuperscript{87} The Court, however, found that the property was “reserved or otherwise disposed of” because to hold that the Indians gained no possessory rights by “attaching themselves to a definite locality, reclaiming, cultivating, and improving the soil and establishing fixed homes thereon”\textsuperscript{88} would contravene the government’s policy of encouraging Indians to abandon their nomadic habits.\textsuperscript{89}

The Court has also sustained some Indian claims for damages resulting from a failure of the executive to comply with the terms of a treaty or agreement. One early example of this is \textit{United States v. Mille Lac Band of Chippewa Indians}.\textsuperscript{90} The Mille Lac Band had recovered damages in the court of claims on grounds that the United States had disposed of lands ceded to the United States by the Band in a manner violative of the act of 1889 under which the lands were ceded.\textsuperscript{91} Although the act had provided

\begin{itemize}
  \item \textsuperscript{85} \textit{Id.} at 226.
  \item \textsuperscript{86} \textit{Id.} at 225 (citing The Act of July 25, 1866, ch. 242. 14 Stat. 239).
  \item \textsuperscript{87} The patent was granted in 1866. 261 U.S. at 225. The homesteading privilege was extended to Indians by the Act of March 3, 1875, ch. 131, 18 Stat. 402, 420. 261 U.S. at 226.
  \item \textsuperscript{88} 261 U.S. at 228.
  \item \textsuperscript{89} \textit{Id.} at 228-29. The Court also rejected the Government’s argument, as defendant, the action of the Government’s agents in granting the patent estopped the United States from maintaining a suit against the grant of the patent. \textit{Id.} at 234. The Court reasoned that, because the Indians acquired occupancy rights to the land with the implied consent of the Government, the grant of the patent to the railway company was unauthorized and could neither “bind the government . . . [nor] deprive the Indians of their rights.” \textit{Id.}.
  \item \textsuperscript{90} 229 U.S. 498 (1913).
  \item \textsuperscript{91} \textit{Id.} at 499-500. This case involved a complicated set of facts, including a disagreement over whether a treaty provision that “owing the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites” permitted the Band to remain on lands so long as their conduct toward the whites in the vicinity complied with the provision. \textit{Id.} at 501-02. The damages arose out of the act of 1889, which resolved the disputes between the Government and the Mille Lac Band with regard to their removal to the new reservation. \textit{Id.} at 503, 509. These disagreements, however, are
\end{itemize}
that the lands be classified pine and agricultural lands and disposed of in accordance with the manner and price stipulated in the act and the proceeds placed in a trust to be managed and distributed in accordance with the provisions of the act, the government disposed of the land "under the general land laws; not for the benefit of the Indians, but in disregard of their rights."92 The Court noted that "[t]he cession was not to the United States absolutely, but in trust,"93 and concluded that the Indians were "entitled to recover for the resulting loss" because the government's disposal of the lands was "clearly in violation of the trust."94

The Court also indicated that the trust doctrine could have a limiting effect on the government's discretion in Indian affairs in Lane v. Pueblo of Santa Rosa,95 where the Court considered a suit by the Santa Rosa Pueblo to enjoin the Secretary of Interior from "offering, listing, or disposing" of as public lands land that the Pueblo claimed title to under the provisions of the Gadsden Treaty between the United States and Mexico.96 Lane came before the Court on appeal from a decision by the Court of Appeals for District of Columbia reversing a decree dismissing a bill for injunction but granting the Pueblo a permanent injunction.97 The Secretary of the Interior argued that, because the Indians were wards of the United States, "disposal of their lands [was] not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection."98 The Court rejected this argument as irrelevant, stating that, even if it were true,

it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have complete and perfect title—as public lands of the United States and disposing of the same under the public land

not germane to the importance of this case in the context of the trust doctrine, which is the Court's affirmation of damages sustained as the result of the Government's failure to comply with the provisions of the act by which lands were relinquished to the United States.

92. Id. at 509.

93. Id. (quoting Minnesota v. Hitchcock, 185 U.S. 373, 394 (1902).

94. 229 U.S. at 509. The Court remanded the case for a reassessment of the amount of the damages due because the court of claims had included damages for some lands which had been excluded by the act of 1889. Id. at 505-09.

95. 249 U.S. 110 (1919).

96. Id. at 111. Under the Gadsden Treaty of December 30, 1853, the United States acquired lands in Arizona, including the land at issue in this case, from Mexico. Id.

97. Id.

98. Id. at 113.
laws. That would not be an exercise of guardianship, but an act of confiscation. 99

The Court remanded the case to the court of first instance, ordering that the lower court grant a restraining order against taking action against the lands until the defendants could respond to the bill to enjoin. 100

Although the Court's opinions in Lane and Mille Lac Band recognize limitations on the power of government in regard to managing the affairs of Indians, the cases did not involve suits brought on a theory of breach of a trust obligations. The Supreme Court explicitly held the government to a fiduciary standard in managing Indian affairs in Seminole Nation v. United States. 101 Seminole Nation involved a claim brought by the Seminoles against the United States for monetary damages for several alleged violations of various treaties, agreements, and acts of Congress. 102 Under a 1856 treaty between the United States and the Seminole Nation, the government was obliged to make annual per capita disbursements of the interest from a trust fund established for the Seminole Nation. 103 The court of claims had found that the government had underpaid or failed to pay on some annual disbursements, making some payments, at the request of the Seminole General Council, directly to the tribal treasurer. 104 The government argued that their treaty obligation was to the Seminole Nation rather than to individual Seminoles and, therefore, that they had met that obligation by payment to the tribal treasury at the request of the General Council. 105 The Court, however, found the government's argument deficient in its "fail[ure] to recognize the impact of certain equitable consideration and the effect of the fiduciary duty of the government toward its Indian wards." 106

The Seminoles had presented evidence that the General Council was "notoriously and incurably corrupt" and that the government, specifically the Commissioner of Indian Affairs, was aware of this corruption at the time the

99. 249 U.S. at 113.
100. Id. at 114.
101. 316 U.S. 286 (1942).
102. Id. at 289. The Seminoles had appealed the decision of the lower court with regard to five separate claims. The Supreme Court found no violation in three of them. Id. at 289-90.
103. Id. at 294.
104. Id. at 294-95, 301. Some payments were made to the Indian Agent for the Seminole Agent rather than to individual Seminoles; the Court found that the Seminoles could not recover these payments because they were authorized by the Act of April 26 1906, ch. 1876, 34 Stat. 137.
105. 316 U.S. at 295.
106. Id.
payments to the tribal treasurer were made. The Court noted that "a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary" and that the General Council stood in a fiduciary relationship to the individual Seminoles to whom the disbursements were due. Because the government, "[u]nder a humane and self imposed policy . . . [expressed] in many acts of Congress and numerous decisions of [the Supreme] Court, has charged itself with moral obligations of the highest responsibility and trust," the Court concluded that the government's conduct toward the Indians should "be judged by the most exacting fiduciary standards." Because the court of claims had made no finding of facts regarding the corruption of the General Council or the government's knowledge of that corruption and because payment made to a tribal council with knowledge of that council's corruption "would be a clear breach of the Government's fiduciary obligation," the Court remanded the case, directing the court of claims to make the necessary findings of fact to determine whether the government had breached its fiduciary obligation and, if so, the extent of its liability.

Lane, Mille Lac Band, and Seminole Nation all involved Court review of administrative decisions, holding the Executive branch accountable under the trust doctrine. These cases were not at odds with Lone Wolf's presumption of congressional good faith in its actions as guardian of its Indian wards. The Court has held Congress accountable in its handling of Indian Affairs by applying the Fifth Amendment Takings Clause when Congressional action resulted in a taking of Indian land without just compensation.

In Shoshone Tribe of Indians of the Wind River Reservation v. United States, the Court considered a claim by the Shoshones that the United

107. Id. at 295-300.
108. Id. at 296.
109. Id. at 296-97.
110. Id. at 297.
111. Id. at 307-08.
112. The Takings Clause provides: "... nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.
113. 299 U.S. 476 (1937). One year earlier, in United States v. Creek Nation, 295 U.S. 103 (1935), a case stemming from a land cession by the Creeks of a portion of land they held in fee simple. Government, as the result of a surveying error, had included a portion of unceded Creek land when disposing of the ceded property. The Court noted that, although the tribal property was under the Government's control and management as the result of the guardianship of the United States, the power to manage "was not absolute ... [but rather]
States had breached a 1868 treaty providing that their Wind River reservation would be

set apart for the absolute and undisturbed use and occupation of the Shoshone Indians . . . and for such other friendly tribes or individuals as from time to time they may be willing, with the consent of the United States, to admit amongst them. 114

The treaty further stipulated that no one, with a few enumerated exceptions, would "ever be permitted to pass over, settle upon, or reside in" the reservation. 115 The government, however, brought a band of Arapahos, traditional enemies of the Shoshones, onto the reservation under military escort after obtaining the Shoshone Chief's agreement to allow the Arapahos to settle peacefully on a close but separate tract of land. 116 Despite frequent complaints by the Shoshone, the government did not relocate the Arapahos. About two years after the arrival of the Arapahos, the government began discussions with the Indians regarding a cession of a portion of the reservation and, despite opposition from the Shoshones, the Commissioner of Indian Affairs held that the Arapahos and the Shoshones had equal rights to the monetary compensation for the land ceded. 117 Congress subsequently ratified two agreements for cession of land, one in 1897 and one in 1905, both clearly recognizing that the two tribes had an equal interest in the land. 118

The Shoshones sued for damages suffered because they had been "permanently excluded from the possession and enjoyment of an undivided half interest" in their tribal lands 119 and the court of claims granted the Shoshones relief. Both the Shoshones and the government were dissatisfied

subject to limitations inhering in such guardianship and to pertinent constitutional restrictions." Id. at 109-10. In granting relief to the Creek Nation, the Court did not specifically mention the Fifth Amendment, but rather gave Lane and Hitchcock as supporting authority. Id. at 110.

114. Id. at 485-86.
115. 299 U.S. at 485-86.
116. Id. at 487. About nine years earlier, the Shoshones had allowed the Arapahos to take refuge for a brief time on the Shoshone reservation while the Government tried to locate a place for the Arapahos to settle. Id. at 486. The Arapahos had left, but the Government had been unable to locate a place for them to settle. Id.
117. 299 U.S. at 488-89.
118. Id. at 489-90.
119. Id. at 484.
with the damage award and appealed to the Supreme Court. In determining that the lower court had erred in not granting “such additional amount beyond the value of the property rights when taken by the government as may be necessary to [an] award of just compensation,” the Court noted that “an appropriation within the meaning of the Fifth Amendment” had occurred. The court went on to state that Congress’ plenary power under Lone Wolf did not extend to “enabl[ing] the government to give tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.”

The Court addressed the application of the Takings Clause to Congress’ dealings with Indians and Lone Wolf in United States v. Sioux Nation. Sioux Nation arose out of an act of Congress by which the Sioux ceded the Black Hills to the United States in return for subsistence rations until the tribe achieved self-sufficiency, aid in achieving civilization and self-sufficiency, and the provision of schools, subject to the children’s attendance of the schools and the “labor of those who resided on lands suitable for farming.” This agreement was an abrogation of the earlier Fort Laramie Treaty.

120. The Government did not claim that no damages should be awarded but rather that the damages should have been measured as on the date of the entry of the Arapahos unto the Shoshone reservation. 299 U.S. at 492. The Court had measured the damages from the date of a statement by the Commissioner of Indian affairs that the two tribes had an equal interest in the land and that negotiation with the tribes regarding cession of reservation land should be conducted on that basis. Id. The Shoshones, on the other hand, felt that damages should be awarded as of the date of the jurisdictional act permitting them to bring the claim against the United States. Id. The Supreme Court held that damages should be measured as of the date of the illegal entry because of evidence tending to show that the Government had intended that the Arapahos occupancy be permanent from the outset and because the right of occupancy is primary with regard to Indian property interests. Id. at 494-96.

121. 299 U.S. at 496.
122. Id. at 497.
123. Id. at 497 (quoting Creek Nation, 295 U.S. at 110).
125. Id. at n.14. The interest of the United States in obtaining the Black Hills was the result of pressure from settlers in the wake of discovery that the Black Hills contained rich deposits of gold and silver. Id. at 376-79.
126. 48 U.S. at 382. The agreement was enacted despite the fact that only ten percent of the adult males, as opposed to the seventy-five percent consent of three-fourths required by the Fort Laramie Treaty, had signed the agreement. Id. at 382. It was also negotiated after the Indians had been defeated in a conflict that arose when the Sioux, exercising their right to hunt on unceded land outside the reservation, failed to return to reservation when ordered to do so by the Indian Agents. Id. at 379. Given severity of the winter, compliance with the order was impossible. Id. The Government then cut off subsistence rations. Id. at 381. As a result, the Sioux were particularity vulnerable during the negotiations.
Sioux Nation came before the Supreme Court on an appeal by the government of the court of claims' decision that the taking of the Black Hills violated the Fifth Amendment and that, therefore, the Sioux were entitled to interest as well as compensation for the value of the land taken.\textsuperscript{127} In its evaluation of this claim, the Court noted that the Court of Claims had relied on the Fort Berthold "good faith test,"\textsuperscript{128} which had been designed to square the Lone Wolf line of cases with the line of cases to which Shoshone Tribe belonged.\textsuperscript{129} The Fort Berthold test distinguishes between situations in which Congress acts in its capacity as trustee for the benefits of Indians and those in which Congress exercises its sovereign power of eminent domain.\textsuperscript{130} The distinction turns on whether "Congress makes a good faith effort to give the Indians full value of the land."\textsuperscript{131} When this is the case, Congress has acted in its role as trustee, merely substituting one form of asset for another, and no taking has occurred.\textsuperscript{132} If there is no good faith effort to give full value, the Court is reviewing Congress's exercise of eminent domain rather than its actions as trustee and Lone Wolf does not apply.\textsuperscript{133} The Court concluded that an inquiry into the adequacy of the government's consideration is inherent in the Fort Berthold.\textsuperscript{134} After making that inquiry, the Court concluded that the government had made no such good faith effort in its taking of the Black Hills; the Court, therefore, affirmed the court of claims's decision granting interest as well as compensation to the Sioux Nation.\textsuperscript{135}

In United States v. Mitchell,\textsuperscript{136} the Supreme Court first articulated the Control Theory of the trust doctrine. Mitchell II involved the consolidated claims of the Quinault tribe, an unincorporated association of Quinault Reservation Allottees, and 1,465 individuals with interests in the allotments on

\textsuperscript{127} \textit{Id.} at 386-87. The government's appeal also involved a claim that the Fifth Amendment issue was barred because the court of claims had dismissed an earlier Fifth Amendment claim by the Sioux. \textit{Id.} While the Court discussed this issue in detail, that discussion is not relevant to this context. The Government did not appeal the holding by the Court of Claims Commission that "the Government had acquired the Black Hills through a course of unfair and dishonorable dealing." \textit{Id.} at 387. Establishing that the taking was unconstitutional as opposed to unfair would entitle the Sioux to interest as well as compensation. \textit{Id.}

\textsuperscript{128} This test was set forth in Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968); 448 U.S. at 408.

\textsuperscript{129} 448 U.S. at 408.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.} at 409.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{See id.} at 414-15.

\textsuperscript{134} 448 U.S. at 416.

\textsuperscript{135} \textit{Id.} at 423-24.

\textsuperscript{136} 463 U.S. 206 (1983) [hereinafter Mitchell II].
the Quinault Reservation, (jointly, "respondents"). The respondents sought to recover money damages incurred because the United States had breached its fiduciary under various statutes by mismanaging timber resources on the reservation. The case had previously been before the Court in *Mitchell I*, where the Court reversed the Court of Claim's holding that, under General Allotment Act, the United States had a fiduciary responsibility in managing allotted timber lands and remanded the case for further consideration by the lower court. On remand, the Court of Claims found that federal timber management statutes, as well as various other federal statutes and regulations, imposed on the United States a fiduciary duty with regard to its management of timber on lands held in trust; the Government appealed.

In *Mitchell II*, the Supreme Court began its considerations stating the necessary inquiry for claims against the United States based on "the Constitution, or any Act of Congress, or any regulation of an executive department"; whether the source of substantive law can fairly be interpreted as mandating compensation by the federal government for the damages sus-

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137. *Id.* at 210.
138. *Id.* The specific allegation made by the respondents included the Government's failure to:
    sell the timber at fair market value; recover any payment for some merchantable timber; pay any interest on some, and sufficient interest on other, government held funds from timber sales; manage the timber resources on a sustained-yield basis; provide sufficient road and easement systems for timber operations; and the Government's extraction of "excessive administrative fees from allottees."

*Id.*

140. *See supra* note 79 and accompanying text.
141. *See Mitchell I*, 445 U.S. at 546. The *Mitchell I* Court came to this conclusion because the General Allotment Act "does not unambiguously provide that the United States has undertaken fiduciary responsibilities as to the management of allotted lands," *Id.* at 553, and the legislative history of the Act does not support reading it as requiring the Government to manage the timber resources, *Id.* at 555. Noting that the Court of Claims had failed to address other statutes cited by the respondent as a further basis for the Government's liability, the Court pointed out that the lower court could consider them on remand. *Id.* at n.7.
143. 463 U.S. at 211.
144. 462 U.S. at 218. Such claims come within the jurisdiction of the Federal Courts under 28 U.S.C. § 1491, known as the Indian Tucker Act, which waives Federal Sovereign Immunity with regard to specific claims. *Id.* at 215. Claims founded on "any express or im-plied contract with the United States" are included in that waiver. *Id.* (quoting 28 U.S.C. § 1491).
The Court then examined the history of the timber management statutes, beginning with the 1910 Act authorizing the Secretary of the Interior to sell timber on both unallotted and allotted lands for the benefit of the Indians and in a manner conserving their interests. The Court noted that both the Indian Reorganization Act of 1934 and a 1964 amendment to the timber management statute strengthened and emphasized the government’s duty to “assure a proper and permanent management of the Indian Forest . . . assur[ing] that [it] will be permanently productive and will yield continuous revenues to the tribes” and “to consider ‘the needs and best interests of the Indian owner and his heirs.” According to the Court, this statutory language, as well as similar language used in regulatory provisions, “directly supports the existence of a fiduciary relationship.” In addition to its argument from the statutory language, the Court states that:

a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and other property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indians) and a trust corpus (Indian timber, lands, and funds). This is followed by a brief mention of the “existence of a general trust relationship between the United States and the Indian people,” which the Court

145. 463 U.S. at 218.
147. 463 U.S. at 220.
148. 25 U.S.C. § 466. The Indian Reorganization Act (IRA) of 1934 was “part of [Commissioner of Indian Affairs] Collier’s attempt to encourage economic development, self-determination, cultural plurality, and the revival of tribalism.” COHEN, supra note 1, at 147. In its final form, it was a compromise between those who saw it as an impediment to the assimilation of Indians into mainstream America and those who felt further tribal autonomy was necessary for Indian self-determination. Id. at 147-48. Its provisions included an extending to the trust period on allotted lands and prohibitions against “further allotment of Indian lands” and “transfer of restricted Indian lands except to Indian tribes.” Id. at 148. The IRA also permitted tribal organization, adoption of tribal constitutions, and the formation of tribal business corporations, subject to review and approval by the Secretary of the Interior. Id. at 149. A tribe could opt out of the IRA by vote of a majority of the tribal members. Id.
149. 463 U.S. at 221 (quoting 78 CONG. REC. 11730 (1934) (statement of Representative Howard, Chairman of the House Committee on Indian Affairs and co-sponsor of the Act).
150. Id. at 222 (quoting 25 U.S.C. § 406(a)).
151. 463 U.S. at 224.
152. Id. at 225.
sees as "reinforcing" its construction of the pertinent statutes and regulations.\textsuperscript{153} It is because the statutes and regulations "clearly establish fiduciary obligations of the government in the management and operations of Indian lands and resources," however, "[that] the government should be liable in damages for the breach."\textsuperscript{154}

The Supreme Court has yet to define the parameters of \textit{Mitchell II}. In the wake of \textit{Mitchell II}, commentators agree that the government will be found liable for monetary damages resulting from a breach of trust where the requisite statutory presence is found.\textsuperscript{155}

There is less agreement concerning what is necessary to establish the substantive right necessary for bringing a claim for breach of trust. Wood and Ellwanger agree that, under \textit{Mitchell II}, a fiduciary obligation on the part of the government arises from statutes that envision "a detailed management role for the executive branch."\textsuperscript{156} Both are less confident about the future success of the second source of a fiduciary duty discussed by the Court: the government's assumption of extensive control over Indian property.\textsuperscript{157} Ellwanger sees the Court's opinion as open to the interpretation that the elements of a common law trust must be present before a fiduciary obligation capable of giving rise to a cause of action for breach of trust can be established from the government's assumption of control.\textsuperscript{158} Roy, on the other hand, shows no hesitation in stating that "\textit{Mitchell II} announced a presumption that the United States is acting as a trustee when managing Indian property."\textsuperscript{159} This overstates the holding by ignoring the \textit{Mitchell II} Court's entire discussion of the comprehensiveness of the federal control over timber management.

The narrow grounds on which the Court distinguished \textit{Mitchell II} from \textit{Mitchell I} are an indication of how much play the court can get out of "comprehensive." The Court is giving future Courts room to define "comprehensive" in a way that will reach whichever outcome they desire. Regardless of how the Court applies \textit{Mitchell II}, comprehensive control in the

\textsuperscript{153} Id. (citing, among others, Seminole Nation v. United States, 316 U.S. 286, 296 (1942); United States v. Shoshone Tribe, 305 U.S. 382, 386 (1938); United States v. Kagama, 118 U.S. 375, 382-84 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)).

\textsuperscript{154} 463 U.S. at 226.


\textsuperscript{156} Wood, supra note 13, at 1519; see also Ellwanger, supra note 155, at 681.

\textsuperscript{157} Wood, supra note 13, at 1519; Ellwanger, supra note 155, at 681-82.

\textsuperscript{158} Ellwanger, supra note 155, at 687.

\textsuperscript{159} Roy, supra note 155, at 841.
area of interest would have to be established before an enforceable obligation would exist under *Mitchell II*. A more global version of the control doctrine would preempt the case-by-case analysis that permits the shifting sensitivities of successive Courts to alternatively expand and contract tribal rights.\(^{160}\)

In 1983, the year the Court decided *Mitchell II*, the Court decided another case which undermined the value of the trust doctrine as a source of formal federal fiduciary obligations toward Indians in areas where the Department of the Interior is obliged to consider the competing interests of more than one party. In *Nevada v. United States*,\(^{161}\) the Court held that res judicata\(^{162}\) barred a claim for water rights sufficient to maintain the level necessary to prevent extinction of the fish indigenous to the Pyramid Lake located on the Pyramid Lake Reservation.\(^ {163}\) The United States had initiated the “Orr Ditch Litigation” in 1935 to adjudicate the water rights to the Truckee River, which flowed into Pyramid Lake.\(^ {164}\) The government, which represented the claims of both the Paiute Tribe and the Newlands Reclamation Project,\(^ {165}\) based the amount of water it claimed on behalf of the Tribe on its anticipated irrigation needs.\(^ {166}\) The Orr Ditch decree did not include the water from the Truckee River necessary to maintain the level of Pyramid Lake required by the tribal fisheries located on the reservation at the time the Executive Order created the Pyramid Lake Reservation. Therefore, the government sought additional rights on behalf of the tribe in 1973, again basing the claim on the implied reservation

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\(^{162}\) *Res judicata* is the rule that “a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.” *BLACK’S LAW DICTIONARY* 1174 (5th ed. 1979).

\(^{163}\) 463 U.S. at 116. The tribe’s water rights claim was based on the doctrine set forth in *Winters v. United States*, 207 U.S. 564 (1908), which held that “a right to the amount of river water necessary to effectuate the purposes” the creation of an Indian Reservation were impliedly reserved by the agreements that created them. *Id.*

\(^{164}\) *Id.*

\(^{165}\) The project was developed pursuant to the Reclamation Act of 1902, which sought to reclaim arid western lands through irrigation and make them available to homesteaders. *Id.* at 115.

\(^{166}\) *Id.* at 118.
of those rights. The Paiute Tribe, who had not been a party to the Orr Ditch Litigation, was granted the right to intervene in the 1973 litigation in support of the government. The Court, relying on language in both the 1935 settlement and the Government’s complaint tending to show that the Orr Ditch decree was intended as a final adjudication of the parties’ water rights with regard to the Truckee River, found the 1973 claim barred by res judicata.

The Court’s Nevada opinion was particularly troubling because of its reversal of the Court of Appeals decision that “[b]y representing the Tribe and the Project against the Orr Ditch defendants, the government compromised its duty of undivided loyalty to the Tribe.” Because the United States represented the Tribe in the Orr Ditch Litigation, the Court found that the tribe was a party to the Orr Ditch Decree and could not relitigate the “implied reservation of water rights issue.” The Court cited Heckman in support of this conclusion.

Heckman, unlike Nevada, involved a situation in which the government and the “Indian wards” were in an antagonistic stance. This situation is qualitatively different from the situation in Nevada, where the government was representing the interests of the tribe in relation to other parties, one of which was also represented by the same governmental department, competing for the same limited resource. In Heckman, the relitigation of the question would have involved the Indian grantees directly opposing the government’s position, while in Nevada the “relitigation” would have involved the litigating of the water necessary for maintaining the level of Pyramid Lake, an aspect of the water rights issue neglected by the government in the original litigation.

The Nevada Court declined to “pass judgment on the quality of the representation [the tribe] received” because the tribe had sued the government for damages in the court of claims in 1951, receiving a settlement of $8,000,000 after waiving further liability on the part of the United States. The Court does discuss how the Department of Interior’s conflicting obligations affect the standard to which its representation of tribal interests will be held. Noting that Congress had seen fit to “require the secretary to carry water on at least two shoulders when it delegated to him the responsibility for the supervision of the

167. 463 U.S. at 118.
168. Id.
169. Id. at 131-32.
170. Id. at 141 (quoting United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1310 (9th Cir. 1981)).
171. 463 U.S. at 133.
172. 224 U.S. 413 (1912). See supra note 78 and accompanying text for a discussion of Heckman.
173. 463 U.S. at 135.
Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands," the Court continued:

it is simply unrealistic to suggest that the Government may not perform its obligation to represent the tribes in litigation when Congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. 175

The use of the word "solely" might be interpreted as implying that additional facts may add up to a breach of trust. Later in its opinion, however, the Court states

[i]t may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in a private litigation will in many, if not all, respects, adequately describe the duty of the United States. But where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within the project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests. 176

175. Id. at 128; see also id. at 142.

176. Id. at 142. The tribe also argued that res judicata, even if otherwise applicable, would amount to a denial of their due process rights. Id. at 144 n.16. The tribe cited Mullane v. Central Hanover Bank, 339 U.S. 306 (1946), to support its claim that, in the Orr Ditch Litigation, they were not given notice as required in a final accounting between beneficiary and trustee and Hansbury v. Lee, 311 U.S. 32 (1940), to support its claim that it was also denied a full and fair opportunity to be heard as required when there is a conflict of interest between certain class members and the class representatives in a class action suit. Id. The Court dismissed these arguments on grounds that no conflict existed, that the tribe's representative, Government, had adequate notice and a full and fair opportunity to be heard, and that the tribe had a remedy against the Government of which it had already availed itself. Id.
This passage does include sufficient facts specific to Nevada to allow a court sympathetic to tribal rights to draw a narrow distinction.\textsuperscript{177} It is equally likely, however, that the Nevada Court’s reasoning will be applied so as to lessen the government’s obligation to protect tribal interests in other situations where the government can show it has a dual role creating split loyalty in the circumstances of the case. Nevada also demonstrates the continued deference the Court shows toward Congressional action. A stronger version of the trust doctrine, which focuses on the government’s obligation to reinforce and protect tribal sovereignty, would strengthen the priority of the tribal interests in dual loyalty situations.

The trust doctrine, in its current form, has not been extended to include a governmental obligation to promote self-government. The Court will review administrative decisions concerning the management of Indian affairs, holding the Executive Branch to a fiduciary standard if there is statutory language indicating Congressional intent that “the best interest of the Indian owner”\textsuperscript{178} be taken into account in managing property specifically addressed by statute, or if the government has assumed comprehensive control of Indian property.\textsuperscript{179} The Court’s Sioux Nation opinion makes it clear that, while the Takings Clause may be applicable to land taken in abrogation of previous treaties, the Court has not abandoned Lone Wolf’s assumption of Congressional good faith in its actions as trustee in managing Indian affairs. Under Nevada, the government cannot be held to a fiduciary standard if it has a conflicting duty to take into account a competing interest.\textsuperscript{180} Finally, when a breach of trust is found, equitable remedies are generally not available.\textsuperscript{181}

\textsuperscript{177} As the inclusion of discussion specific to the General Allotment Act in Mitchell I allowed Mitchell II to be distinguished on narrow grounds by its discussion of the timber management statutes.

\textsuperscript{178} Mitchell II, 463 U.S, at 221.

\textsuperscript{179} See Wood, supra note 13, at 1568; Reid, supra note 7, at 1230.

\textsuperscript{180} Charles F. Wilkinson points out that, in Nevada, issues of judicial finality may have overridden policies in favor of holding government officials to a strict standard in managing Indian affairs because the length of time that had passed since the rendering of the decision challenged had resulted in a buildup of “powerful reliance interests.” CHARLES F. WILKENSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 85 (1987). His discussion of Nevada suggests that, even in dual loyalty situation, government officials may be held some heightened level of “care, competence, and integrity.” Id. While this is true, my concern is still that courts unsympathetic to Indian interests have been granted yet another route to limit the trust obligation.

\textsuperscript{181} See, Chambers, supra note 7, at 1242-43.
III. COMMENTATORS AND THE TRUST DOCTRINE

Various Commentators have written on the trust doctrine. In this section I present several accounts of the trust doctrine that point to areas in which the trust doctrine, in its current form, is deficient. As these areas must be addressed by any adequate justification of the trust doctrine, I return to them in part IV, where I discuss them in terms of the justification I propose.

Mary Christina Wood characterized the early federal-Indian trust relationship as the "sovereign trusteeship" model, which she described as "premised on a model of federal-tribe relations organized around a paradigm of native separatism." In addition to the Cherokee cases, she cited the Trade and Intercourse Acts and the Northwest Ordinance in support of her characterization. She contrasted this early model with the "guardian-ward" paradigm which has its roots in United States v. Kagama and focuses on tribal dependency. While the "sovereign trusteeship" paradigm is directed at native separatism, the "guardian-ward" paradigm is directed at assimilation. Wood noted that, although the two models are often treated synonymously and the "guardian-ward" language of Kagama

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182. Wood, supra note 13, at 1498.
183. The Trade and Intercourse Acts are a series of Congressional Acts passed between 1790 and 1834, generally in "response to worsening frontier conditions characterized by aggressive whites infringing on the territory of tribes in violation of the treaties." Id. The acts provided for the exclusion and removal of non-Indians from Indian territories, prohibited alienation of Indian land without Federal approval, and regulated Indian trade with non-Indians. Id.
184. The Northwest Ordinance was passed by Congress in 1787. Wood cites the following language from Article III:

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 shall never 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 done to them, and for preserving peace and friendship with them.

Id. at 1499. See also, Mark Allen, Comment, Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination, 16 B.C. ENVTL. AFF. L. REV. 857, 858 (1989) (citing Larry B. Leventhal, American Indians — The Trust Responsibility: An Overview, 8 HAMLIN L. REV. 625. 627 (1985)).
186. 118 U.S. 375 (1886).
188. Id. at 1504.
often appears in modern cases applying the trust doctrine, both paradigms have continued to coexist.\textsuperscript{189}

Wood noted that “the trust doctrine is particularly important in the modern era of self-determination as a means of responding to threats to the native land base.”\textsuperscript{190} She sees in the trust doctrine a potential shield against “environmental threats both to the tribal land base and to shared resources such as water and wildlife.”\textsuperscript{191}

She recognizes, however, that the trust doctrine must be cleaved from the plenary power doctrine in order for the trust doctrine to act as “doctrine of federal restraint, not permission, and as an important source of protection of Indian rights.”\textsuperscript{192} A footnote at the end of Wood’s discussion of plenary power points out that the basis of the \textit{Lone Wolf} Court’s sanction of unilateral treaty abrogation by Congress was the Court’s failure to distinguish between foreign and Indian treaties.\textsuperscript{193} Wood suggests that a trust obligation arose out of the early treaties, which are in fact land transactions but does not develop this idea.\textsuperscript{194}

Reid Peyton Chambers has written about the interrelationship of treaty abrogation and the trust doctrine. He argued that overruling \textit{Lone Wolf} and reading the Cherokee cases as establishing a broad trusteeship on the part of the federal government could provide a basis for holding Congress to a “rigid duty of ‘exclusive loyalty’ in managing Indian property, and require[ing] Congress to [strictly] observe treaties and executive agreements with Indian tribes.”\textsuperscript{195} In discussing the pros and cons of overruling \textit{Lone Wolf}, Chambers pointed out that, although requiring strict adherence to treaties with Indian tribes would afford those treaties “greater permanence

\begin{footnotes}
\footnotetext{189}{\textit{Id.} Charles Scott, on the other hand, sees the trust relationship as the result of the awkward merging of the concepts of plenary power and the guardian-ward relationship which are the legacy of \textit{Cherokee Nation} and \textit{Lone Wolf}. Charles Scott, \textit{Administrative Law: Self-Determination and the Consent Power: The Role of the Government in Indian Affairs}; 5 Am. Indian L. Rev. 195, 197 (1977). The result is a self-imposed, judicially enforced duty requiring the government “to exercise its great authority only in the best interest of the Indians.” \textit{Id}.}
\footnotetext{190}{\textit{Id.} supra note 13, at 1476. The history of United States Indian policy has been divided into six eras: “Discovery, Conquest and Treaty-Making, from 1532 to 1828; Removal and Relocation, from 1828 to 1887; Allotment and Assimilation, from 1887 to 1928; Reorganization and Self-Government, from 1928-1887; Termination, from 1945 to 1961; and Self-Determination, from 1961 to the present.” \textit{Id.} at n.3 (citing Vine Deloria, Jr. & Clifford M. Lytle, \textit{American Indians, American Justice} 2-24 (1983)).}
\footnotetext{191}{\textit{Id.} supra note 13, at 1505.}
\footnotetext{192}{\textit{Id.} at 1507-08.}
\footnotetext{193}{\textit{Id.} at n.359.}
\footnotetext{194}{\textit{Id}.}
\footnotetext{195}{Chambers, \textit{supra} note 7, at 1227.}
\end{footnotes}
than treaties with foreign nations which can be unilaterally abrogated," 196 ... a requirement of strict adherence may be appropriate with regard to treaties "between a nation and its dependant subjects protected by a trust responsibility." 197 Chambers noted that the Lone Wolf doctrine may appear sound because of the difficulty of judicial enforcement of imprecise treaties and the necessity of flexibility in the formation of public policy. However, he suggested that these difficulties may be overcome by allowing Congress only to "mak[e] modifications to meet changed conditions," provided those modifications are consistent with the mutual intent of the parties and provided that the modification is in response to a "compelling public need." 198

The limitations suggested by Chambers would be in keeping with an interpretation of the trust doctrine that is protective of tribal sovereignty. Chambers does not, however, present an argument for why the trust doctrine should protect tribal sovereignty or present any authority upon which such limitations of Congress could be based.

Chambers noted that Lone Wolf's bite has been mitigated by the Court's application of the Fifth Amendment's requirement of just compensation when Congress exercises its power of treaty abrogation and diminishes Indian land holdings secured by a treaty or agreement. 199 He also noted the line of cases, to which Lane and Crammer belong, in which the Court has used the trust doctrine to enforce limitations on the executive branch in its deals with the Indians. 200 This line of cases, however, is limited to monetary damages. As Chambers points out, if monetary damages remain the exclusive remedy for the taking of Indian property, Indian culture will lose its "underlying environment" and "the purpose of the trusteeship guarantee as perceived by Chief Justice Marshall ... may not be realized." 201 In Part III I argue that the use of social contract theory as a basis

196. Id. The Lone Wolf opinion notes Congressional power to pass legislation which conflicts with treaties with foreign nations in support of its decision that Congress may unilaterally abrogate provisions of an Indian treaty. 187 U.S. at 566 (citing Chinese Exclusion Case, 130 U.S. 581, 600 (1889)).
197. Chambers, supra note 7, at 1227.
198. Id. at 1228-29.
199. Chambers, supra note 7, at 1229.
201. Id. at 1235. The authors particularly noted the importance of equitable relief in "conflicts between Indian trustee responsibilities and competing government projects that affect countless federal agencies." Id. at 1236. This scenario was later presented to the
for the trust doctrine will extend the scope of the trust doctrine to the tribal right to self-government. This will entail equitable relief where the government acts in a manner limiting tribal sovereignty.

Like Wood, a Harvard Law Review Note identified two theories articulated by courts subsequent to the Cherokee Cases as potential sources of the trust relationship: the cultural theory of trust relationship and the control theory of trust relationship. The "cultural theory," which characterizes the Supreme Court's use of the trust doctrine from the late nineteenth to early twentieth century, is much like Wood's guardian-ward paradigm. It focuses on the dependency of the Indians and the Christian duty of the United States in its "treatment of an ignorant and dependent race." The Harvard Note found the cultural theory inadequate because its grounding in racial intolerance is inconsistent with "widely accepted tenants [sic] of contemporary morality" and its vague prescriptive implications are as likely to allow the higher culture to destroy the inferior culture as to protect it.

The control theory refers to the source of the trust obligation increasingly relied on by modern courts: the assumption of elaborate control over a particular area of tribal concern. The Note criticizes the control theory as either logically circular or over inclusive: if control is justified because the government cannot fulfill its trust obligation without it, control cannot in turn justify the trust obligation; on the other hand, if the fact that the government's control of tribal property generates a trust obligation, then the government would owe a fiduciary duty to all owners of regulated property.

The Note suggests that four moral principles support a trust doctrine based on an autonomy principle: self-determination, promise-keeping, liberal freedom, and public freedom. According to the Note, the autonomy principle requires the United States to "afford the tribes enough political autonomy to enable them to chart their own economic, social, and cultural

Court in Nevada, see supra notes 160-80 and accompanying text. The Court's unwillingness to give its obligation to the Indians thus sets a troublesome precedent.

203. Id. at 426 (citing Beecher v. Wetherby, 95 U.S. 517, 525 (1877)).
204. Id.
205. The Note attributes the Control theory to Navajo Tribe of Indians v. United States, 624 F.2d 981 (Ct. Cl. 1980), where the court stated that a fiduciary duty on the part of the Government arises whenever the Government controls or supervises tribal property or moneys. It sees Mitchell as affirming the control theory. Note, supra note 202, at 427-28.
207. Id. at 430.
development" and requires judges "to recognize and enforce [the autonomy principle] . . . to the greatest extent possible within the constraints of their institutional role." Other than appeal to "moral principles prevalent in American political discourse," the Note provides no justification for the Court to impose a set of moral principles on the other two branches of the government. Nor does the Note provide a reason why principles that usually attach to individual rights should be extended to the rights of a group.

IV. THE SOCIAL CONTRACT PARADIGM OR THE FEDERAL-INDIAN TRUST RELATIONSHIP

The Court's use of the trust doctrine, sketched out in Part II, has shown it to be a double-edged sword. One edge has given Congress nearly absolute power over Indian affairs. The other has permitted the Indians to enforce obligations traceable to treaties and agreements with the government or to statutes relating to the management of Indian affairs. The ability of the government to litigate on behalf of Indians to protect Indian interests has cut both ways, depending on whether the government and the Indian share a similar view of what those interests are.

The trust doctrine has not developed into a weapon with which Indians can hold Congress accountable for protecting the tribal interest in self-government and sovereignty. I propose that the trust doctrine be forged into such a weapon by grounding it, not on Chief Justice Marshall's opinions in the Cherokee Cases, but rather in the social contract theory of the relation-

208. Id. at 429-30.
209. Id. at 434.
211. The Court's opinion in Morton v. Mancari, 417 U.S. 535 (1974), might provide a potential justification. In considering the constitutionality of statutory provisions giving Indians preferential status for employment in the Bureau of Indian Affairs, the Mancari Court pointed out that the Constitution itself "singles Indians out as a proper subject for separate legislation," id. at 552 (citing U.S. Const. art. I, § 8, cl. 3 (granting Congress regulatory power over commerce with Indians), art. II § 2, cl. 2 (granting the President the power to make treaties, with the advice and consent of the Senate)), and that Indian tribes and reservation have historically received special legislative treatment. Id. at 552. In this context, the Court found that the special treatment was not racial but instead was analogous to residency requirements for membership in city counsel. Id. at 554. The Court stated: "As long as the special treatment can be tied rationally to the fulfillment of Congress' [sic] unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555. The legislation in Mancari met this requirement because it promoted the federal policy of increasing Indian participation in their own self-government. Id. at 541. The step from using this rationale to find a statute constitutional to using to justify imposing an obligation on Congress would, however, require justification.
ship between a government and those it governs. The opinions in the Cherokee cases give insight into the nature of the implied social contract between the government and the Indians, but it is the contract itself that is the source of the trust relationship.

A. SOCIAL CONTRACT THEORY AND THE NATURE OF THE FEDERAL-INDIAN CONTRACT.

Social contract theory provides an answer to the question of why individuals submit to the authority of a government to limit their inherent right to punish attacks on themselves or their property. Social contracts may be formalized, as in a constitution, or they may be the "legal fictions" that legitimize governmental authority. I take the view that constitutions are merely the formalization of an implied contract between the Government and the governed. The rights of the governed, in the case of the contract between the United States and its citizens, are formalized in the Bill of Rights. Formalized or not, the rights of the governed are the contractual limits the governed set on the legitimate authority of the government.

I argue that treaties between the United States and the various Indian tribes, like constitutions, are the formalization of an implied contract by which the Indians accepted the authority of the federal government, giving up their right to defend themselves from intrusions on their sovereignty in return for the United States Government's promise to protect their sovereignty. In this sense, the tribal right to self-government is analogous to a constitutional right: it is the contractual limitation on the legitimate power of the government of the United States over the Indians. The United States Government has, therefore, an obligation to protect the tribal right of self-government to the same degree as constitutional rights.


Despite the common nomenclature, Indian treaties were not the qualitative equivalents of treaties with foreign nations. Chief Justice

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212. See generally BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 829-33 (Simon and Schuster 1972) (1945). Russell's discussion on the pages cited centers around John Locke's version of social contract theory. Social contract theory had its origins in an attempt to replace the Divine Right Theory as the source of the legitimacy of Government. The Divine Right Theory, developed at a time when rule by aristocracy was the norm, maintained that authority of the king was bestowed by God. Social Contract theory placed the source of governmental authority in the consent of the governed.

213. Id. at 629.
Marshall recognized this in his description of the Cherokee Nation as a "domestic dependent nation."\textsuperscript{214} The early treaties between the United States and the various Indian tribes established a relationship in which the Indian tribe acquiesced to the authority of the United States, who then promised to protect the tribe.\textsuperscript{215} Acquiescence to the sovereignty of the United States with regard to its relation with other sovereigns\textsuperscript{216} is inherent in the treaty language acknowledging that the tribe was "under the protection of the United States and of no other sovereign."\textsuperscript{217} When this acquiescence is taken together with the United States' promise to protect the tribe against incursions on tribal territory, the treaty becomes a formalization of a social contract. The implied contract, as the basis of the legitimacy of the government's authority over the tribe, exists whether or not it is formalized in a treaty. This means that, under the social contract paradigm, the government's obligation to protect the tribal right to self-government exists even in the absence of a treaty with the tribe.

2. The Right to Self-Government is a Contractual Limitation on the Authority of United States Over Indian Tribes Analogous to Constitutional Rights Enforced by the Court.

Just as constitutional rights are the contractual terms limiting the authority of the United States over its citizens, the right to self-government is the contractual term limiting the power of the United States Government over Indian tribes. With regard to constitutional rights, the basic holder of the right is the individual citizen: it is the individual that enjoys of freedom of speech, religion, and association, as well as the right to be secure in his own home.\textsuperscript{218} The government limits those rights when they threaten the well being of others, for example when speech crosses a line and becomes "fighting words," which threaten the safety of other citizens.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{214} See supra note 21 and accompanying text.
\item \textsuperscript{215} See supra note 30 and accompanying text.
\item \textsuperscript{216} See 30 U.S. at 17. Chief Justice Marshall's discussion of the limitations on native sovereignty — that they no longer possessed the right to treat with other nations or to alienate title to their lands — gives the doctrine of discovery rather than treaty language as the source of the limitation. \textit{Id.}
\item \textsuperscript{217} See supra note 28 and accompanying text.
\item \textsuperscript{218} See, e.g., \textit{Steagald v. United States}, 451 U.S. 204, 222 (1981) ("the right . . . of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the Government—is weighty").
\item \textsuperscript{219} See, e.g., \textit{NAACP v.Claiborne Hardware Co.}, 458 U.S. 886, 927 (1982) ("It is clear that 'fighting words'—those that provoke immediate violence—are not protected by the First Amendment.").
\end{itemize}
In the case of tribal rights, the basic unit is the tribe. The right of an individual to be secure in his own home can be converted from an individual right into a tribal right: the right to be secure on its own reservation, which is precisely what the tribal right to self-government is about. Chief Justice Marshall’s *Worcester* opinion shows how this right is inherent in the Indians’ understanding of the federal-Indian relationship that arose out of the treaty-making era.

Chief Justice Marshall outlines the foundational rights the Indians would have understood — given their preceding relationship with Great Britain — that the United States had agreed to protect: intrusions into their country and encroachment on their lands. Because, as recognized by Chief Justice Marshall, “it is inconceivable that [the Indians] could have supposed themselves . . . to have divested themselves of the right to self-government,” and because the reach of State laws and regulations into Indian Land is both a form of encroachment on the land and a divestiture of self-government, it is arguable that the right to self-government was included in the rights the Indians believed the United States to have undertaken to protect. The canon of construction requiring that treaties be interpreted as the Indians would have understood them, mandates adopting the Indians’ understanding of the obligation undertaken by the United States in its early treaties with the Indians. Because the tribe’s ability to effectively govern itself is dependent on both maintaining its land base and on its economic security, the government also has a trust responsibility with regard to any tribal property it undertakes to hold in trust or manage on behalf of the tribe.

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221. See supra note 30 and accompanying text.

222. 31 U.S. at 554. See also supra note 30 and accompanying text. Although Chief Justice Marshall was speaking specifically of the language in Article Nine of the treaty of Hopewell, his rational is equally applicable to the Cherokee’s understanding of the effect of the treaty itself.


224. This canon is an “acknowledgment of the unequal bargaining position[s].” COHEN, supra note 1 at 222. Because it is an extension of the rules of interpretation used in contracts, See RESTATEMENT (SECOND) OF CONTRACTS §§ 201-03, no circularity is involved in using it as a step in justifying the trust doctrine.
The promises of the United States included protection against incursions by white settlers onto their land. That these agreements were taken seriously by the Indians is demonstrated in a message sent to President Washington by the Cherokee Chiefs in response to continued incursions by white settlers onto Cherokee land, reminding Washington of the United States promises in the treaty of Hopewell: “[W]e gave up to our white brothers all the land we could anyhow spare, and have but little left to raise our women and children upon, and we hope you won’t let any people take any more from us without our consent.” This suggests an understanding on the part of the Cherokees that the United States has the power, if not the authority, to prevent or permit the taking.

B. IMPLICATION OF THE SOCIAL CONTRACT PARADIGM OF THE FEDERAL-INDIAN TRUST RELATIONSHIP.

Wood recognized the connection between the trust doctrine and the plenary power doctrine would have to be broken before the trust doctrine could effectively function as a doctrine of restraint. When based in social contract theory, the trust doctrine is no longer an outgrowth of power. The tribal right to self-government, as foundational right in the federal-Indian relationship, is equivalent to the constitutional rights foundational to the federal-citizen relationship. Because the government’s trust obligation is not based on the individual treaties or on Congressional power but rather on rights inherent in the federal-Indian implied social contract, that obligation binds all branches of the government, imposing an obligation on the Court to enforce tribal rights. The Court must, therefore, subject both Congressional and Executive action in violation of the trust obligation to the same strict scrutiny as fundamental constitutional rights.

Basing the government’s trust obligation on an implied social contract with the Indians provides the justification, lacking in the Harvard Note, for extending autonomy principles to Indian tribes and for the Court’s review of Congressional and Executive action in light of these principles. They can be extended to Indian tribes because, in Indian Law, the tribe, not the individual, is the basic unit. The Court can enforce them because the trust obligation attaches to all branches of the government.

Chambers suggested that overruling Lone Wolf may be a prerequisite for holding Congress accountable under the trust doctrine. The Court is

225. See, e.g., Treaty of Hopewell, art. V, IV; Washburn, supra note 32.
226. IV Washburn, supra note 32, at 2275.
227. See supra note 183 and accompanying text.
228. See supra note 202 and accompanying text.
extremely unlikely to do this: in the context of Indian Law, the Court tends to distinguish precedent rather than overturn it.\textsuperscript{229} The need to overrule \textit{Lone Wolf} might be avoided by distinguishing cases brought for breach of a trust arising out of treaty rights to land or property from breach of trust claims arising out of the government's obligation, under its implied social contract with the Indian tribes, to protect the tribal right to self-government. The implied social contract does not rest on the Congress' plenary power under Article I sections eight and two of the Constitution.\textsuperscript{230} Because Congress is not acting as a trustee under the plenary power doctrine, \textit{Lone Wolf} would not apply here anymore than it does when the Court reviews Congress' exercise of eminent domain, as it did in \textit{Sioux Nation}.

Chambers also pointed out that equitable relief in cases involving the taking of Indian land is crucial to maintaining Indian sovereignty.\textsuperscript{231} Because the Indians would have understood that the United States had undertaken to protect their freedom from encroachment onto their lands as part of the social contract underlying the federal-Indian relationship,\textsuperscript{232} the social contract paradigm favors equitable relief over monetary relief in cases involving the taking of Indian land.

The social contract paradigm is similar to the "model of Indian expectations," which assumes that the Indians "voluntarily vested title to their land in the government as trustee . . . [and] then asks what terms the Indians would have provided in such a trust."\textsuperscript{233} David McNeill criticized Indian expectations model on grounds that it is speculative, has "an inescapable element of Monday morning quarterbacking," and "risks sovereignty confrontations with the United States."\textsuperscript{234} While it might be argued that the first two criticisms apply to the social contract paradigm of the trust doctrine, the same might be said of any legitimizing theory.

\textsuperscript{230} See supra note 2 and accompanying text.
\textsuperscript{231} See supra note 201 and accompanying text.
\textsuperscript{232} See supra note 30 and accompanying text.
\textsuperscript{233} Daniel McNeill, \textit{Trusts: Toward an Effective Indian Remedy for Breach of Trust}, 8 AM. INDIAN L. REV. 429, 456 (1980). Daniel McNeill argued that the absence of a "coherent model of the government-Indian relation" is an obstacle to remedies in Indian breach of trust actions. \textit{Id.} at 453. He characterized the early Supreme Court Indian law decisions as allowing Congress to "gain[] the power of a trustee without the title," creating a vicious circle in which "trusteeship justified exploitation . . . [which] in turn justified the trusteeship." \textit{Id.} at 435 (citing Kagama, 118 U.S. at 384 ("From the Indian's very weakness and helplessness, so largely due to the course of dealing of the Federal Government . . . there arises the duty of protection, and with it the power.")).
\textsuperscript{234} \textit{Id.} at 456.
Determining the terms of the implied social contract by which the Indians accepted the authority of the United States does not require a vast "leap of imagination." The terms can be derived from the initial conditions under which the contract developed and from the evidence presented by the resulting treaties in cases where that contract was formalized. The social contract paradigm does not present a risk of sovereignty confrontations with the United States because the Indian tribes have accepted the status of domestic dependent nations.

The social contract paradigm of the federal-Indian trust relationship would place an obligation on the federal government to protect Indian tribes against state encroachment on tribal sovereignty. Chief Justice Marshall viewed the tribes as "inherently empowered to govern everything that happened within their territories." Prior to 1987, the Court, when dealing with the issue of whether the tribe or the state had sovereignty, started with the presumption that "state action is invalid unless Congress [has] affirmatively extend[ed] state law into the transaction." This presumption is consistent with Chief Justice Marshall's view. In 1989, however, the Court completed a shift toward a presumption "favor[ing] the validity of state law regarding the regulation of non-Indians in Indian country." Under the social contract paradigm of the federal-Indian trust relationship, the government's promise to protect the tribal right to self-government is one of the contractual terms of the Indian's acquiescence to the authority of the United States. The social contract paradigm, therefore, requires a return to the pre-1989 paradigm.

C. APPLICATION OF THE SOCIAL CONTRACT PARADIGM OF THE FEDERAL-INDIAN TRUST RELATIONSHIP.

The trust obligations under the implied contract paradigm differ from the trust obligations in the context of the "guardian-ward" paradigm. Unlike obligations based in treaties, they cannot be unilaterally abrogated because they are part of an ongoing contract. If the government does not

235. Id.
236. See infra Part IV. C. and accompanying text for an explanation of the threshold inquiry for bringing a claim for a breach of the Government's trust obligation to protect the tribal right of self-government.
239. Id. at 482.
live up to its end of the bargain, its authority over the governed — the tribe — loses its legitimacy.

Congress remains free, under *Lone Wolf*, to unilaterally abrogate treaties, but the way in which it does so is reviewable to the extent that it impacts negatively on the tribal right to self-government. Like Fifth Amendment analysis, there would be a threshold question when bringing a claim under the implied contract trust obligation. A determination would first be made as to whether the alleged violation on the part of the Government, or an alleged intrusion by a State onto tribal sovereignty, impinged on an exercise of tribal autonomy which is inconsistent with its status as a domestic dependent nation. If so, the claim would be dismissed. If the tribe’s complaint involves a threat to an exercise of tribal autonomy consistent with the tribe’s status as a domestic dependent nation, then the Court would apply the same narrowly tailored to a compelling interest standard it applies to fundamental constitutional rights.

This means that the challenge to the Major Crimes Act brought in *Kagama* would be reviewable: exercise of tribal jurisdiction over crimes committed by Indians in Indian county is compatible with the tribe’s status as a domestic dependant nation. However, the Court might still find that the Major Crimes Act did not violate the government’s obligation to protect tribal self-government if the Act was narrowly tailored to a compelling interest.

On the other hand, the General Allotment Act did violate an obligation to protect tribal self-government by decreasing the tribal land base without which tribal culture cannot be maintained. The Termination Acts violated the government’s trust obligation under the implied contract by unilaterally ending the trust relationship. The policies behind these acts have long since been repudiated, but the acts have not been

240. This would be evaluated in terms of the limitations on sovereignty as set forth by Chief Justice Marshall in Worcester. *See supra* note 32 and accompanying text.

241. *See supra* note 79 and accompanying text.

242. *Id.*


244. The General Allotment Act was repudiated during the Reorganization and Self-Government Era, 1928-1945 and formalized in the Indian Reorganization Act of 1934. *Deloria & Vine, supra* note 190, at 12-15. The policy underlying the Termination Acts began to erode in the 1960s, with the beginning of the Self-Determination Era and was formally repudiated by President Nixon in a message to Congress in July 1970. *Id.* at 21.
repealed and their effects are apparent in the presence of non-Indian land holdings on reservations today.

In *Brendale v. Confederated Tribes & Bands of Yakima Indians*, the Court considered whether the Yakima tribe had the authority to regulate the use of land held in fee by a non-Indian in an area of the Yakima reservation where "non-Indian owners... have come to own a substantial portion of the land." The Yakima Indians argued that, under a treaty granting them "exclusive use and benefit" of their reservation land and the power to exclude all white men except those employed by the Indian Department, they had exclusive power to regulate land use on the reservation. The Court rejected the Indians’ argument that the effects of the Allotment Act should not be considered "because it was repudiated in 1934 by the Indian Reorganization Act." The majority of the Court found that the non-Indian land holdings diminished the tribal interest in controlling the land use and upheld the county’s exercise of zoning authority over the non-Indian held land. At least, the implied-contract trust responsibility would mandate that any diminishment of tribal holding that resulted from the General Allotment and Termination Acts not be considered in deciding cases such as *Yakima Band*.

V. CONCLUSION

I have shown that the trust doctrine, in its current form, does not include an obligation on the part of the government to promote self-government. Although the Court holds the Executive Branch to a fiduciary standard if there is statutory language expressing an intent to impose a trust

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246. *Id.* at 422. This case involved two separate zoning issues, the first involving Wilkenson, the owner of the land I am discussing, and a second concerning Brendale, the non-Indian owner of property in an area which was predominantly comprised of trust land. *Id.* at 438. The Justices were split as to which property the tribe had the authority to regulate, with Justice White, joined by the Chief Justice and Justices Scalia and Kennedy, delivering the opinion of the Court that the Tribe could not regulate Wilkenson’s property, but dissenting with the decision of the Court that the tribe could regulate Brendale’s property. *Id.* at 433. Justice Stevens, joined by Justice O’Conner, delivered the opinion of the Court with regard to Brendale and concurred with regard to Wilkenson. *Id.* at 444. Justice Blackmun, joined by Justices Brennan and Marshall, concurred with regard to Brendale but dissented with regard to Wilkenson. *Id.* at 448-68.
247. 492 U.S. at 414-15 (quoting Treaty with the Yakimas, 12 Stat. 951 (1859)).
248. *Id.* at 415 n.1.
249. *Id.* U.S. at 423.
250. 492 U.S. at 431 (White, J., delivering the opinion of the Court with regard to Wilkenson), at 446, (Stevens, J., concurring with the judgment with regard to Wilkenson).
responsibility with regard to a specific area of tribal interest or specific property or if the government has assumed comprehensive control of Indian property, the Court has not held Congress to a trust responsibility in its dealings with the Indians absent a taking in violation of the Fifth Amendment. Finally, the use of monetary rather than equitable damages prevents tribes from reversing the damage to tribal sovereignty as a result of a violation of the trust doctrine.

I then suggested that a stronger paradigm of the trust doctrine based on social contract theory could strengthen the efficacy of the trust doctrine in protecting tribal autonomy. The resulting social contract paradigm of the trust doctrine is based on the concept that the contractual limitations on the power of the United States over Indian inherent in an implied contract between the United States and the Indian Nations are equivalent to Constitutional rights. The paradigm draws on Chief Justice Marshall’s account of the Indian understanding of the obligations accepted by the United States in return for tribal acquiescence to the authority of the United States which limited the right of the tribes to defend themselves against incursions onto their land. These obligations include the duty to protect the tribes from incursions onto their land, which entails the duty to protect the tribal right to self-government.

Because the social contract paradigm is not connected to the plenary power doctrine, it may be a way to hold Congress to a trust obligation in its dealings with Indian affairs without overruling *Lone Wolf*. 