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# Treat all Men Alike: An Analysis of United States v. White Mountain Apache Tribe and Suggestions for True Reparation

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**TREAT ALL MEN ALIKE<sup>+</sup>: AN ANALYSIS OF *UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE* AND SUGGESTIONS FOR TRUE REPARATION**

“Great nations, like great men, should keep their word.”<sup>1</sup>

I. INTRODUCTION

In 1492, Christopher Columbus landed on the shores of the New World. He brought with him dreams of gold, a sword, fire and disease.<sup>2</sup> In doing so, he began the systematic annihilation of the Western Hemisphere’s indigenous people.<sup>3</sup> The torture and genocide of Native Americans, motivated by desire for gold and land, did not end with the

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<sup>+</sup> See generally PBS – THE WEST: CHIEF JOSEPH SPEAKS, available at <http://www.pbs.org/weta/thewest/resources/archives/six/jospeak.htm> (last visited March 6, 2005). Joseph was the West’s most eloquent and celebrated advocates of racial equality. PBS – THE WEST: CHIEF JOSEPH, available at [http://www.pbs.org/weta/thewest/people/a\\_c/chiefjoseph.htm](http://www.pbs.org/weta/thewest/people/a_c/chiefjoseph.htm) (last visited March 6, 2005). The Nez Perce chief, displaced from his homeland by the empty promises of the federal government, often railed against the injustice of United States policy toward his people. *Id.* Joseph became famous for his tactical retreat from federal cavalry, a chase that encompassed over 1,400 miles, where approximately 200 Indian warriors, fought 2,000 U.S. soldiers and Indian auxiliaries in four major battles and numerous skirmishes. *Id.* At heart a peaceful man, Chief Joseph “held out the hope that America’s promise of freedom and equality might one day be fulfilled for Native Americans.” *Id.* In 1879, he was granted access to the White House, where he plead his case with emotion, candor and grace:

I am tired of talk that comes to nothing. It makes my heart sick when I remember all the good words and all the broken promises. There has been too much talking by men who had no right to talk. Too many misinterpretations have been made; too many misunderstandings have come up between the white men and the Indians. If the white man wants to live in peace with the Indian he can live in peace. There need be no trouble. Treat all men alike. Give them the same laws. Give them all an even chance to live and grow. All men were made by the same Great Spirit Chief. They are all brothers.

CHIEF JOSEPH SPEAKS, *supra*.

1. Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

2. See Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745, 759-67 (1999) (describing Columbus’s discovery and conquest of New World as well as the Spanish extermination of the indigenous people).

3. See *id.* at 761, 764 (stating “Columbus initiated what would constitute a similar plight for the indigenous people of the Americas – systematic annihilation” and “[i]n the pursuit of wealth, what began as a military conquest of the ‘New World’ would decimate the indigenous population and destroy their land base . . . through means of brute force rationalized and fueled by religious doctrine, the Spanish Inquisition, and the self-proclaimed right of subjugation”).

Spaniards: it carried on through English rule and young America's taming of the west.<sup>4</sup>

It is estimated that the indigenous population of the continental United States at the time of first contact was between five and ten million.<sup>5</sup> According to the 2000 census, the Native American population (including Alaskan natives) was just under 2.5 million:<sup>6</sup> a reduction of over seventy-five percent from the highest estimation of native population prior to Columbus' landing. But even this is an improvement, considering the near extinction of Native Americans evidenced by the 1890 census.<sup>7</sup>

In response to this apparent genocide, the United States Supreme Court created the trust doctrine – a principle that the United States owes general trust responsibilities in its dealings with the Indian people.<sup>8</sup> Within the last quarter of a century, Indian plaintiffs have come to rely on the federal-Indian trust relationship to impute liability in money damages on the United States for breaches of its trust responsibilities.<sup>9</sup> *United States v. White Mountain Apache Tribe* is an example of this reliance.<sup>10</sup>

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4. *See id.* In 1763, Lord Jeffrey Amherst, Governor General of British North America, wrote a letter to Colonel Henry Bouquet stating: "You will do well to try and inoculate the Indians by means of blankets as well as to try every other method that can serve to extirpate this exorable race." *Id.* Bouquet wrote to Amherst: "I will try to inoculate the Indians by means of blankets that may fall in their hands, taking care however not to disease myself." OTTAWA NATION: SIGNIFICANT PEOPLE, available at [http://www.historytelevision.ca/chiefs/htmlen/ottawa/sp\\_bouquet.asp](http://www.historytelevision.ca/chiefs/htmlen/ottawa/sp_bouquet.asp) (last visited Sept. 3, 2004). The blankets to which they referred, of course, were taken out of smallpox hospitals. *See Sager, supra* note 2, at 764 (quoting Captain Ecuyer of the Royal Americans: "Out of regard for them we gave them two blankets and a handkerchief out of the smallpox hospital. I hope it will have the desired effect.").

5. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 78 (1993) (citing RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492* (1987)).

6. UNITED STATES CENSUS 2000, available at <http://www.census.gov> (last visited Sept. 3, 2004).

7. *See* Clinton, *supra* note 5, at 79. If the 1890 census was accurate, slightly more than 243,000 Indians were counted. *Id.* This is a reduction in the aboriginal population of North America from at least 5 million to 243,000 – a decrease of 95.14% based on even the most conservative estimates. *Id.*

8. *See* John Fredricks III, *Indian Lands: Financing Indian Agriculture: Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105, 107 (1989) (stating that "[i]t has been established that the United States owes general trust responsibilities in its dealings with Indian people, but the extent of these responsibilities is unclear").

9. Kimberly T. Ellwanger, *Money Damages for Breach of the Federal – Indian Trust Relationship After Mitchell II*, 59 WASH. L. REV. 675, 676 (1984).

10. *See* *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468-470 (2003). Plaintiffs filed suit alleging that the United States had breached its fiduciary duty to "maintain, protect, repair and preserve" trust property and therefore was liable for damages. *Id.*

This Note examines the origin, evolution, elements and application of the trust doctrine.<sup>11</sup> Part II focuses on the origin, evolution and modern interpretation of the trust doctrine.<sup>12</sup> Part III provides a statement of the facts, the procedural history and the United States Supreme Court decision in *United States v. White Mountain Apache Tribe*.<sup>13</sup> Part IV analyzes the *White Mountain Apache Tribe* decision, argues that based on fundamental legal arguments, the Court decided the case incorrectly, and offers suggestions for reformulating the trust doctrine or reestablishing Indian sovereignty.<sup>14</sup>

## II. BACKGROUND

### A. Origin of the Trust Doctrine: The Cherokee Cases

In order to completely appreciate the intricacies of federal Indian law,<sup>15</sup> it is imperative to understand the nature and origin of one of the most fundamental areas in the jurisprudence: the trust doctrine.<sup>16</sup> The

11. See *infra* Parts II-IV.

12. See *infra* notes 15-79 and accompanying text.

13. See *infra* notes 80-111 and accompanying text.

14. See *infra* notes 112-220 and accompanying text.

15. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1 (University of New Mexico Press 1971) [hereinafter COHEN I] (1942). Federal Indian law is defined in “terms of the legal questions involved in a case [involving Indians].” *Id.* Federal Indian law is the body of jurisprudence created by decisions of the courts and administrative agencies, by statute and treaty, Executive order, governmental regulation, and such customs and practices “as are accorded, by courts and administrators, ‘the force of law.’” *Id.* Cohen emphasizes that a lawsuit involving Indian litigants is not necessarily part of our Indian law. *Id.* Federal Indian law is notoriously complex and confusing – so much so that Justice Felix Frankfurter once described the jurisprudence as “the vast hodgepodge of treaties, statutes, judicial and administrative rulings, and unrecorded practice in which the intricacies and perplexities, confusions and injustices of the law governing Indians lay concealed.” *Id.* at Publisher’s Note (quoting Justice Felix Frankfurter).

16. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (Rennard Strickland et al. eds., Law Publishers (3d ed. 1982) [hereinafter COHEN II] (calling the trust doctrine a “cornerstone” of Indian law); see also, Robert Laurence, *Thurgood Marshall’s Indian Law Opinions*, 27 HOW. L.J. 3, 3 (1984) (describing the trust doctrine as a “principal” area of Indian law). Felix S. Cohen is considered the foremost scholar of Indian law. Philip P. Frickey, *Domesticating Federal Law*, 81 MINN. L. REV. 31, 94 n.11 (acknowledging Felix Cohen as the preeminent Indian law scholar). He was born in New York City in 1907 and graduated magna cum laude from City College in New York at age eighteen. COHEN I, *supra* note 15, at viii. Cohen attended Cambridge, majoring in Philosophy, but also reading on the law and auditing classes taught by such professors as Felix Frankfurter and Roscoe Pound. *Id.* In 1927, Cohen received his M.A. in Philosophy and completed his residence for a Ph.D. in 1928. *Id.* Cohen entered Columbia Law School in the fall of 1928 and worked as book review and legislation editor of the school’s law review. *Id.* He received another Ph.D. from Harvard in 1929 and graduated from Columbia in 1931. *Id.* In 1933, Cohen was offered the position of Assistant Solicitor to the Secretary of the Interior. *Id.* at ix. He was brought on board to help draft legislation that would transfer more rights

trust doctrine is rooted in early American case law, specifically Justice John Marshall's Cherokee Cases: *Cherokee Nation v. Georgia*<sup>17</sup> and *Worcester v. Georgia*.<sup>18</sup>

In *Cherokee Nation v. Georgia*, the Indian litigants claimed to be a foreign state that did not owe any allegiance to the United States.<sup>19</sup> At issue was a Georgia statute that (1) annexed Cherokee land as established under a federal treaty, (2) extended the laws of Georgia over Cherokee land and (3) abolished the existing laws of the Cherokee nation.<sup>20</sup> The Court held that it lacked jurisdiction to hear the case under Article III, Section 2 of the Constitution because the Cherokee were not a foreign nation, and therefore had no standing.<sup>21</sup>

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and power to Indians over their political and economic affairs. *Id.* Cohen continued to work for the Secretary for fourteen years, raising himself to Associate Solicitor and Chairman of the Interior's Board of Appeals. *Id.* While working as a Special Assistant to the Attorney General, Cohen prepared his Handbook, which has become a standard source book for Indian law. *Id.*

17. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

18. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Some scholars include Justice Marshall's opinion in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) in the *Cherokee Nation* line. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385 (1993). *Johnson* was the first significant Indian case heard by the Supreme Court. *Id.* The case involved a dispute between two non-Indians over a parcel of land. *Id.* One party traced title back to a transaction between a tribe and non-Indian, while the competing party traced title back to a conveyance between the tribe and the United States. *Id.* at 385-86. In finding for the party whose title flowed from the United States, Justice Marshall laid the groundwork for federal Indian law. *Id.* at 386. The Court held that "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Johnson*, 21 U.S. at 573. Under the discovery rationale, only a discovering, European sovereign could acquire the lands held by the Indians, not a private party or non-European government. Frickey, *supra* at 386. The Court held that the sovereign could extinguish Indian title "either by purchase or conquest." *Johnson*, 21 U.S. at 587. Justice Marshall noted that European cultures generally granted the conquered two choices: assimilate as one people or be governed as a distinct people. Frickey, *supra* at 387. Ultimately, in America, the conquerors were faced with the choice of abandoning any claim to the country, or enforcing their claims with violence against a people too wild to properly settle the land and too proud to be governed by another. *Id.* at 387-388. History tells us the sovereign chose the latter. Justice Marshall, in enforcing the conqueror's right to title, relied on colonial principles of "cultural superiority – the Christian nature and 'superior genius' of the Europeans. . ." *Id.* at 388 (quoting *Johnson*, 21 U.S. at 573).

19. *Cherokee Nation*, 30 U.S. at 2. Specifically, the Cherokee claimed to be "the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any state of this union, nor to any prince, potentate or state, other than their own." *Id.*

20. Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 117 (1997) (citing *Cherokee Nation*, 30 U.S. at 3, 7).

21. Aitken, *supra* note 20, at 117. The first issue before the Court was one of jurisdiction. *Cherokee Nation*, 30 U.S. at 15. Justice Marshall analyzed the tribe's claim under the Cases and Controversies clause of the Constitution, which states: "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made. . . [to controversies] between a State, or the Citizens thereof, and foreign States, Citizens or

Justice Marshall instead found that the Cherokee Nation was more properly described as a “domestic dependent nation” in a “state of pupillage.”<sup>22</sup> Marshall then fired the first volley of the trust doctrine, the ward-guardianship principle.<sup>23</sup> What exactly Marshall meant by the “ward guardian” relationship remains unclear to this day.<sup>24</sup>

One year later, the Court decided *Worcester v. Georgia*, a case that raised essentially the same issues as *Cherokee Nation*.<sup>25</sup> Worcester was convicted of violating a Georgia statute making it unlawful for non-

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Subjects.” *Id.* (quoting U.S. CONST. art. III, § 2, cl. 1). The pivotal inquiry was whether the Cherokee Nation constituted a foreign nation as mandated by the Constitution. *Cherokee Nation*, 30 U.S. at 15. Justice Marshall answered that question in the negative. *Id.* at 17. Marshall relied on several factors in reaching this decision. *Id.* First, that the Indian territory is admitted to compose a part of the United States as evidenced by all “maps, geographical treatises, histories and laws.” *Id.* Second, that the United States had the sole power to regulate trade with the Indians. *Id.* Third, that under their treaties, the Indians acknowledge being under the protection of the United States. *Id.* Fourth, that, in regards to the Cherokee specifically, they had been allowed to send an emissary to Congress pursuant to the treaty of Hopwell. *Id.* Additionally, Marshall opined that the framers did not intend to include the Indians as foreign states under the Constitution, pointing to the Commerce Clause’s specific, separate references to the Indian tribes and foreign nations. *Id.* at 18.

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

23. Justice Marshall held that the relationship between the Indians and the United States most closely “resemble[d] that of a ward to its guardian.” *Id.* He went on to state the tribes “look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.” *Id.* It is this language, so rooted in the dependency of the Indians on the United States, which established the trust doctrine and later supported the evolution of the trust doctrine as a source of congressional power over Indian tribes. *See Aitken, supra* note 20, at 118.

24. Kathleen M. O’Sullivan, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?*, 84 GEO. L.J. 123, 129 (1995) (describing the unclear nature of the guardian ward relationship). Felix Cohen noted Marshall “did not say that Indian tribes were wards of the Government but only that the relation to the United States of the Indian tribes within its territorial limits resembles that of a ward to its guardian.” COHEN I, *supra* note 15, at 170. In fact, Cohen interpreted Marshall’s statement as purely a “suggestive analogy.” *Id.* Cohen believed that “there [were] important similarities and suggestive parallels” between traditional notions of the ward guardian relationship and the actual relationship between Indian tribes and the United States. *Id.* at 169. Cohen never actually specified the similarities, but instead listed various types of “wardships” used throughout Indian law and left it for the reader to make the comparisons. *Id.* The list included: wards as domestic independent nations, as tribes subject to congressional power, as individuals subject to congressional power, as subjects of federal court jurisdiction, as subjects of administrative power, as beneficiaries of a trust, as non-citizens, as subject to restraints on alienation, as unequal in bargaining power, and as subjects of federal bounty. *Id.* at 169-173. With the multitude of uses of the term “ward,” it is easy to understand the confusion concerning Justice Marshall’s meaning. *See id.* at 169 (stating that a “failure to distinguish among these different senses is responsible for a considerable amount of confusion”).

25. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832) (holding a Georgia statute regulating Indian territory invalid). *See also* Frickey, *supra* note 18, at 393. The distinguishing factor in *Worcester* was that the plaintiff was a non-Indian missionary. *Id.* Therefore, no jurisdictional issues were before the Court. Aitken, *supra* note 20, at 118.

Indians to reside in Cherokee territory without a license.<sup>26</sup> The Court held that Georgia had no power to regulate the Cherokee.<sup>27</sup> While Justice Marshall did not utilize the ward-guardian principle, he did explicitly use the term “duty” to describe the government’s relation to the Indian tribes.<sup>28</sup>

In sum, Marshall’s opinions concerning Indian tribes provided for three things. First, they established the ward guardian principle, which would in turn evolve into a source of federal power over the tribes.<sup>29</sup> Second, they established notions of Indian sovereignty laced with a

26. *Worcester*, 31 U.S. at 539. The Georgia statute at issue read:

An act [to] prevent the exercise of assumed and arbitrary power, by all persons, under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part 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.

*Id.* at 521. Worcester was sentenced to four years of hard labor in the Georgia penitentiary. *Id.* at 536. Worcester alleged the Georgia Act was “repugnant to the constitution, laws, and treaties of the United States.” *Id.* Essentially, Worcester asserted the same theory as had been before the Court one year previous: the Georgia law did not reach to Cherokee territory within the state. O’Sullivan, *supra* note 24, at 128.

27. *Worcester*, 31 U.S. at 540. In doing so, Justice Marshall analyzed many Indian treaties and concluded that they “manifestly consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.” *Id.* at 557. He went on to say that the “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.” *Id.* Marshall concluded,

[T]he federal government rightfully possessed this authority, based on the war power, the treaty power, and the power to regulate commerce with tribes, as well as the notion that the federal government is the successor to the British crown, in which power to deal with tribes resided rather than in the colonies.

Frickey, *supra* note 18, at n.52 (citing *Worcester*, 31 U.S. at 558-59).

28. *Worcester*, 31 U.S. at 556. The Court interpreted the treaty to provide for the federal government to “assume[e] the duty of protection” of the Cherokee Nation. *Id.* Marshall went on to describe the Indian – European (and subsequently American) relationship as “a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.” *Id.* at 552. This acknowledgment of the tribe’s sovereignty still bore the trappings of Indian dependency. However, this opinion produced a second prong of the trust doctrine: federal responsibility. *See id.*

29. *See* Ellwanger, *supra* note 9 and accompanying text. One author criticized Marshall for never articulating the source of the fiduciary duty owed to the tribes nor providing any authority whatsoever “to support the view that the United States was obligated to act as a guardian for the tribes.” Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 424 (1984) [hereinafter *Rethinking*]. *But see supra* note 15 (detailing Felix Cohen’s arguments against a literal interpretation of the ward guardian model). The author put forth the proposition that Justice Marshall substituted his own moral judgment for any definitive legal principles or authority. *See Rethinking, supra*, at 425.

federal responsibility for protecting a weaker, conquered nation.<sup>30</sup> Finally, the opinions “laid the foundation for the canon of construction that treaties must be construed as the Indians would have understood them.”<sup>31</sup>

### *B. Evolution of the Trust Doctrine: Plenary Power*

Between 1832 and 1942, the Supreme Court shaped the trust doctrine in a way wholly unforeseen by John Marshall.<sup>32</sup> The first case, *United States v. Kagama*<sup>33</sup> involved a constitutional challenge of the Major Crimes Act.<sup>34</sup> *Kagama*, in holding the Act constitutional, sired what is known as the plenary power doctrine.<sup>35</sup> Justice Miller’s opinion

30. See *supra* notes 27-28 and accompanying text.

31. Aitken, *supra* note 20, at 120. Justice Marshall used the following language to establish this canon:

Is it credible, that they should have considered themselves a[s] 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.

*Id.* (quoting *Worcester*, 31 U.S. at 554) (emphasis added). Again, notice Marshall’s strong indication of Indian sovereignty by questioning whether Indians could seriously have voluntarily surrendered the right to self-government outside areas of trade. See *Worcester*, 31 U.S. at 554. Sovereignty is an extremely important and active portion of Indian law. See Laurence, *supra* note 16, at 3 (defining tribal sovereignty as a principal area of Indian law).

32. The next line of cases hijacked the ward guardian model and its underlying theory of “parental power” to advocate governmental plenary control over Indian affairs. See O’Sullivan, *supra* note 24, at 132-33. This in turn meant a reduction of tribal sovereignty. *Id.* This reduction directly contradicted Marshall’s ideas of Indian sovereignty. See *supra* notes 27 - 29.

33. *United States v. Kagama*, 118 U.S. 375 (1886). *Kagama* was one of two plaintiffs convicted of murdering a tribe member on the tribe’s reservation. *Id.* at 376.

34. 18 U.S.C. § 1153 (2000) (extending federal jurisdiction to Indians committing murder, manslaughter, kidnapping, maiming, rape, incest, arson, burglary, robbery, assault with intent to commit murder, assault with a dangerous weapon, and assault resulting in serious bodily against another Indian or non-Indian, including crimes committed in Indian country). *Kagama* was preceded by *Ex parte Crow Dog*, 109 U.S. 556 (1883), where the Court found that the Sioux’s right to self-government and “regulation by themselves of their own domestic affairs” equated to a lack of jurisdiction in federal courts over a Sioux Indian indicted for the murder of another Indian. See Aitken, *supra* note 20, at 122-23 (quoting *Crow Dog*, 109 U.S. at 568). The *Crow Dog* decision led to public outrage and the passage of the Major Crimes Act in 1885. Steven Paul McSloy, *The “Miner’s Canary”: A Bird’s Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 736 (2003) (detailing the circumstance leading up to *Crow Dog* and the subsequent implications). See also Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 212 (1984) (describing *Crow Dog* and the repercussions of the decision, namely passage of the Major Crimes Act).

35. See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1502 (1994) (acknowledging *Kagama* as the origin of the plenary power doctrine). The Court’s decision was not based on constitutional grounds, but

for the Court in *Kagama* abrogated Marshall's vision of a federal-Indian relationship resembling that of a ward to its guardian into an *actual* ward guardian relationship.<sup>36</sup>

After *Kagama*, there existed two theories of the ward guardian principle: the first obligating the government to protect the sovereignty of the tribes, and the second supporting absolute authority of the federal government deriving from the tribe's dependency and the federal duty of protection.<sup>37</sup>

In *Lone Wolf v. Hitchcock*,<sup>38</sup> the Court held "that Congress had the power to abrogate unilaterally a treaty between a tribe and the federal government."<sup>39</sup> In doing so, the Court joined with *Kagama* in rejecting the trust doctrine's respect for tribal sovereignty and embraced the doctrine's dark side: plenary control.<sup>40</sup> It is important to note that this power extends only to Congress, not to the Executive branch.<sup>41</sup>

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steeped in a policy "that the federal government had both the duty to protect Indians from serious criminals and the *power* to enact the means of protection." O'Sullivan, *supra* note 24, at 132 (emphasis added).

36. In *Kagama*, the Court concluded:

These Indian tribes are the wards of the nation. They are communities dependent on the United States . . . [f]rom 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 a duty of protection, and with it the power.

*Kagama*, 118 U.S. at 383-84. It is commonly held that this plenary power "justif[ied] nearly total federal authority over tribal lands and internal tribal governance, even though such authority lacks any textual basis in the constitution or treaties." Wood, *supra* note 35, at 1503. This absolute authority derives from the protection of the tribes so prevalent in *Cherokee Nation*. See *supra* note 23 and accompanying text. *But see* Newton, *supra* note 34, at 231 (stating that the Court has refuted the notion that Congress's plenary power is extra-constitutional by ruling that it was "drawn both explicitly and implicitly from the Constitution itself") (quoting *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974)) (internal quotation marks omitted).

37. See Wood, *supra* note 35, at 1503-04 (describing the two theories of the ward guardian principle).

38. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903) (holding Congress may unilaterally abrogate treaties between the United States and Indian tribes).

39. O'Sullivan, *supra* note 24, at 133. The Court upheld the constitutionality of the General Allotment Act, 24 Stat. 388, codified as amended at 25 U.S.C. §§ 331-358 (2000), which had the effect of redistributing lands granted to the Kiowa and Comanche tribes by an 1867 treaty. *Id.*

40. O'Sullivan, *supra* note 24, at 133. The *Lone Wolf* opinion emphasized great deference to Congress and judicial impotence. *Id.*

We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made. . . . In any event, as *Congress possessed full power* in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.

*Id.* (quoting *Lone Wolf*, 187 U.S. at 568) (emphasis added).

41. O'Sullivan, *supra* note 24, at 133-34 (noting that *Seminole Nation v. United States*, 316 U.S. 286, 295 (1942), held the executive branch to a stricter fiduciary duty than that of Congress; and *United States v. Creek Nation*, 295 U.S. 103 (1935), held the executive branch may not exercise absolute control over Indian lands).

### C. Contemporary Trust Doctrine

The trust doctrine has evolved into an “important legal tool to protect native rights against adverse agency action.”<sup>42</sup> Due to its association with plenary power, the trust doctrine is not effective against Congressional action.<sup>43</sup> Against the executive branch, however, the trust doctrine is a much more effective weapon.<sup>44</sup>

It is against such executive agency action that *United States v. White Mountain Apache Tribe*<sup>45</sup> focuses. With an understanding of the trust doctrine established, it is advisable to evaluate the law concerning suits against the United States for money damages, and the modern precedents central to the Court’s decision in *White Mountain Apache Tribe*.<sup>46</sup>

### D. Jurisdiction in the Court of Claims

Jurisdiction in any suit against the Government requires a waiver of sovereign immunity<sup>47</sup> and a claim falling within the terms of that waiver.<sup>48</sup> In the Court of Claims, such a claim must be based on a substantive right enforceable by money damages.<sup>49</sup> It is well established that, as sovereign, the United States cannot be sued unless it consents.<sup>50</sup> In order to support a substantive claim against the Government, the waiver of immunity must be clearly expressed.<sup>51</sup> Therefore, without

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42. Wood, *supra* note 35, at 1505.

43. See *supra* note 40 and accompanying text.

44. See Wood, *supra* note 35, at 1508.

45. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475-476 (2003) (holding the Secretary of the Interior responsible as a trustee for Indian territory allowed to depreciate while occupied by the Government).

46. See *infra* notes 47-79 and accompanying text.

47. See BLACK’S LAW DICTIONARY, 753 (7th ed. 1999) [hereinafter BLACK’S LAW DICTIONARY] (defining sovereign immunity as “a government’s immunity from being sued in its own courts without its consent”). Congress has waived most of the United States’ sovereign immunity.

48. *White Mountain Apache Tribe*, 537 U.S. at 470 (citing *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980) [hereinafter *Mitchell I*] and *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) [hereinafter *Mitchell III*]).

49. See *infra* note 90 (defining Court of Claims jurisdiction to render money damages).

50. See *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003) (quoting *Mitchell II*); *Mitchell II*, 463 U.S. at 212 (stating it is axiomatic that the United States may not be sued without its consent); *Mitchell I*, 445 U.S. at 538 (stating the United States is immune from suit save as it consents to be sued).

51. *White Mountain Apache Tribe*, 537 U.S. at 472 (citing *Mitchell I*, 445 U.S. at 538-39). See also *Mitchell I*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969) for the proposition that terms of consent may not be inferred, but must be “unequivocally expressed”).

“clear congressional consent,”<sup>52</sup> the Court of Claims has no more authority than any other court to hear claims against the United States.<sup>53</sup>

*E. Congressional Consent – The Tucker Act and Indian Tucker Act*<sup>54</sup>

The Supreme Court has held that the Tucker Act, 28 U.S.C.A. § 1491<sup>55</sup> and its companion statute, the Indian Tucker Act, 28 U.S.C.A. § 1505<sup>56</sup> to constitute the unequivocal consent necessary to sustain a claim against the United States.<sup>57</sup> However, the Tucker Acts are strictly

52. *Mitchell I*, 445 U.S. at 538.

53. *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 587-88 (1941) (holding the district court did not have jurisdiction to hear a claim under the Tucker Act because the Government had not waived sovereign immunity with respect to the type of claim asserted).

54. Hereinafter referred to collectively as “The Tucker Acts.”

55. The Tucker Act states:

The United States Court of Federal Claims shall have jurisdiction . . . upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

28 U.S.C.A. § 1491 (2000). Representative John Randolph Tucker introduced the Act in 1886. *Mitchell II*, 463 U.S. at 213. The measure was intended “to ‘give the people of the United States what every civilized nation of the world has already done – the right to go into the courts to seek redress against the Government for their grievances.’” *Id.* at 213-14 (quoting 18 CONG.REC. 2680 (1887) (remarks of Rep. Bayne)).

56. The Indian Tucker Act states:

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States. . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C.A. § 1505 (2000). The Indian Tucker Act was enacted to provide Native Americans with the same opportunities to have their day in court as other Americans. *See Mitchell I*, 445 U.S. at 539, 540 (stating that “Congress plainly intended to give tribal claimants the same access to the Court of Claims provided to individuals by the Tucker Act” and holding that “[u]nder 28 U.S.C. § 1505, then, tribal claimants have the same access to the Court of Claims provided to individual claimants by 28 U.S.C. § 1491. . .”).

57. *See, e.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (holding the Tucker Acts contain such a waiver [of consent]); *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003) (holding “[i]f a claim falls within the terms of the [Indian] Tucker Act, the United States has presumptively consented to suit”) (quoting *Mitchell II*, 463 U.S. at 216) (internal quotation marks omitted); *Mitchell II*, 463 U.S. at 212 (holding that by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity); *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 734 (1982) (holding that the Tucker Act “effects one such explicit waiver. . .”); *Dalehite v. United States*, 346 U.S. 15, 25, n.10 (1953) (noting in 1887 the “consent was enlarged [by the Tucker Act]. . . to include all cases for damages not sounding in tort”); *Sherwood*, 312 U.S. at 590 (holding the Tucker Act “must be interpreted in the light of its function in giving consent of the Government to be sued”); *Dooley v. United States*, 182 U.S. 222, 227-228 (1901) (holding that the Tucker Act provides jurisdiction in contract, but not in tort); *Belknap v. Schild*, 161 U.S. 10, 17 (1896) (listing

jurisdictional and do not confer any “substantive right enforceable against the United States for money damages.”<sup>58</sup> The Tucker Acts serve the purpose of opening the door to a claimant if a substantive right exists.<sup>59</sup>

Consequently, a party bringing a suit against the Government under the Tucker Acts must find an independent substantive source on which to base their claim.<sup>60</sup> It is well documented that the claimant’s cited authority must “fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.”<sup>61</sup>

#### F. *The Mitchell Decisions*

The *Mitchell* decisions form the foundation for modern day claims of money damages for breach of the federal-Indian trust relationship.<sup>62</sup> In *Mitchell I*, the United States appealed a decision by the Court of Claims, denying its motion to dismiss on the ground that it had not

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numerous statutes, including the Tucker Act, that assert Congress’ consent to be sued on contracts); *Schillinger v. United States*, 155 U.S. 163, 167-69 (1894) (stating that the Tucker Act provides jurisdiction in certain cases not sounding in tort).

58. *Mitchell I*, 445 U.S. at 538 (quoting *United States v. Testan*, 424 U.S. 392, 398 (1976) (internal quotation marks omitted)). The Court in *Testan* held that the Court of Claims lacked Tucker Act jurisdiction because no statute asserted provided a substantive right to money damages. *Testan*, 424 U.S. at 398.

59. See *Mitchell I*, 445 U.S. at 538 (holding that the Act merely confers jurisdiction).

60. The substantive law must be founded upon the Constitution, acts of Congress, executive orders or regulations, implied or express contracts with the United States, the laws and treaties of the United States or claims for liquidated or unliquidated damages in cases not resounding in tort. See the Tucker Acts, *supra* notes 55, 56.

61. *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1009 (1967) (holding that “[u]nder Section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, this court cannot give relief under Section 1491. . .”); *Testan*, 424 U.S. at 400 (holding that claimant’s asserted authority must be fairly interpreted as mandating compensation by the Government) (quoting *Eastport*, 372 F.2d at 1009); *White Mountain Apache Tribe*, 537 U.S. at 472 (holding that “a statute creates a right capable of grounding a claim within the waver of sovereign immunity if, but only if, it ‘can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained’”) (quoting *Testan*, 424 U.S. at 400).

62. See, e.g., *White Mountain Apache Tribe*, 537 U.S. at 470 (declaring *Mitchell I* and *Mitchell II* as “the seminal cases of tribal trust claims for damages”); *Navajo Nation*, 537 U.S. at 502 (citing the Court’s decisions in *Mitchell I* and *Mitchell II* as controlling); *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (citing *Mitchell II* as the leading case on Indian trust responsibilities); *Brown v. United States*, 86 F.3d 1554, 1557 (Fed. Cir. 1996) (citing *Mitchell I* and *Mitchell II* as the controlling cases); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (holding that *Mitchell I* and *Mitchell II* establish the scope of the United State’s duty to an Indian tribe).

waived its sovereign immunity with respect to the claims raised.<sup>63</sup> The Supreme Court reversed and remanded.<sup>64</sup> The first principle established in *Mitchell I* was that the Tucker Act[s] did not waive sovereign immunity.<sup>65</sup> The second principle established in *Mitchell I* was that of the limited or “bare” trust.<sup>66</sup>

In holding the General Allotment Act did not establish a fiduciary responsibility the Court noted that any right to recover money damages for mismanagement must lie in other sources.<sup>67</sup> The Court acknowledged that the tribe had asserted statutes requiring the Government to manage the forests, sell the timber, and pay the proceeds of such sales to the allottees.<sup>68</sup> The Court sanctioned consideration of these statutes on remand.<sup>69</sup>

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63. In the original action, members of the Quinault tribe brought suit against the Government in the Court of Claims for an alleged breach of its fiduciary duty. *Mitchell I*, 445 U.S. at 537. The tribe’s claim arose from alleged mismanagement, by the Government, of timber resources located on tribal lands. *Id.* The claimants contended that the Government owed a fiduciary duty as trustee of lands allotted to the Quinault people under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U.S.C. § 331 (repealed by Act of November 7, 2000, P.L. 106-462, Title I, § 106(a)(1)). *Id.* The tribe asserted Tucker Act jurisdiction. *Id.* at 538. The Court of Claims, in denying the Government’s motion to dismiss, held the General Allotment Act provided a fiduciary duty and sustained the tribe’s right to pursue a claim alleging breach of that duty. *Mitchell v. United States*, 219 Ct. Cl. 95, 103 (1979). The Supreme Court granted certiorari. *United States v. Mitchell*, 442 U.S. 940 (1979).

64. *Mitchell I*, 445 U.S. at 546. The Court held that the General Allotment Act created only a “limited trust relationship” that did not impose any duty on the Government to manage timber resources. *Id.* at 542. In reaching this conclusion, the Court reasoned that the Act did not unambiguously provide that the United States assumed fiduciary responsibilities. *Id.* Additionally, the majority pointed out that according to the Act, the Indian allottee, not the United States, was responsible for using the land allotted to them. *Id.* Furthermore, the Court looked to Congress’ intent in placing the land in trust: to prevent alienation of the land and ensure that allottees would be immune from taxation. *Id.* at 544.

65. *Mitchell I*, 445 U.S. at 538 (holding that individual claimants must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims). The Court held that tribal claimants had the same access to the courts as non-Indians under the Tucker Act. *Id.* at 540. The Court further held that the Indian Tucker Act no more conferred a substantive right against the United States to recover money damages than did the Tucker Act. *Id.*

66. *See supra* note 64.

67. *Mitchell I*, 445 U.S. at 547.

68. *Id.* at 546 n.7. The statutes referenced include 25 U.S.C. § 162(a) (2000) (describing procedures for investment of funds of tribe and individual allottee); 25 U.S.C. §§ 318(a) (2003), 323-325 (2000) (granting the Secretary of the Interior authority to grant rights-of-way and to build roads across Indian land); 25 U.S.C. §§ 349, 372 (2000) (describing issuance of fee patents to allottees or heirs found to be capable of managing their affairs); 25 U.S.C. §§ 406, 407 (2000) (governing the sale of timber from lands held in trust); 25 U.S.C. § 413 (2000) (describing the collection of administrative expenses incurred on behalf of Indians); 25 U.S.C. § 466 (2000) (directing the Secretary of the Interior to make rules and regulations for the operation and management of the forests on a sustained-yield basis).

69. *Mitchell I*, 445 U.S. at 546 n.7.

On remand, the Court of Claims found for Mitchell and the Quinault tribe.<sup>70</sup> In *Mitchell II*, Justice Thurgood Marshall reversed his position in *Mitchell I* and spoke for the Court in holding that the timber statutes at issue imposed a fiduciary responsibility, the breach of which was compensable by money damages.<sup>71</sup> The Court first corrected the rule handed down in *Mitchell I* requiring a separate waiver of sovereign immunity aside from the jurisdictional statute.<sup>72</sup>

Turning from jurisdiction to the merits of the case, the Court established a three-part test for determining whether the federal government is liable for money damages for breach of its fiduciary duty.<sup>73</sup> In establishing this test, the Court introduced and relied upon what has become known as the “control theory” of the trust doctrine.<sup>74</sup>

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70. *Mitchell II*, 463 U.S. at 211 (1983). The plaintiffs put forth several timber management statutes. See *Mitchell v. United States*, 229 Ct. Cl. 1, 6 (1981) (describing the plaintiff’s claims and mapping out the order the court will address them). They also asserted statutes governing construction of roads and rights of way, statutes governing Indian funds, and numerous regulations which were scripted under the power of these statutes. *Id.* The Court of Claims found that the timber statutes established a fiduciary responsibility on the Government. *Id.* at 6, n.5. The court read monetary compensation for breach of these duties into the statutes and thus found for Mitchell. *Mitchell II*, 463 U.S. at 211. The Supreme Court granted certiorari and affirmed. *Id.*

71. *Mitchell II*, 463 U.S. at 228. Justice Marshall’s primary reversal was in his interpretation of what sort of language was required to impose a fiduciary responsibility. See *Laurence*, *supra* note 16, at 77. In *Mitchell I*, Marshall, writing for the Court, required an unambiguous statement of responsibility. *Mitchell I*, 445 U.S. at 542. However, in *Mitchell II*, he held that if the source of substantive law relied on can “be fairly interpreted as mandating compensation” it is sufficient to sustain a claim against the United States. *Mitchell II*, 463 U.S. at 219.

72. *Id.* Justice Marshall noted the confusion caused by *Mitchell I* and subsequently concluded that “by giving Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act[s] constitute a waiver of sovereign immunity with respect to those claims.” *Mitchell II*, 463 U.S. at 212. Therefore, stated Marshall, “[i]f a claim falls within the terms of the Tucker Act[s], the United States has presumptively consented to suit.” *Id.* at 216.

73. O’Sullivan, *supra* note 24, at 135. The three factors are:

- (1) a tribe must base its claim on a substantive right found in the Constitution or federal statute, or created by the assumption of federal control over Indian property; (2) the claim must be for money damages; and (3) the claimant must demonstrate that the law creating the substantive right “can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.”

*Id.* (quoting *Mitchell II*, 463 U.S. at 217). The third factor is deeply rooted in Supreme Court precedent. See, e.g., *United States v. Testan*, 424 U.S. 392, 400 (1976) (holding the asserted law must be fairly interpreted as mandating compensation by the Federal Government); *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1009 (1967) (holding the source of substantive law must be fairly interpreted as mandating compensation by the Federal Government). The right may be express or implied. *Id.* at 1007.

74. Aitken, *supra* note 20, at 136. The Court in *Mitchell II* stated that “a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians”). *Mitchell II*, 463 U.S. at 225. The Court further justified the control theory by stating:

[W]here the Federal Government takes on or has control or supervision over tribal

Finding the existence of a general fiduciary duty, the Court opened the door for subsequent decisions to turn to private trust principles to determine whether the breach of these duties required compensation by money damages.<sup>75</sup> The Court ultimately determined that breach of the general fiduciary duty did require federal compensation.<sup>76</sup>

The dissent argued that the majority had abandoned the controlling precedent of *Mitchell I*.<sup>77</sup> Justice Powell focused on the lack of congressional intent to be sued for mismanagement of Indian assets.<sup>78</sup> Justice Powell quickly moved on to criticize the majority's use of common law trust doctrine in determining whether the breach required

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monies or properties, the fiduciary relationship exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute. . . .

*Id.* (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)) (internal quotation marks omitted). The Court used such terms as "pervasive" and "comprehensive" when discussing the extent of control necessary to constitute a trust relationship. *See id.* at 219, 222 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 145, 145 (1980)); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 803-810 (1992) (discussing the nature of control required to impose a fiduciary obligation on the Government). Justice Marshall referred to the statutes at issue in *Mitchell II* as "address[ing] virtually every aspect of forest management. . ." *Mitchell II*, 463 U.S. at 220. Ultimately, the Court did not provide the parameters necessary to establish the substantive right needed to bring a claim for breach of trust, and it is fairly evident that the Court left "wiggle room" for future Courts to define "comprehensive" in a way that furthers their goals. *See Aitken, supra* note 20, at 137. However, it is generally believed that if the claim falls under the requisite statutory guidelines, the Government will be liable in money damages for breach. *See id.*

75. *See Newton, supra* note 74, at 788. The Court noted that all the essential elements of a common law trust (trustee, beneficiary and trust corpus) were present. *Mitchell II*, 463 U.S. at 225. "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust." *Id.* at 226 (citing Restatement (Second) of the Law of Trusts §§ 205-212 (1959)). The Court went on to cite at length precedent recognizing that the existence of a trust relationship between the Government and Indians includes the right to sue the trustee for damages resulting from a breach of the trust. *See id.* at 226 n.31.

76. *Mitchell II*, 463 U.S. at 228.

77. *Id.* at 228-29 (Powell, J., dissenting). As such, *Mitchell I* reaffirmed the general principle that in order to sue for money damages against the United States, the cause of action must be explicitly and unequivocally expressed. *Id.* at 229. Justice Powell accused the majority of "overruling *Mitchell I sub silentio*." *Id.* at 233. *See generally* BLACK'S LAW DICTIONARY, *supra* note 47, at 1442 (defining *sub silentio* as "without being expressly mentioned"). The dissent held that "whether the United States has created a cause of action turns upon the intent of Congress, not the inclinations of the courts." *Mitchell II*, 463 U.S. at 229. Absent express statutory authority, the dissent held, Congress has not consented to be sued for money damages. *Id.*

78. *Mitchell II*, 463 U.S. at 232-35. "Congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in terms, provide for such an action." *Id.* at 232. The dissent then attacked what it deemed to be disregard for established principles because of pressure to conform with enlightened governmental policy. *Id.* (quoting *Testan*, 424 U.S. at 400).

monetary compensation.<sup>79</sup>

### III. STATEMENT OF THE CASE

#### A. *Statement of the Facts*

In 1870, the United States Army established the military outpost<sup>80</sup> known as Fort Apache on land<sup>81</sup> that eventually became the reservation for the White Mountain Apache Tribe.<sup>82</sup> Fort Apache remained a military outpost until 1922, when Congress authorized the Secretary of the Interior to assume control of the fort, and in 1923 designated approximately 400 acres to be used as a Native American boarding school.<sup>83</sup>

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79. *Mitchell II*, 463 U.S. at 234-35. The dissent agreed with the proposition that the nature of the federal-Indian trust relationship is vastly different than that of a private trustee. *See id.* at 234. Therefore, the dissent cautioned against explicit reliance on Restatement sections and Scott on Trusts to impose liability. *See id.* In fact, The Restatement (Second) of Trusts § 4 warns that there are many relationships that resemble, but in fact are not, trusts. *Id.* 234 n.8. The dissent argued the importance of differentiating between them. *Id.* The dissent used the ward-guardian model as an example of such a relationship because “[a] guardianship is not a trust.” *Id.* at 235 (quoting Restatement (Second) of Trusts, § 7) (1959)). The dissent went on to attack the majority’s foundational principle that all the elements of a trust were present. *Mitchell II*, 463 U.S. at 235. “[T]wo persons and a parcel of real property, without more, do not create a trust. Rather, ‘[a] trust . . . arises as a result of a manifestation of an intention to create it.’” *Id.* (quoting Restatement (Second) of Trusts, § 2) (1959)). The dissent adamantly maintained that such a manifestation of intent was not present in the statutes. *Id.* at 235.

80. In 1869, Colonel John Green led an expeditionary force to the area of the White River. FORT APACHE HISTORY, available at <http://www.wmat.nsn.us/wmahistory.shtml> (last visited Oct. 23, 2004) Due to the abundance of farmland, game, and water, Col. Green recommended that an outpost be constructed. *Id.* In 1870, the fort itself was established. *Id.* In 1877, President Ulysses S. Grant set aside approximately 7,500 acres surrounding the fort as a military reserve. *Id.* Fort Apache’s primary purpose was to protect peaceful Apache from the hostile renegades and the encroachment of white settlers seeking minerals, timbers, and arable land. *Id.* The area around Fort Apache was a hotbed of activity during the Apache War (1870 – 1886). *Id.* In fact, many White Mountain Apache served as scouts for the U.S. Army. *Id.* The troops positioned at Fort Apache often skirmished with renegade Apache, including Geronimo. *Id.* The fort eventually served as a holding area for the infamous warrior until his escape in 1885. *Id.* Ultimately, Geronimo was found, cornered, and forced to surrender by Brigadier General Nelson A. Miles and his Apache scouts in 1886. *Id.*

81. The land is located in east central Arizona, south of the town of White River. Brief for the United States at 2-3, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (No. 01-1067).

82. Congress created the White Mountain Apache Tribe reservation in 1897. *Id.* at 3 n.1 (citing Act of June 7, 1897, ch. 3, 30 Stat. 62, 64 (1897)). The Tribe is organized under Sec. 16, 25 U.S.C. § 476 (2000) (Indian Reorganization Act) and has approximately 12,000 members. Petitioner’s Brief at 3, *White Mountain Apache Tribe*, 537 U.S. 465 (No. 01-1067).

83. The relevant statute states:

The Secretary of the Interior is authorized to establish and maintain the former Fort

By Act of March 18, 1960 (1960 Act), Congress authorized the Fort Apache Military Reservation to be held by the United States in trust for the White Mountain Apache Tribe, subject to specific uses by the Secretary.<sup>84</sup> In 1965, the Tribe council opted to place the reservation on the National Historic Register.<sup>85</sup> In 1976, The National Park Service declared Fort Apache as a National Historic site.<sup>86</sup>

In 1993, the Tribe commissioned a study to determine the extent of damage the land sustained while occupied by the Government.<sup>87</sup> The Government acknowledged the dilapidation of several of the thirty-five buildings it controlled, yet maintained it had adequately preserved and restored others.<sup>88</sup>

### B. Procedural History

The White Mountain Apache Tribe brought a breach of trust action<sup>89</sup> against the United States in the United States Court of Federal

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Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: Provided, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes.

25 U.S.C. §277 (2000). The school is still in use today for a small number of students. *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 22 (1999). The future of the school as a viable educational institution is under review. *Id.* at 22 n.2. The tribe explained at argument that it anticipates that the property might be available for use in the near future. *Id.*

84. The 1960 Act states:

[A]ll right, title and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation, created by Executive Order of February 1, 1877, and subsequently set aside by the Act of January 24, 1923 (42 Stat. 1187), as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

The Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 (1960).

85. *White Mountain Apache Tribe*, 46 Fed. Cl. at 22.

86. *Id.* Twenty years later, the World Monuments Watch declared Fort Apache one of the 100 Most Endangered Monuments. *White Mountain Apache Tribe*, 537 U.S. at 469.

87. *White Mountain Apache Tribe*, 537 U.S. at 469. The Tribe sought to rehabilitate the property occupied by the Government in accordance with the standards of historic preservation. *Id.* The study determined that it would cost about \$14 million “to protect, preserve, maintain, repair, rehabilitate and restore said property within the Historic District as a cultural and economic resource for the Tribe.” *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1370 n.4 (Fed. Cir. 2001) (internal quotation marks omitted).

88. *White Mountain Apache Tribe*, 249 F.3d at 1370.

89. The Tribe alleged that the Government breached its “fiduciary duty to maintain, protect, repair and preserve the Tribe’s trust corpus.” *Id.* at 1370 (quoting the intent of the “Master Plan”

Claims.<sup>90</sup> The Tribe sought \$14 million in damages in order for the Tribe to repair and restore the trust property.<sup>91</sup> The claim was brought under the 1960 Act and numerous other statutes and regulations.<sup>92</sup>

The Government filed a motion to dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction.<sup>93</sup> Additionally, the Government argued that the statute of limitations governing suits filed under The Tucker Act<sup>94</sup> and the Indian Tucker Act<sup>95</sup> had tolled, and thus, the action was barred.<sup>96</sup> The Court of

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for restoration adopted by the Tribe and set forth in the complaint) (internal quotation marks omitted).

90. See BLACK'S LAW DICTIONARY, *supra* note 47, at 1534 (defining "United States Court of Federal Claims" as a federal court that has "original, nationwide jurisdiction to render a money judgment on any claim against the United States founded on the Constitution, a federal statute, a federal regulation, an express or implied-in-fact contract with the United States or any other claim for damages not sounding in tort"). Congress created the Court of Claims in 1885. Richard W. Hughes, *Can The Trustee Be Sued For Breach? The Sad Saga of United States v. Mitchell*, 26 S.D. L. REV. 447, 452 (1981) [hereinafter HUGHES]. See also, Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. The court was originally established to investigate claims and report its findings to Congress. HUGHES, *supra*, at 452. However, in 1863, the Congress granted the Court of Claims the power to render final decisions and the right of appeal to the United States Supreme Court. *Id.*

91. See *supra* note 87 (describing the Tribe's commissioned study and subsequent plans to renovate the property).

92. *White Mountain Apache Tribe*, 537 U.S. at 469 n.1 (citing additional statutes including the Snyder Act, 42 Stat. 208, as amended in 25 U.S.C. § 13 (2003); and the National Historic Preservation Act, 80 Stat. 915, 16 U.S.C. § 470 *et seq.* (2000)). The Snyder Act details expenditures of appropriations by the Bureau of Indian Affairs. See 25 U.S.C. § 13 (2003). The National Historic Preservation Act declares the propriety of the Federal Government's assistance with historic preservation programs. See 16 U.S.C. § 470 *et seq.* (2000).

93. *White Mountain Apache Tribe*, 537 U.S. at 470. First, the Government acknowledged that under the Indian Tucker Act, the Court of Federal Claims had jurisdiction over claims by Indian tribes against the United States. See *infra* notes 94-95. However, the Government stipulated that the waiver of sovereign immunity put forth by the Tucker Acts came into being only when the "underlying substantive law could fairly be interpreted as giving rise to a particular duty, breach of which should be compensable in money damages." *White Mountain Apache Tribe*, 537 U.S. at 469-470. The Government primarily argued that no jurisdiction existed because the regulations and statutes cited by the Tribe as the underlying substantive law could not be fairly read to impose a legal obligation on the United States to maintain or restore the trust property. *Id.* Therefore, it followed that the cited statutes and regulations did not authorize monetary compensation for a breach, since no legal duty existed. See *id.*

94. The Tucker Act states in relevant part:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort . . . .

28 U.S.C. § 1491(a) (2000). This statute constitutes a waiver of the nation's sovereign immunity in the types of actions listed. *Mitchell II*, 463 U.S. 206, 218-19 (1983).

95. The Indian Tucker Act states in relevant part:

The United States Court of Federal Claims shall have jurisdiction of any claim against

Federal Claims dismissed the action for lack of subject matter jurisdiction.<sup>97</sup>

The Court of Appeals for the Federal Circuit reversed and remanded the judgment of the lower court.<sup>98</sup> The majority held that the Government's use and essentially exclusive control over portions of the trust property implied a fiduciary duty to act in accordance with principles of common law trustees.<sup>99</sup> The United States Supreme Court

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the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising out of the Constitution, laws or treaties of the United States, or Executive Orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (2000).

96. *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 23 (1999). The statute of limitations concerning actions brought under 28 U.S.C. §§ 1491 and 1505 is six years. *Id.* The Government argued the Tribe knew or should have known of the deteriorated state of the property for more than six years. *Id.* The Court of Federal Claims, dismissing on other grounds, refused to entertain this argument. *Id.* at 29. The United States Court of Appeals for the Federal Circuit ignored this argument as well. *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1383 (Fed. Cir. 2001). It was not argued before the Supreme Court. *See White Mountain Apache Tribe*, 537 U.S. at 470-81.

97. The Court of Federal Claims primarily relied on the two seminal cases of American Indian claims for money damages in lieu of a breach of trust: *Mitchell I*, 445 U.S. 535 (1980), and *Mitchell II*, 463 U.S. 206 (1983). *White Mountain Apache Tribe*, 537 U.S. at 470. For a discussion of the *Mitchell* decisions, see *supra* notes 62-79 and accompanying text. The court compared the 1960 Act to the General Allotment Act at issue in *Mitchell I* as creating a "bare trust" in that the 1960 Act does not direct the Government to manage the site for the benefit of the tribe, but authorizes the Secretary to use the site for administrative or school purposes for as long as they are needed. *White Mountain Apache Tribe*, 46 Fed. Cl. at 26. This is contrary to *Mitchell II*, according to the court, in that the timber management statutes at issue in that case (which were found to create a fiduciary duty) expressly required the Secretary to conduct timber sales in accordance to the best interests of the Indians, and use the funds procured from the sales to benefit the Indians. *Id.* at 24.

98. *White Mountain Apache Tribe*, 249 F.3d at 1383. Chief Judge Mayer vehemently dissented. *Id.* at 1384-85 (Mayer, C.J., dissenting). Chief Judge Mayer argued that the 1960 Act did not impose a fiduciary duty on the Government. *Id.* at 1384. The Chief Judge argued that the rule handed down in *Mitchell II* was that a fiduciary obligation existed when the statutes or regulations require the Government to manage trust property or Indian resources for the benefit of the American Indians. *Id.* He agreed with the Court of Federal Claims that the 1960 Act did not impose a responsibility to manage the Fort for the benefit of the Tribe and specifically carved out the Government's right to use the property for specific purposes, therefore creating a "bare trust." *Id.* Chief Judge Mayer further argued that the Tribe held a contingent future interest in that nothing in the statute prohibits the Secretary from using the "carved out" property for school or administrative purposes in perpetuity. *Id.* According to the 1960 Act, the Secretary may use the property for school or administrative purposes for as long as it is needed. *Id.* There is no certainty, Chief Judge Mayer argued, that the Tribe's interest would ever vest and is therefore contingent. *Id.* Chief Judge Mayer noted that the majority had already pointed out that the owner of a contingent future interest had no right to sue for money damages for permissive waste. *Id.*

99. *Id.* at 1377. Additionally, the majority would sustain the Tribe's claim for money damages on a theory of permissive waste, as the Tribe's future interest in the trust most closely

granted a writ of certiorari on April 22, 2002.<sup>100</sup>

### C. *United States Supreme Court Opinion*

In a 5-4 decision, the United States Supreme Court affirmed the Court of Appeals for the Federal Circuit.<sup>101</sup> It held that the language of the 1960 Act expressly defined a fiduciary trust relationship.<sup>102</sup> The Supreme Court acknowledged that under the 1960 Act, the Government had discretionary authority to make use of the trust property.<sup>103</sup> The Court concluded that the Government not only used the property, but also occupied it daily, obtaining “control at least as plenary as its authority over the timber in *Mitchell II*.”<sup>104</sup>

Justice Ginsburg submitted a concurring opinion in which Justice Breyer joined.<sup>105</sup> Justice Ginsburg clarified that the majority’s view did not conflict with the opinion she authored in *United States v. Navajo Nation*.<sup>106</sup> Justice Ginsburg analogized *Navajo Nation* to *Mitchell I*, while noting *White Mountain Apache Tribe* fell under the guidelines set

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resembled an “indefeasibly vested future interest” while the Government’s interest most closely resembled a life estate in the trust property. *Id.* at 1382. Therefore, the court noted that under the common law of property, a beneficiary has an “immediate claim for money damages for any alleged failure to maintain and repair buildings.” *Id.* The court analyzed §§ 139 and 187 of the Restatement (First) of Property, summarizing that the owner of a life estate has a duty to preserve the land and structures, that the owner of an indefeasibly vested future interest has the right to expect compliance with said duty of preservation and that the owner of the future interest may obtain a judgment for the damages caused to him by the failure to comply with the duty of preservation. *Id.*

100. *United States v. White Mountain Apache Tribe*, 535 U.S. 1016 (2002) (granting writ of certiorari).

101. *White Mountain Apache Tribe*, 537 U.S. at 479. The Court noted that since the land occupied by the Government was subject to a trust, a fair inference could be made that the government was obligated to preserve the trust property. *Id.* at 474.

102. *Id.* at 475. The Court quoted the 1960 Act for the proposition that Fort Apache be “held by the United States in trust for the White Mountain Apache Tribe.” *Id.* (quoting the 1960 Act, 74 Stat. 8) (internal quotation marks omitted). Furthermore, the Court noted that “where . . . the relevant sources of substantive law create ‘[a]ll of the necessary elements of a common-law trust,’ there is no need to look elsewhere for the source of a trust relationship.” *White Mountain Apache Tribe*, 537 U.S. at 476 n.3 (quoting *Mitchell II*, 463 U.S. 206, 225(1983)).

103. *White Mountain Apache Tribe*, 537 U.S. at 474-75.

104. *Id.* The Court stated that it was “undisputed” by the parties that the Government availed itself daily of its option to occupy and make use of portions of the trust property. *Id.*

105. *Id.* at 479-81 (Ginsburg, J., concurring).

106. *Id.* at 479. In *Navajo Nation*, an Indian tribe brought suit alleging a breach of fiduciary duty by the Secretary of the Interior concerning the Indian Mineral Leasing Act (IMLA) of 1938. *United States v. Navajo Nation*, 537 U.S. 488, 493 (2003). The Supreme Court, 6-3, held that the Tribe’s claim failed because the statutes and regulations it relied on did not impose any obligation on the Government. *Id.*

forth in *Mitchell II*.<sup>107</sup>

In a vigorous dissent, Justice Thomas declared the majority opinion as unsupported by case law or the plain text of the 1960 Act.<sup>108</sup> The dissent opined that the use of the word “trust” in the 1960 Act, so crucial to the majority opinion, in reality held little weight.<sup>109</sup> Furthermore, Justice Thomas distinguished the 1960 Act from the statutes and regulations at issue in *Mitchell II*.<sup>110</sup> The dissent’s reasoning rejected the majority’s theory of plenary control inferring a fiduciary duty, as in *Mitchell II*.<sup>111</sup>

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107. *White Mountain Apache Tribe*, 537 U.S. 480-81 (Ginsburg, J., concurring). Justice Ginsburg cited *Navajo* for the proposition that the “coal leasing provisions of the IMLA and its allied regulations . . . lacked the characteristics that typify a genuine trust relationship. . . .” *Id.* at 481. Additionally, she refuted the lower court’s opinion that the language of the 1960 Act created nothing more than a “bare” trust. *Id.* According to Justice Ginsburg, the “authorized use and management” and the “plenary control the United States exercises under the Act” brought the case within the purview of *Mitchell II*. *Id.* at 481. See *supra* note 74 (describing the “control theory” advocated in *Mitchell II*).

108. *White Mountain Apache Tribe*, 537 U.S. at 481-82 (Thomas, J., dissenting). The Chief Justice, Justice Kennedy and Justice Scalia joined Justice Thomas. *Id.* Justice Thomas felt that the majority strayed from precedent and created a new “fair inference” test as opposed to whether an Act could be “fairly interpreted as mandating compensation. . . .” *Id.*

109. See *id.* at 482-83. The dissenters adamantly held that authorization of money damages must be made with specificity. *Id.* See also *United States v. Testan*, 424 U.S. 392, 400 (1976) (holding a “grant of a right of action [for money damages] must be made with specificity”). *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 739 (1982) (holding that Tucker Act jurisdiction “cannot be premised on regulations that do not specifically authorize awards of money damages”). Additionally, Justice Thomas stated that the Court made it clear in *Mitchell I* that the existence of a trust does not immediately create a claim for money damages. *White Mountain Apache Tribe*, 537 U.S. at 482-84 (Thomas, J., dissenting). In *Mitchell I*, Justice Thomas wrote, the Court reasoned that the General Allotment Act created only a “bare” trust because it did not unambiguously shoulder the fiduciary responsibility for management of the land. *Id.* The dissent’s attack on the nature of the relationship between the Tribe and the Government continued in a footnote, where Justice Thomas illustrated his point by quoting the oft-cited guardian – ward relationship, and declaring “a guardianship is not a trust. The duties of a trustee are more intensive than the duties of some other fiduciaries.” *Id.* at 1138 n.1 (quoting *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 556, 573 (1990)).

110. *White Mountain Apache Tribe*, 537 U.S. at 483 n.1 (Thomas, J., dissenting) (stating “[t]he 1960 Act does not ‘establish. . . comprehensive responsibilities of the Federal Government in managing the’ Fort Apache property”) (quoting *Mitchell II*, 463 U.S. 206, 222 (1983)). Additionally, Justice Thomas put forth that unlike the statutes at issue in *Mitchell I* and *Mitchell II*, “nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe. . . .” *Id.* (quoting *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1384 (Fed. Cir. 2001) (Mayer, C. J., dissenting)).

111. *White Mountain Apache Tribe*, 537 U.S. at 484-85. Justice Thomas felt that the majority’s control analysis misconstrued *Mitchell II*, “by focusing on the extent rather than the nature of control necessary to establish a fiduciary relationship.” *Id.* at 485. (Thomas, J., dissenting) (quoting *United States v. White Mountain Apache Tribe*, 46 Fed. Cl. 20, 27 (1999)). Justice Thomas did not agree that the present case involved the “level of elaborate control over the Tribe’s property that the Court found sufficient to create a compensable trust duty in *Mitchell II*.” *Id.*

## IV. ANALYSIS

Every legal argument, and thus nearly every judicial opinion, may be reduced to five, independent and fundamental areas of reasoning: text, intent, precedent, tradition and policy arguments.<sup>112</sup> The five types of legal arguments are distinct in four ways.<sup>113</sup> First, the five legal arguments “spring from a different source of law.”<sup>114</sup> Second, each argument functions as “a rule of recognition.”<sup>115</sup> Third, each argument

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Specifically, “*Mitchell II* involved a ‘comprehensive’ regulatory scheme that ‘addressed virtually every aspect of forest management,’ and under which the United States assumed ‘full responsibility to manage Indian resources and land for the benefit of the Indians.’” *Id.* (quoting *Mitchell II*, 463 U.S. at 220, 222, 224). Contrarily, no document (including the 1960 Act) put forth by the Tribe mandates any specific management duties upon the United States. *Id.* at 483 n.1 (Thomas, J., dissenting). Therefore, when viewed in the context of nature over extent, the United States had the “barest degree of control over the Tribe’s property.” *Id.* Since the minute control exhibited by the United States was to the benefit of the Government, and not the Tribe, Justice Thomas felt the present case was clearly distinguishable from *Mitchell II* on the facts. *Id.* at 485. Justice Thomas concluded his dissent by reiterating the irrelevancy of the majority’s “new test” and by attacking the sensibility of “divining fiduciary duties out of the use of the word ‘trust’ and notions of factual control” over focusing on “actual fiduciary duties created by statute or regulation . . . .” *Id.*

112. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENTS* 13 (Carolina Academic Press 2002) [hereinafter HUHN]. Numerous scholars have advanced theories similar to Professor Huhn’s. *See id.* at 4. For example, Professor Philip Bobbitt developed a theory of modalities of constitutional argument. *Id.* Professor Bobbitt’s six modalities include:

[T]he *historical* (relying on the intentions of the framers and ratifiers of the Constitution); *textual* (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average, contemporary “man on the street”); *structural* (inferring rules from the relationships that the Constitution mandates among the structures it sets up); *doctrinal* (applying rules generated by precedent); *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and *prudential* (seeking to balance the costs and benefits of a particular rule).

PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-13 (Blackwell Publishers 1991) (emphasis added). Additionally, William Eskridge and Philip Frickey developed a theory of statutory interpretation stressing that courts take textual, historical and evolutive concerns under consideration. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990).

113. *See* HUHN, *supra* note 112, at 13.

114. Each legal argument is representative of various conceptions of what exactly constitutes the law. *Id.*

Law may be considered to be legal text itself [textual]. It may be regarded as what the text meant to the people who enacted the law [intent]. Law may be conceived of as the holdings or opinions of courts setting forth what the law is [precedent]. It may be thought of as the traditional ways in which members of the community have conducted themselves [tradition]. Finally, law may be understood as the expression of the underlying values and interests that the law is meant to serve [policy].

*Id.*

115. *Id.* Rules of recognition are the secondary rules of law used to actually create the law. *Id.* at 14 (citing H.L.A. HART, *THE CONCEPT OF LAW* 103 (1998)). For example, Professor Huhn notes that the bicameralism and presentment requirements of the U.S. Constitution illustrate an

is “based upon a different set of evidence.”<sup>116</sup> And finally, the five legal arguments serve different values.<sup>117</sup> Both parties relied upon these legal arguments in *United States v. White Mountain Apache* and, based upon

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elementary form of a rule of recognition. HUH, *supra* note 112, at 14. (citing U.S. CONST., ART. I, sec. 7, cl. 2). Thus, analogically, the five types of legal arguments are a summarization of widely accepted and valid legal arguments. See HUH, *supra* note 112, at 14. See also Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1910-14, 1916 (1994) (stating that the six modalities represent the totality of legitimate legal arguments in constitutional interpretation).

116. See HUH, *supra* note 112, at 15. Just as evidence is used to prove questions of fact at trial, the five legal arguments are the tools with which attorneys argue for or against questions of law. *Id.* Such arguments are in a way, a form of evidence. See *id.* Legal arguments are especially important on appeal and before the Supreme Court because questions of fact are not at issue – only questions of law. See *id.* The five legal arguments act as Rules of Evidence for determining what exactly may be considered by the court. *Id.* The five legal arguments as Rules of Evidence may be viewed along a continuum beginning at a narrow scope and moving towards a more expansive scope. *Id.* Textual arguments provide the narrowest grounds for admissibility as the arguments are contained by the specific text of the statute, regulation or constitution. *Id.* at 15. Precedent is related to text in that it is restricted to the actual opinions of the courts concerning the law at issue. *Id.* More towards the middle of the continuum, intent arguments expand the scope of admissibility to evidence relevant to the purported mindset of the drafters of the statute, regulation or constitution. *Id.* Intent’s companion is the tradition argument, which expands the scope of admissibility to include historical beliefs and behaviors of the American people. *Id.* Finally, at the expansive end of the continuum is the policy argument, which is virtually unlimited in its substance – restrained only by its relevance to the issue before the court. *Id.*

117. *Id.* at 16. We as Americans expect certain things of the law. *Id.* Professor Huh believes that these expectations are reflected by the way in which attorneys argue cases and judges decide them. *Id.* Accordingly, the five legal arguments employed by legal professionals embody the expectations and values we as a people place in the law. *Id.* First, the textual argument reflects the natural desire for the law to be an objective statement of clear and unmistakable law. *Id.* In other words, the law should say what it means and mean what it says. Next, the intent argument respects our passion for choice. See *id.* By employing intent arguments, the practitioner, scholar or student may decipher the motivation and will of the people who executed the documents. *Id.* at 15. Intent arguments promote the value of “popular sovereignty” (in the case of statutes) and equally as important, the concept of “personal autonomy” (in the case of wills, deeds and contracts). *Id.* Third, the law must be consistent. *Id.* Nowhere is this precept more evident than in the doctrine of stare decisis. See Wilson R. Huh, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 444 (2000) (noting the preeminent example of stare decisis is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), where Justices O’Connor, Kennedy and Souter reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973) despite fears that the case had been wrongly decided). The legal argument of precedent emphasizes the desired stability of the law. HUH, *supra* note 112, at 16. Fourth, the tradition argument reflects the prudence of following settled societal behaviors. *Id.* An instructive case of utilizing a tradition argument is *Palko v. Connecticut*, 302 U.S. 319 (1937), where Justice Benjamin Cardozo defined fundamental rights as those “so rooted in the traditions and conscience of our people as to be ranked fundamental.” See HUH, *supra* note 112, at 32. Another strong indicator of tradition is the underlying principles of our laws, which reflect the settled expectations of society; for example: murder, stealing, lying, and a myriad of other nefarious deeds are fundamentally wrong and therefore the people must be protected against those who would commit them. *Id.* at 16. Finally, we believe that the law should be able to adapt to rapidly changing times, contemplating “contemporary notions of justice.” *Id.* Policy arguments endeavor to enlighten the court to the changing world and attempt to abrogate notions of justice to comport with societal changes. See *id.*

textual, precedent and policy arguments, the Court decided the case incorrectly.

### A. Textual Arguments<sup>118</sup>

Textual arguments consist of three distinct areas of interpretation: plain meaning interpretation,<sup>119</sup> intratextual interpretation<sup>120</sup> and

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118. *Id.* at 17. Historically, the primary source of law in our society is legal text. *Id.* Such legal texts may include written constitutions, contracts, deeds, wills, statutes and administrative agency regulations. *Id.* Committing ideas, negotiations or rules to writing helps to ensure that they “may not be mistaken, or forgotten. . .” *Marbury v. Madison*, 5 U.S. 137, 176 (1803). Professor Huhn observes that the common law is giving way to the rise of textual law. HUHNS, *supra* note 112, at 18. In the modern era, statutes and detailed codes have supplanted the common law in many areas. *Id.*

119. HUHNS, *supra* note 112, at 19. The basic tenet of the plain meaning rule of interpretation is that “legal text is to be interpreted according to its plain meaning.” *Id.* When a legal text is interpreted by its plain meaning, forays into alternate forms of interpretation are unnecessary, and some would say, pointless. *See id.* This rule is often limited by the notion that plain meaning should be used only when it does not lead to absurd results. *Id.* at 20 (citing KENT GREENWALT, STATUTORY INTERPRETATION: 20 QUESTIONS 57 (1999)). A leading advocate of this approach was Justice Hugo Black, a southern progressive appointed to the Court in 1937 by President Franklin D. Roosevelt. GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW lxxi (4th ed. 2001) [hereinafter *Constitutional Law*]. Justice Black felt that absolute literalism was necessary to curb judicial power and as a result, often insisted (usually in dissents) upon literal enforcement of constitutional guarantees. *Id.* Justice Black was an advocate for the unmitigated guarantee of free speech under the first amendment and rejected the Court’s approach expanding the fourteenth amendment’s applicability beyond the first eight amendments. *Id.* Black’s plain meaning approach is evident in substantive due process cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), where he rejected the Court’s opinion that the Constitution contained a right of privacy beyond those expressly articulated in the document. *Id.* at lxxi. “The Court talks about a constitutional ‘right of privacy’ as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the ‘privacy’ of individuals. But there is not.” *Griswold*, 381 U.S. at 508. The modern standard-bearer of the plain meaning approach is Justice Antonin Scalia. HUHNS, *supra* note 112, at 20. Though a political conservative, Justice Scalia’s plain meaning approach has at times led him to side with the more liberal wing of the Court, especially in cases concerning freedom of speech. *Constitutional Law* at lxxxiii. *See generally* *Texas v. Johnson*, 491 U.S. 397 (1989) (holding flag burning to be protected expression under the first amendment); *R.A.V. v. St. Paul*, 505 U.S. 377, 378-81 (1992) (unanimously holding a hate crime ordinance unconstitutional as violating free speech). However, the same plain meaning approach has led him to become the Court’s most outspoken critic of constitutional balancing tests and reliance on non-textual sources of interpretation. *Constitutional Law* at lxxxiii. Subsequently, Justice Scalia is a relentless opponent of affirmative action and abortion rights. *Id.* For example, in *Casey*, Justice Scalia leveled his judicial canon at the Court’s adherence to the *Roe* principle. *Casey*, 505 U.S. at 980 (Scalia, J. concurring). “The issue is whether [the power of a woman to abort her unborn child] is a liberty protected by the Constitution of the United States. I am sure it is not. . . because. . . the Constitution says absolutely nothing about it. . .” *Id.*

120. HUHNS, *supra* note 112, at 25. “Intratextual arguments use one portion of the legal text to interpret another portion.” *Id.* *See also*, Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (introducing the concept of intratextualism). There are two types of intratextual arguments. HUHNS, *supra* note 112, at 25. The first format is a comparison between the disputed words and the

interpretation facilitated by canons of construction.<sup>121</sup> This Note's analysis of *United States v. White Mountain Apache Tribe*<sup>122</sup> incorporates two of the three textual arguments: the plain meaning approach and interpretation utilizing canons of construction.<sup>123</sup>

### 1. Plain Meaning Approach

The majority employed the most evident plain meaning argument when it noted that the statutory language of the 1960 Act clearly defined a fiduciary relationship.<sup>124</sup> Consequently, if the statute expressly

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words of another portion of the same text. *Id.* The second format is to “deduce the meaning of portions of the text from their position within the organization of the text.” *Id.* The famous Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873) provide an excellent illustration of an intratextual argument. *Id.* In *Slaughter House*, the Louisiana legislature passed a bill granting the Crescent City Live Stock Landing and Slaughter House Company the exclusive right to engage in their business within the City of New Orleans. *Slaughter House*, 83 U.S. at 59-60. All other persons engaged in similar operations were required to butcher their livestock in the centrally located slaughterhouse and were charged a fee set by the statute. *Id.* Justice Miller, writing for the Court and analyzing the applicability of the Privileges and Immunities Clause, U.S. CONST. amend. XIV, § 1 to state action, utilized the following intratextual argument:

It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that *the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.* It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

*Slaughter House*, 83 U.S. at 74 (emphasis added). Justice Miller used this argument to hold that only citizens of the United States were placed under the protection of the Privileges and Immunities Clause and that state citizens could find no protection from state action under the disputed clause. *Id.*

121. HUNN, *supra* note 112, at 19. A canon of construction is a “rule[ ] of inference that draw[s] meaning from the structure or context of a written rule.” *Id.* at 22. Canons of construction are divided into two categories: textual canons and substantive canons. *Id.* at 23. Textual canons infer the meaning from the written word's structure or context. *Id.* In contrast, substantive canons are “interpretive principles that are derived from the legal effect of the rule.” *Id.* at 24. A common substantive canon of construction is that criminal statutes are to be strictly construed. *Id.* The canons of construction at issue in *White Mountain Apache Tribe* are substantive in nature. *See infra* notes 133-138 and accompanying text.

122. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

123. *See infra* notes 124-38 and accompanying text (discussing the nature of the plain meaning and canon arguments within the context of *White Mountain Apache Tribe*).

124. *White Mountain Apache Tribe*, 537 U.S. at 475-76. Congress' use of the language “held by the United States in trust for the White Mountain Apache Tribe,” clearly indicates a trust relationship, which in turn implies a fiduciary responsibility. *Id.* If the plain meaning of the 1960 Act is employed, and the United States is acting as a trustee for the Tribe, then “[o]ne of the fundamental common law duties of a trustee is to preserve and maintain trust assets. . . .” *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 572 (1985). *See also* *United States v. Mason*, 412 U.S. 391, 398 (1973) (stating “a trustee is under a duty. . . to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property”) (quoting 2 A. Scott, *Trusts* 1408 (3d ed. 1967)) (internal quotation marks

authorized a trust relationship, the trustee would be liable in damages for breach of that trust.<sup>125</sup> Justice Souter bolstered his conclusion by acknowledging that all the necessary elements of a trust were present.<sup>126</sup>

The dissent refuted the proposition that employing a term of art necessarily indicated the Government had opened itself up to suits for money damages.<sup>127</sup> In support of this position, Justice Thomas reiterated

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omitted); Restatement (Second) of Trusts § 176 (1957) (“The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.”). In her concurring opinion, Justice Ginsburg observed that the 1960 Act did not stop at clearly defining a fiduciary duty, but employed a term of art. *White Mountain Apache Tribe*, 537 U.S. at 480 (Ginsburg, J., concurring). “[T]he Act expressly and without qualification employs a term of art (‘trust’) commonly understood to entail certain fiduciary obligations. . . .” *Id.*

125. The majority in *White Mountain Apache Tribe* held: “[g]iven this duty on the part of the trustee to preserve [the trust] corpus, ‘it naturally follows that the government should be liable in damages for the breach of its fiduciary duties.’” *White Mountain Apache Tribe*, 537 U.S. at 475-76 (quoting *Mitchell II*, 463 U.S. 206, 226 (1983)). The *Mitchell* court held that “[i]t is well established that a trustee is accountable in damages for breaches in trust.” *Mitchell II*, 463 U.S. at 226.

126. *White Mountain Apache Tribe*, 537 U.S. at 476 n.3. Justice Souter referred to the Court’s finding in *Mitchell II* that “[a]ll of the necessary elements of a common-law trust are present: a trustee, a beneficiary, and a trust corpus.” *Mitchell II*, 463 U.S. at 225 (internal parentheticals omitted). *But see id.* at 235 n.8 (Powell, J., dissenting) (stating “two persons and a parcel of real property, without more, do not create a trust. Rather, ‘[a] trust . . . arises as a result of a manifestation of an intention to create it.’”) (quoting Restatement (Second) of Trusts § 2 (1959)).

127. *White Mountain Apache Tribe*, 537 U.S. at 482-84. Justice Thomas first assaulted the majority’s declaration that the Court should determine whether common-law trust principles permit a “fair inference” that money damages are available, in effect trumping the statute. *Id.* at 483. Justice Thomas pointed out that the Court had held on numerous occasions that “the test to determine if Congress has conferred a substantive right . . . in a suit for money damages is whether the Act ‘can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.’” *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). Therefore, the first textual problem Justice Thomas considered was the subtle distinction between a fair interpretation and fair inference. *See id.* at 481-82. An inference is a “conclusion reached by considering other facts and deducing a logical consequence from them.” BLACK’S LAW DICTIONARY, *supra* note 47, at 781. *But see id.* at 824 (defining “interpretation” as “[t]he process of determining what something, esp. the law or a legal document, means; the ascertainment of meaning”). In promoting a “fair inference” standard, the Court is effectively saying that *trust means trust* and as such, even though the statute is silent on the issue of compensation for breach, it can be fairly inferred that Congress intended such by use of the term of art. *See White Mountain Apache Tribe*, 537 U.S. at 474-75. Under Justice Thomas’ plain meaning approach, *trust may mean trust*, but since the statute is silent on the matter of compensation for breach, the statute cannot be fairly interpreted to provide money damages for a breach. *See id.* at 482 (Thomas, J. dissenting). In utilizing a fair inference standard, the majority allowed other facts and circumstances to influence their reading of the statute, which violates the precepts of plain meaning. *See HUHNS*, *supra* note 112, at 19 (stating that when a Court employs a plain meaning argument, the language of the text is so clear as to negate any need to resort to outside factors). Alternatively, Justice Thomas’ approach is a more pure form of plain meaning argument: that the 1960 Act expressly excludes any mention of monetary compensation for breach and it is therefore impossible to fairly interpret, or fairly determine the meaning of, language that is not there. *See White Mountain Apache Tribe*, 537 U.S. at 483 (Thomas, J. dissenting). A “grant of a right of action [for monetary damages against the

the concept of a limited, or bare trust put forward in *Mitchell I*.<sup>128</sup>

The next, subtler textual argument employed by the majority distinguished the language creating a bare trust in *Mitchell I* with the trust language in the 1960 Act.<sup>129</sup> Justice Thomas countered by

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United States] must be made with specificity.” *Id.* at 482 (quoting *Testan*, 424 U.S. at 400 (1976) (internal quotation marks omitted). *Accord* *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 739 (1982) (stating a “complaint cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages”). Justice Thomas adamantly maintained a plain meaning reading of the statute precluded a right to money damages while noting the majority had conceded that the 1960 did not specifically authorize the award of money damages. *White Mountain Apache Tribe*, 537 U.S. at 482 (Thomas, J. dissenting). *But see* HUHNS, *supra* note 112, at 20 (stating that “many courts have observed that legal text should be given its plain meaning only if this would not lead to an absurd result) (citing KENT GREENWALT, STATUTORY INTERPRETATION: 20 QUESTIONS 57 (1999)). The majority and dissent would most likely disagree on what constitutes “absurd.” Justice Souter would say that strictly reading the statute would lead to the absurd result of a fiduciary not held responsible for mismanagement of trust property while Justice Thomas would argue it is absurd to conclude that the Government should pay damages for breach of a regulation that does not exist.

128. *White Mountain Apache Tribe*, 537 U.S. at 482-484 (Thomas, J. dissenting). Aspiring to take the wind out of Justice Souter’s proverbial sails, Justice Thomas attempted to reduce the relevance of the express trust language in the 1960 Act. *See id.* In doing so, he blurred the edges between textual and precedent arguments. Justice Thomas noted that in *Mitchell I*, the Court made it clear “the existence of a trust relationship does not itself create a claim for money damages.” *Id.* at 483. The Act at issue in *Mitchell I* also required the United States to hold lands “in trust for the sole use and benefit of the Indian. . .” *Mitchell I*, 445 U.S. 535, 541 (1980) (internal quotation marks omitted). Yet, in spite of almost identical trust language, the Court held that Congress created a “bare trust” because the Act did not “unambiguously provide that the United States ha[d] undertaken full fiduciary responsibilities as to the management of the allotted lands.” *Id.* at 542. Therefore, even taking into consideration the express trust term, a plain reading meaning of the 1960 Act illuminates the profound lack of a monetary damages provision. *White Mountain Apache Tribe*, 537 U.S. at 482-83 (Thomas, J. dissenting). This finding precludes the notion that “Congress intended to create anything other than a bare trust, which [the Court had] found insufficient to confer jurisdiction” on the Court of Claims, in which a claim for money damages is required. *Id.* at 482 (internal quotation marks omitted).

129. *See White Mountain Apache Tribe*, 537 U.S. at 473-74. This textual argument sought to undercut the dissent’s theory that the 1960 Act created a “bare trust” not subject to the fiduciary responsibilities incumbent upon common-law trusts. “The characterizations of the trust as ‘limited[]’ . . . or ‘bare[]’ . . . distinguish the . . . trust-in-name-[only] from [a trust] with hallmarks of a more conventional fiduciary relationship.” *Id.* at 473. While the Act at issue in *Mitchell I* created a trust in form, the statute gave the United States no functional obligations. *Id.* To the contrary, the *Mitchell I* Act “established that ‘the Indian allottee, and not a representative of the United States [was] responsible for using the land,’ and that ‘the allottee would occupy the land,’ and that ‘the allottee, and not the United States, was to manage the land.’” *Id.* (quoting *Mitchell I*, 445 U.S. at 542-43). Thus, the *Mitchell I* Act “removed a standard element of a trust relationship.” *United States v. Navajo Nation*, 537 U.S. 488, 504 (2003). Justice Ginsburg concurred that the Act at issue in *Mitchell I* modified its use of the term “trust” and subsequently reduced the role of the trustee in the relationship. *White Mountain Apache Tribe*, 537 U.S. at 481 n.\* (Ginsburg, J., concurring). The 1960 Act, at issue in *White Mountain Apache Tribe*, did not modify its trust language, except to account for governmental occupation and use of the trust property. *Id.* Such occupation, according to Justice Ginsburg, is not unusual in trust relationships, and in no way alters the fiduciary duty owed to the beneficiary and incorporated in an express trust. *Id.*

distinguishing the language of the 1960 Act from the language of the statutes at issue in *Mitchell II*.<sup>130</sup>

In the final substantive plain meaning analysis, the dissent reasoned the 1960 Act's silence on managing the land for the benefit of the Tribe and the Government's specific right to unrestricted use of the trust property constituted less evidence of a fiduciary responsibility than the Act at issue in *Mitchell I*.<sup>131</sup> Justice Souter, for the majority, emphasized a plain meaning argument in disagreement.<sup>132</sup>

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130. *White Mountain Apache Tribe*, 537 U.S. at 483-484 (Thomas, J., dissenting). The Court held that the timber management statutes considered in *Mitchell II* did impose a fiduciary obligation on the Government due to the elaborate control given to the Secretary of the Interior over Indian forests and property. See *Mitchell II*, 463 U.S. at 225. This control was evidenced by the language of the statutes that "establish[ed] the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber." *Id.* at 222 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 145, 145 (1980)). Justice Thomas argued that the 1960 Act contained no such language establishing an elaborate managerial scheme. *White Mountain Apache Tribe*, 537 U.S. at 485-86 (Thomas, J. dissenting). "[T]he 1960 Act is 'silen[t]' not only with respect to money damages, but also with regard to any underlying 'maintenance and protection duties' that can fairly be construed as creating a fiduciary relationship." *Id.* at 483 (quoting Brief for Respondent 11). See also *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377 (Fed. Cir. 2001) (stating "It is undisputed that the 1960 Act does not explicitly define the government's obligations."). The 1960 Act is distinguishable from the statutes at issue in *Mitchell II* in that it "do[es] not establish comprehensive responsibilities of the Federal Government in managing the Fort Apache property" nor does it "clearly establish fiduciary obligations of the Government in the management and operation of Indian lands." *White Mountain Apache Tribe*, 537 U.S. at 484 (Thomas, J., dissenting) (internal quotations omitted). Therefore, the 1960 Act must fall under the shadow of *Mitchell I* and its concept of a bare trust. *Id.*

131. *White Mountain Apache Tribe*, 537 U.S. at 483-484. Chief Judge Mayer agreed with Justice Thomas that "[n]othing in the 1960 Act impose[d] a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carve[d] the government's right to unrestricted use for the specified purposes. . . of the trust." *White Mountain Apache Tribe*, 249 F.3d at 1384 (Mayer, C.J., dissenting). The 1960 Act allowed the Secretary of the Interior to use any part of the land for administrative or school purposes. See The Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 (1960). This provision, it was argued, meant that the property occupied by the Government was outside of the trust corpus. *White Mountain Apache Tribe*, 537 U.S. at 476. Justice Thomas noted that the Government's use of the land did not have to benefit the Indians and that control of the property could remain with the Government indefinitely. See *id.* at 483-84. Given the aforementioned factors, "there is less evidence of a fiduciary relationship. . . than there was in. . . *Mitchell I*." *Id.* at 484. Therefore, the 1960 Act constituted a superior candidate for "bare trust" status than the Act in *Mitchell I* that had given the concept life. See *id.*

132. See *White Mountain Apache Tribe*, 537 U.S. at 474-75. Justice Souter felt such an argument conflicted with the natural reading of the 1960 Act. *Id.* "[The Act] provided that 'Fort Apache' was subject to the trust; it did not read that the trust consisted of only the property not used by the Secretary." *Id.* at 476. According to Justice Souter, it "ma[de] sense to treat even the property used by the Government as trust property, since any use the Secretary would make of it would presumably be intended to redound to the benefit of the Tribe in some way." *Id.* See generally MERRIAM WEBSTER'S ONLINE DICTIONARY, available at <http://www.m-w.com/cgi-bin/dictionary> (last visited Oct. 9, 2004) (defining redound as "[t]o have an effect for good or ill"). But see *supra* note 131 (showing that the 1960 Act did not expressly mandate the trust for the

## 2. Canons of Construction

A pivotal canon of construction in Federal Indian law states that treaties must be construed as the Indians would have understood them.<sup>133</sup>

A second canon of construction applicable to Indians states, “statutes affecting Indians ‘are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”<sup>134</sup>

The Court does not mention the Indian canons in the *White Mountain Apache Tribe* opinion.<sup>135</sup> It is debatable which side would

benefit of the Tribe, in direct contradiction to Justice Souter’s presumption).

133. See *supra* note 31 and accompanying text (describing Justice Marshall’s reasoning for establishing the canon). See also *Indian Health and Education Bills: Hearing on H.R. 151 and H.R. 2440 Before the House Resources Comm.*, 110<sup>th</sup> Cong. (2003) [hereinafter *Indian Health and Education Bills*] (statement of Kay Culbertson, President, National Council of Urban Indian Health) (describing one Indian canon of construction as “Indian treaties and statutes that must be interpreted as the Indians would have understood them”). Some commentators have noted that the canons of construction originated due to recognition of the trust relationship and the unequal bargaining position of the Tribes. See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: ‘As Long as Water Flows, or Grass Grows Upon the Earth’ – How Long a Time Is That?*, 63 CAL. L. REV. 601, 617 (1975).

134. *Supreme Court Ruling on Tribal Government Authority: Oversight Hearing on the Management of Indian Trust Funds Before the Senate Comm. On Indian Affairs*, 109<sup>th</sup> Cong. (2002) (statement of Reid Payton Chambers, Partner, Chambers, Sachse, Endreson & Perry) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)). See also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (canon of construction “rooted in the unique trust relationship between the United States and the Indians”); *Indian Health and Education Bills*, *supra* note 133 (stating “the U.S. Supreme Court has established canons of construction that provide that: (1) ambiguities must be resolved in favor of the Indians; (2) Indian treaties and statutes must be interpreted as the Indians would have understood them; and (3) Indian treaties and statutes must be construed liberally in favor of the Indians); See COHEN I, *supra* note 15, at 222 (stating that [i]n construing Indian Tribe treaties, the courts have required that treaties will be liberally construed to favor Indians). See also *Squire v. Capoean*, 351 U.S. 1, 6-7 (1956) (utilizing the canon that statutes must be construed liberally in favor of Indian tribes). This canon is a “product of the general federal guardianship over Indian people and property” and requires “that statutes intended to benefit Indians are to be construed liberally in the Indians’ favor.” HUGHES, *supra* note 90, at 474. In *Squire*, the Supreme Court opined concerning the necessity of this canon under principles of federal guardianship. *Squire*, 351 U.S. at 6-7. “‘Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.’” *Id.* (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). Additionally, “[t]he language used in treaties with the Indians should never be construed to their prejudice.” *Worcester v. Georgia*, 31 U.S. 515, 582 (1831).

135. A possible explanation for the failure to apply the Indian canons of construction is the Rehnquist Court’s apparent abandonment of the principles. See Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 22 (2003) [hereinafter SKIBINE]. Skibine suggests the abandonment is a “consequence of the Court’s expansion of federalism and its concomitant requirement for more specificity from Congress in revealing its intent.” *Id.* See also Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 663-64 (2002) [hereinafter SEIELSTAD] (stating that the Rehnquist Court has

have the more persuasive argument had the canons been considered.<sup>136</sup>

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recently been active in defining a new type of federalism, increasing state's sovereign immunity, but limiting Indian tribes). For example, in *Chickasaw Nation v. United States*, the Court refused to apply an Indian canon, deeming it a non-substantive canon, not mandatory in its application and necessary only in interpreting Indian treaties. SKIBINE, *supra*, at 22 (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001)). *But see* Graydon Dean Luthey, Jr., *Chickasaw Nation v. United States: The Beginning of the End of the Indian-Law Canons in Statutory Cases and the Start of the Judicial Assault on the Trust Relationship?*, 27 AM. INDIAN L. REV. 553, 559 (2002) (arguing that the Court's reasoning in *Chickasaw*, which led to dilution of the Indian canons of construction was remarkably flawed). Additionally, much of the Court's attack on the Indian-Law canons was dictum, not part of the holding. *See id.* at 559-563. Justice O'Connor dissented that the canon should have been used because it "presumes congressional intent to assist its wards to overcome the disadvantage our country has placed upon them." SKIBINE, *supra*, at 22 (quoting *Chickasaw Nation*, 534 U.S. at 99). Justice O'Connor also opined the form of the legislation was immaterial, that the canons should apply to statutes as well as treaties. *Id.* The Court's failure to use the canons in *White Mountain Apache Tribe* could be attributed to its efforts to remain consistent in its non-mandatory approach in application of Indian canons to statutes, such as the one at issue in *White Mountain Apache Tribe*. *See supra* note 84 (detailing the 1960 Act at issue in the case). *But see* SKIBINE, *supra* (arguing that use of the Indian canons should not be discretionary, but mandatory, because the canons are substantive rules of statutory construction); Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act?*, 11 ST. THOMAS L. REV. 15, 25 (1998) (arguing the Indian canons are not simply grammatical Latin canons, but are substantive rules).

136. Analyzed under the above canons of construction, it is readily apparent that use of the term "in trust" in the 1960 Act would lead the Indian tribe to believe that "the fact the property occupied by the United States [was] expressly subject to a trust support[ed] a fair inference that an obligation to preserve the property. . . was incumbent on the United States as trustee." *White Mountain Apache Tribe*, 537 U.S. at 475. On its face, all essential elements of a trust were present. *Id.* at 476 n.3. *See also White Mountain Apache Tribe*, 249 F.3d at 1373 (describing the elements of a trust as a trustee, a beneficiary, and a trust corpus). To the layman, these elements were present in the 1960 Act. Additionally, any argument as to the ambiguity of the statute in relation to authorization for money damages would be construed in favor of the Indian tribe. *See Blackfeet Tribe*, 471 U.S. at 766 (holding "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *see also Indian Health and Education Bills*, *supra* note 133 (stating that any ambiguities in "Indian treaties and statutes must be construed liberally in favor of the Indians"). *See generally* COHEN II, *supra* note 16, at 221-225 (addressing the "canons of construction" that should be applied when construing statutes affecting Indians). However, had this argument been raised, the dissent in *White Mountain Apache Tribe* would not necessarily have been painted into a corner. Hypothetically, Justice Thomas could raise the argument that an Indian, in reading the statute would notice "the 1960 Act does not even 'speak in terms of money damages or of a money claim against the United States.'" *White Mountain Apache Tribe*, 537 U.S. at 482 (Thomas, J. dissenting) (quoting *Gnotta v. United States*, 415 F.2d 1271, 1278 (8th Cir. 1969). Therefore, the layman, failing to see authorization for damages could not reason that "[c]ongress ha[d] conferred a substantive right. . . for money damages. . . for the damage sustained." *Id.* Regarding the issue of ambiguity, Justice Thomas might argue that the 1960 Act is not ambiguous as to authorization for money damages as it did not "specifically authorize awards of money damages." *Id.* (quoting *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 739 (1982)). Congress' intent cannot be considered ambiguous because the 1960 Act did not "grant. . . a right of action [for money damages against the United States]. . . with specificity." *United States v. Testan*, 424 U.S. 392, 400 (1976).

However, the Rehnquist Court seems to follow Justice Thurgood Marshall's lead stemming from his *Mitchell I* opinion.<sup>137</sup> Advocates of the dissent in *White Mountain Apache Tribe* could argue the significance of Justice Marshall's decision not to apply the canons.<sup>138</sup> Additionally, the canons are rooted in the same racist notions as the trust doctrine and are repugnant in the modern era.<sup>139</sup>

In light of the themes put forward in *Chickasaw Nation*, the failure of numerous courts (including the Supreme Court) to apply the canons and the paternalistic nature of the canons, it is clear they should be disregarded.<sup>140</sup> Given this analysis of textual arguments, the Court

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137. See *Mitchell I*, 445 U.S. 535, 536-46 (1980).

138. In *Mitchell I*, Justice Marshall opted not to apply the canons of construction. See Laurence, *supra* note 16, at 53. Advocates of the dissent would argue that Justice Marshall's disregard for the canon of construing ambiguity is an indication of two possible propositions: (1) that this particular canon was not required to interpret the statutes at issue in *Mitchell I* or in *Mitchell II* (in which Justice Marshall also penned the majority opinion) or (2) Justice Marshall deemed the *Mitchell I* Act as unambiguous in its establishment of no authorized money damages as to make analysis with the canon moot. Under the first possibility, Justice Marshall would have established a principle that the canons were not necessary and perhaps unimportant. Additionally, none of the courts involved in *White Mountain Apache Tribe* ever considered the canons in structuring their opinions. See *White Mountain Apache Tribe*, 537 U.S. 465; *White Mountain Apache Tribe*, 249 F.3d at 1364; *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20 (1999). Because neither the *White Mountain Apache Tribe* courts nor Justice Marshall under similar circumstances applied the ambiguity canon, it is reasonable to infer that the 1960 Act was not ambiguous and therefore a textual argument based upon this canon is untenable.

139. See *supra* note 134 (describing the canons of construction as a product of the federal guardianship and enacted to protect the "weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith"). See *infra* notes 195 – 220 (describing policy arguments against the trust doctrine inasmuch as it is rooted in colonialist notions of inferiority and barbarism).

140. See *supra* notes 135–39 (describing arguments against utilizing the canons of construction). Although some compelling arguments exist for disregarding the distinction between statutes and treaties, it is textually clear that the first canon relates solely to treaties. See *supra* note 133 (stating that Indian treaties must be interpreted as the Indians would have understood them). This is a realistic canon because, at the time the treaties were entered into, Indian tribes were in an unequal bargaining position due to naiveté concerning European ideas of property, and modern Indian tribes should receive the benefit of the doubt concerning treaties entered into by a less knowledgeable party but applicable to them. See *id.* (stating that some commentators have noted that the canons of construction originated due to the unequal bargaining position of the Tribes). The second canon applies to statutes, but only comes into play when ambiguity is an issue. See *supra* note 134 (describing the statutory canon for ambiguous provisions). Not one court involved in *White Mountain Apache Tribe* opted to apply the statutory canon, including a majority of the Supreme Court. See *supra* note 138 (describing how the canons have not been used at any stage in *White Mountain Apache Tribe*). This approach is unlikely a coincidence, as Justice Marshall, who fathered the treaty canon, refused to apply the statutory canon when provided an opportunity in *Mitchell I* and *Mitchell II*. See *supra* note 138 (describing Justice Marshall's failure to apply the canons). One can only ascertain that the statutes at issue in *Mitchell I* and *White Mountain Apache Tribe* simply were not ambiguous, or that the canons were not deemed important enough to mention. See *supra* notes 136, 138 (theorizing that the statutes were unambiguous as to monetary

wrongly decided *White Mountain Apache Tribe*.<sup>141</sup>

### B. Precedent Arguments

The courts have long recognized precedent arguments as valid theories upon which to state a legal claim.<sup>142</sup> Precedent arguments are conceptually “reasoning by analogy.”<sup>143</sup> The driving force behind precedent, the element that substantiates the argument, is the doctrine of *stare decisis*.<sup>144</sup>

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damages and the Court didn’t deem the canons as important enough to mention). Finally, the statutory canon is unrealistic because it imputes the ancestral Indians’ naiveté and lack of understanding on the modern Indian tribes’ ability to interpret a modern statute, a notion that is condescending and paternalistic.

141. See *supra* notes 101-04 (describing the Court’s 5-4 decision for the Indian tribe); notes 124–39 (discussing applicable textual arguments, in specific plain meaning and canonical approaches).

142. See HUHNS, *supra* note 112, at 41 (stating “judicial precedent had been considered to be an independent source of law”). Arguments based on precedent gained stature under the care of Sir Edward Coke, who first began to assemble compendiums of authoritative cases and the important rules gleaned from such. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 446-47 (1996). However, Coke’s Reports were not authoritative sources of law; they were simply useful examples of the rules of law handed down by precedents. *Id.* at 447. Yet, in spite of Coke’s tampering with some of the precedent to suit his own ends, the birthing pangs of the modern doctrine of precedent had begun. See *id.*

143. See HUHNS, *supra* note 112, at 42. Reasoning by analogy involves exposing similarities between the precedent and the present case. See *id.* at 43. Similarities between cases may take the form of similar fact patterns or similar underlying values implicated by the decisions. *Id.*

144. See *id.* at 42. Stare decisis is defined as “to stand by things decided.” BLACK’S LAW DICTIONARY, *supra* note 47, at 1414 (internal quotation marks omitted). Professor Huhn described the principle of stare decisis in the following manner: “Stare decisis encourages courts to follow their own prior decisions, and it requires lower courts to follow decisions of higher courts in the same jurisdiction. The principle of stare decisis, however, applies only to the holding of the previous case.” HUHNS, *supra* note 112, at 42. Professor Huhn also noted the important role stare decisis played in *Casey*, where the court invoked stare decisis to affirm *Roe v. Wade*, despite concerns that it may have been wrongly decided. See *supra* note 117. *Casey* provided four factors for considering whether to overrule precedent: (1) The workability of the existing rule (2) Society’s reliance on the existing rule (3) Whether the rule has been undermined by subsequent decisions and (4) Whether the premises of fact underlying the decision had changed. See HUHNS, *supra* note 112, at 124. See also Christopher P. Banks, *Reversals of Precedent and Judicial Policy Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 239 (1999) [hereinafter BANKS] (describing reliance as one of the most venerated tenets of the doctrine of stare decisis); James C. Rehnquist, Note: *The Power That Shall Be Vested in Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 358-59 (1986) [hereinafter REHNQUIST] (describing the principled overruling theory and outlining some of the suggested characteristics necessary to satisfy the Court’s special burden when overruling precedent). The strength of precedent varies and generally the Court is more reluctant to overrule cases involving statutory interpretation than Constitutional cases. HUHNS, *supra* note 112, at 125; BANKS, *supra*, at 237 (detailing Justice Brandeis’ observation that the Court should exhibit more hesitation in upsetting prior law concerning statutory interpretation).

Precedent arguments may be attacked in any of eight ways.<sup>145</sup> However, the two methods of attacking precedent relevant to this analysis are: (1) distinguishing the precedent case on the facts<sup>146</sup> and (2) arguing that the precedent case should *not* have been overruled.<sup>147</sup> Under the first prong of the analysis, this Note will distinguish *White Mountain Apache Tribe* from *Mitchell II* and analogize it to *Mitchell I*.<sup>148</sup> Under the second prong of the analysis, this Note will argue that *Mitchell I* was the root precedent in this area of the law and was incorrectly overruled *sub silentio* by the Court in *Mitchell II*.<sup>149</sup>

### 1. Distinguishing Based on the Facts

Both parties relied on precedent arguments to influence the Court's opinion.<sup>150</sup> At the heart of the precedent debate was the notion of

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145. See HUH, *supra* note 112, at 111-125. The first method is to challenge the Court's decision by arguing that the decision was obiter dictum as opposed to an actual holding. *Id.* at 111. The second method is to argue that the Court's opinion did not command a majority. *Id.* at 113. When pluralities exist, the opinion that exists on the narrowest grounds acts as binding precedent for future decisions. *Id.* Perhaps one of the most famous and influential plurality opinions was Justice Powell's opinion in *Regents of the University of California v. Bakke*, in which he penned the principles of affirmative action in university admissions. See *Bakke*, 438 U.S. 265, 269-324. Although Justice Powell's opinion was a solo endeavor, his reasoning provided the narrowest grounds and therefore, for nearly twenty-five years, most major American universities relied on his "plus factor" standard in drafting their admissions policies. See *id.* at 317. The third attack on precedent is to argue that a controlling authority did not author the opinion. HUH, *supra* note 112, at 115. The fourth method is distinguishing the precedent on the facts. *Id.* at 116. The fifth method is employing policy concerns to distinguish the precedent case. *Id.* at 118. The sixth attack on precedent arguments is the existence of two conflicting lines of authority. *Id.* at 122. The seventh method is showing that the precedent case has been overruled. *Id.* at 123. Finally, the last method of attacking precedent arguments is by convincing the reviewing tribunal that the precedent case *should be* overruled. *Id.* at 124 (emphasis added).

146. See HUH, *supra* note 112, at 116. Professor Huh considers distinguishing the facts of the prior case one of the most powerful forms of attack on precedent. *Id.* Since application of precedent is reasoning by analogy, "[i]n logical terms, to apply a case by analogy is to find that there is a sufficient condition for applying the rule of the cited case to the case at hand, whereas to distinguish a case is to find that a necessary condition for applying the rule of the cited case is lacking." *Id.* (citing Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 1016 (1996)).

147. See HUH, *supra* note 112, at 124. Professor Huh's example is of arguing that the case should be overruled. *Id.* However, the attack is a two-edged sword, and oftentimes, a precedent is overruled when it should not have been. Since the principle of stare decisis cautions against overruling precedent, the standard for overruling should be lofty, as evidenced by Justice O'Connor's opinion that stare decisis should control even though she remained unconvinced that *Roe v. Wade* was correctly decided. See *supra* note 144 (describing the holding in *Casey*).

148. See *infra* notes 150-158 and accompanying text.

149. See *infra* notes 159-170 and accompanying text.

150. See Brief for Petitioner, *United States v. White Mountain Apache Tribe*, 2002 WL 1559747, 10-11 (2002) (No. 01-1067) (stating the 1960 Act fell under the purview of *Mitchell I*);

control theory.<sup>151</sup> The majority relied upon the Government's daily occupation and use of the trust property to establish control, while the dissent argued that the majority had misconstrued the concept of control.<sup>152</sup>

The majority's reasoning concerning the control theory is flawed because the facts of *White Mountain Apache Tribe* differed from those in *Mitchell II*. The Court erred when it concluded that occupation equated to control because *Mitchell II*'s holding concerning elaborate Governmental control was based on the nature of the control as opposed to extent of control.<sup>153</sup>

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Brief for Respondent, United States v. White Mountain Apache Tribe, 2002 WL 31107555, 30-32 (2002) (No. 01-1067) (arguing that the control theory established in *Mitchell II* controlled).

151. See *supra* note 74 (describing control theory). Control theory is the moniker attributed to the principle stating: "[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians" originally affirmed by the Supreme Court in *Mitchell II*. *Id.* See also Rodina Cave, Comment, *Simplifying the Indian Trust Responsibility*, 32 ARIZ. ST. L.J. 1399, 1414 (2000) (quoting *Mitchell II* for the proposition that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians"). In review, in a breach of trust case, the claimants must establish a substantive right to a governmental fiduciary duty. Ellwanger, *supra* note 9, at 681. The Court in *Mitchell II* held that a "fiduciary relationship arises when the government assumes control over Indian property. Thus, there are two possible sources of fiduciary duties – statutes and assumption of control." *Id.*

152. Compare *supra* note 108-111 and accompanying text (describing the *White Mountain Apache Tribe* dissenting opinion) with *supra* note 101-04 and accompanying text (describing the *White Mountain Apache Tribe* majority opinion). The majority stated: "[I]t is undisputed that the Government has to this day availed itself of its option. [T]he United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority. . . in *Mitchell II*." United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003). Justice Ginsburg, in concurrence, opined that "[t]he plenary control the United States exercise[d] under the Act as sole manager and trustee. . . places this case within *Mitchell II*'s governance." *Id.* at 481 (Ginsburg, J., concurring). But see *id.* at 485 (Thomas, J. dissenting) (stating the majority's analysis of Governmental control misconstrued *Mitchell II* by focusing on the extent of control rather than the nature of control necessary to establish a fiduciary responsibility).

153. See *Mitchell II*, 463 U.S. 206 (1983). The statutes at issue in *Mitchell II* specifically denoted extensive management responsibilities on the Federal Government. See *id.* at 220, 222. For example, the "regulations addressed virtually every aspect of forest management. . ." *Id.* at 220. Also, "Congress. . . again emphasize[d] the Secretary of the Interior's management duties." *Id.* at 222. The *Mitchell* Court found that "[t]he timber management statutes. . . establish the comprehensive responsibilities of the Federal Government in managing the harvesting of Indian timber." *Id.* (internal quotes omitted). Accordingly, the Federal Government "'exercised literally daily supervision over the harvesting and management of tribal timber.'" *Id.* (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 145, 145 (1980)). The Court found that "[v]irtually every stage of the process [was] under federal control." *Mitchell II*, 463 U.S. at 222. The Court also noted that the federal control over the timber resource management was so pervasive that the Secretary of the Interior was authorized to appropriate money held in trust and invest it if deemed in the best interests of the Indians. *Id.* at n.24. The Court of Federal Claims accurately put forth the theory that "[p]laintiff's argument, however, misconstrues. . . *Mitchell II* by focusing on the extent, rather than the nature of control necessary to establish a fiduciary relationship." United States v.

The timber management statutes put forth by the *Mitchell II* respondents clearly required the Federal Government to do just that: manage natural resources for the benefit of the Indian tribe.<sup>154</sup> While the *Mitchell II* statutes imposed management duties on the Secretary of the Interior, at no time does the 1960 Act require the Federal Government to affirmatively act for any party, let alone for that party's benefit.<sup>155</sup>

Federal management as indicia of control is not a novel concept in Supreme Court jurisprudence.<sup>156</sup> For example, speaking for the majority in *United States v. Navajo Nation*, Justice Ginsburg relied heavily on management based control theory to deny the Indian tribe compensation for an alleged breach of fiduciary duty owed to the Nation by the Federal Government.<sup>157</sup> This opinion is in stark contrast to her acquiescence to

White Mountain Apache Tribe, 46 Fed. Cl. 20, 27 (1999).

154. See *White Mountain Apache Tribe*, 537 U.S. at 485-86 (Thomas, J., dissenting). "*Mitchell II* involved a *comprehensive* regulatory scheme that addressed *virtually every aspect of forest management*, and under which the United States assumed *full responsibility to manage* Indian resources and land for the benefit of the Indians." *Id.* (internal quotations omitted) (emphasis added). Additionally, one scholar indicates that a general trust relationship should arise "in all instances where the executive branch *manages* tribal land held in trust. Several courts have relied in part upon the control theory to find a fiduciary duty in controversies involving *natural resource management* on Indian lands." Wood, *supra* note 35, at 1526. See, e.g., *Pawnee v. United States*, 830 F.2d 187, 190-91 (Fed. Cir. 1987) (holding the Federal Government has a trust obligation in oil and gas lease management and that the duty arises from broad regulatory scheme), *cert. denied*, 486 U.S. 1032 (1988); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 681 (1987) (holding Government liable for mismanagement of range and forest resources), *aff'd*, 5 F.3d 1506 (Fed. Cir.), *cert. denied*, 114 S.Ct. 1538 (1993).

155. See *White Mountain Apache Tribe*, 537 U.S. at 485-86 (Thomas, J., dissenting). "But, until now, the Court has never held the United States liable for money damages under the Tucker Act or Indian Tucker Act based on notions of factual control [occupation] that have no foundation in the actual text of the relevant statutes." *Id.* "In addition, unlike the statutes at issue in . . . *Mitchell II*, [n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe. . . ." *Id.* at 484 (quoting *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1384 (Fed. Cir. 2001) (Mayer, C.J., dissenting)). Conversely, the 1960 Act specifically allowed for the Secretary of the Interior to make use of the trust property for the Federal Government's benefit and therefore the Federal Government exercised the "barest degree of control over the Tribe's property." *Id.* at 486. See generally *supra* note 84 (detailing the language of the 1960 Act).

156. See, e.g., *Navajo Tribe v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966) (holding the government liable for mismanaging helium leases on tribal lands); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F.Supp. 536, 547 (D.N.M. 1979) (holding government liable for mismanagement of oil and gas lease); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F.Supp. 1238, 1247 (N.D. Cal. 1973) (holding government liable for mismanagement of tribal trust funds).

157. See *United States v. Navajo Nation*, 537 U.S. 488, 507 (2003). "The [act in question] and its implementing regulations impose no obligations resembling the *detailed fiduciary responsibilities* that *Mitchell II* found adequate to support a claim for money damages." *Id.* (emphasis added). Justice Ginsburg noted that the Indian tribe's endeavor to align the case with *Mitchell II* fell short because the act in question did not include "elaborate" provisions and did not impose upon the Government "full responsibility to manage Indian resources. . . for the benefit of

the majority's use of extent based control theory in *White Mountain Apache Tribe*, decided on the same day.<sup>158</sup>

## 2. Mitchell I was Improperly Overruled Sub Silentio

The main theme of Justice Powell's dissent in *Mitchell II* was that *Mitchell I* was established precedent and that the Court had overruled it *sub silentio*, contrary to the doctrine of *stare decisis*.<sup>159</sup> As discussed previously, the Supreme Court often considers the doctrine of *stare decisis* and is overall reluctant to overrule precedent, especially in cases involving statutory interpretation.<sup>160</sup> Ultimately, adherence to *stare*

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the Indians." *Id.* (internal quotation marks omitted) (quoting *Mitchell II*, 463 U.S. at 225, 224). Clearly, Justice Ginsburg and a majority of the Court defined elaborate control as management – or the nature of the control exercised by the Federal Government. *See id.* In a telling statement, the Court concluded, "[s]imilarly here, the [act in question] and its regulations do not assign to the Secretary managerial control over coal leasing. Nor do they even establish the limited trust relationship existing under the [*Mitchell I* statute]." *Id.* at 508 (internal quotation marks omitted). A careful reading of this passage indicates that the lack of managerial control takes a statute out of the penumbra of *Mitchell II* and outside the reach of control theory as a means of imputing a fiduciary responsibility on the Federal Government. In 2002, University of South Dakota School of Law student Jesse Cook, while penning a case note on *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001), was prophetic in writing: "The Navajo Nation's argument that the government had an obligation to supervise negotiations for leases also fails. As is noted by the dissenting opinion of this case, the regulation cited by the Navajo Nation 'does not discuss the government supervising lease negotiations.'" Jesse Cook, *Casenote, Navajo Nation v. United States: Determining When Native American Tribes Can Sue the United States Within a Trust Relationship*, 7 GREAT PLAINS NAT. RESOURCES J. 233, 242 (2002).

158. *See White Mountain Apache Tribe*, 537 U.S. at 481 (Ginsburg, J., concurring). "The plenary control the United States exercises under the [1960] Act as sole manager and trustee, I agree, places this case within *Mitchell II*'s governance." *Id.* Despite Justice Ginsburg's assertion that the Federal Government was the "sole manager" of the property, nowhere in the 1960 Act does Congress impose management responsibilities on the Government or classify them as "sole managers." *See supra* note 84.

159. *Mitchell II*, 463 U.S. at 233 (Powell, J., dissenting) (stating "[t]he Court in effect is overruling *Mitchell I sub silentio*. . ."). Justice Powell referred to *Mitchell I* as "[t]he controlling law in this case." *Id.* at 228. Justice Powell recognized the importance of *stare decisis* in opining, "courts are not free to dispense with 'established principles. . .'" *Id.* at 232 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)).

160. *See supra* note 144 (describing how the Supreme Court relied on *stare decisis* in deciding not to overrule *Roe v. Wade*). Justice Antonin Scalia framed the issue in the following way: "[O]ne is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear." HUHNS, *supra* note 112 at 125 (internal quotation marks omitted) (quoting *Rutan v. Republican Party*, 497 U.S. 62, 110-111 (1990) (Scalia, J., dissenting)). In *Burnett v. Coronado Oil and Gas Co.*, 285 U.S. 393 (1932), Justice Louis Brandeis' dissent observed that in cases where the Court is asked to interpret a statute, as opposed to a constitutional claim, it should be more reluctant to overturn precedent. *See Banks, supra* note 144, at 238. The primary purpose behind this theory is that Congress may amend statutes that are erroneous, while constitutional claims are based upon the Federal Constitution, which is difficult to amend, therefore,

*decisis* hinges on its virtues: fairness, stability, predictability and judicial efficiency.<sup>161</sup>

In *Rutan v. Republican Party*,<sup>162</sup> Justice Scalia articulated four factors crucial in overruling precedent.<sup>163</sup> Utilizing the preceding factors, it is apparent that there was not a sufficient basis for the Court to overcome their “reluctan[ce] to depart from precedent.”<sup>164</sup> Succinctly, the rule handed down in *Mitchell I* was that the General Allotment Act could not be read as establishing a fiduciary responsibility on the Federal Government because the Act did not unambiguously provide that the United States had opened itself up to monetary damages.<sup>165</sup>

Analyzing *Mitchell I* under *Rutan*'s factors, it is apparent that the precedent at issue was not wrongly decided. This proposition is evidenced by the fact that the Court did not explicitly overrule *Mitchell I*, but instead created a divergent line of precedent in *Mitchell II*.<sup>166</sup>

Courts should be more inclined to overturn precedents to right a constitutional wrong. See Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 264 (1992).

161. See REHNQUIST, *supra* note 144, at 347 (stating “[t]he Anglo-American version of stare decisis promotes important values of the rule of law: fairness, stability, predictability and efficiency”). “Adherence to precedent ensures that like cases will be treated alike, and that similarly situated individuals are subject to the same legal consequences.” *Id.* Additionally, stare decisis endorses judicial stability by limiting the fluctuation of doctrinal approaches. *Id.* Judicial stability inspires public confidence in the judicial system. *Id.* Even amongst important equitable concepts such as fairness and stability, perhaps the most important virtue also appears to be the most self-serving: judicial economy. See *id.* at 348. Proper and judicious application of stare decisis promotes judicial efficiency. *Id.* at 348. Benjamin Cardozo observed “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.” REHNQUIST, *supra* note 144, at 348 (internal quotation marks omitted) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1928)). If then Judge Cardozo considered that judges would reach the breaking point without stare decisis in 1928, his words ring exponentially true in the modern era of ridiculously clogged dockets.

162. *Rutan*, 497 U.S. 62.

163. See *id.* at 110-11. See also HUH, *supra* note 112, at 125. Scalia’s factors include: whether the precedent was wrong; whether the precedent was recent or established; whether the precedent ran contradictory to long established tradition and whether the precedent was unworkable in practice. *Id.*

164. See HUH, *supra* note 112, at 125 (quoting *Rutan*, 497 U.S. at 110-111 (Scalia, J., dissenting)). Although writing in dissent, Justice Scalia’s factors resemble the *Casey* factors articulated by Justice O’Conner, which is generally held to be the authoritative test for overruling precedent. Compare HUH, *supra* note 112, at 124 (describing the *Casey* factors) with *supra* note 163 and accompanying text (describing Scalia’s four factors for overruling precedent).

165. *Mitchell I*, 445 U.S. 535, 542 (1980).

166. See *Mitchell II*, 463 U.S. 206, 224-25 (1983). Justice Marshall backed away from the rule established in *Mitchell I* and focused instead on the managerial responsibility provided by the timber management statutes. *Id.* at 224. However, the timber management statutes did not unambiguously provide for compensation in the form of money damages and instead of overruling *Mitchell I* and holding that explicit authorization was not required, the Court implied monetary

Additional evidence of *Mitchell I*'s correctness is the fact that the Supreme Court has not abandoned it since it decided the case in 1980 and, in fact, relied on the case in subsequent decisions.<sup>167</sup>

Although *Mitchell I* was recent precedent in 1983 when *Mitchell II* was decided, *Mitchell I* was not contradicted by a long line of tradition; in fact, tradition supported unequivocal expression of monetary damages.<sup>168</sup> In satisfaction of *Rutan*'s final factor, *Mitchell I* has proved exceptionally workable in practice because it incorporates the fundamental principles of plain meaning statutory construction.<sup>169</sup> The 1960 Act simply did not unambiguously provide money damages for a breach of an alleged fiduciary duty; on the contrary, it carved out a section of the trust property for the United States to do with as it wished.<sup>170</sup>

### C. Policy Arguments

Policy arguments are not rules of law, but instead are the values useful in deriving substantive legal rules.<sup>171</sup> There are many policy

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damages based on the control theory. *See id.* at 225.

167. *See, e.g.*, *United States v. Navajo Nation*, 537 U.S. 488, 507 (2003) (holding that the Indian Mineral Leasing Act's statutory scheme fell under the shadow of *Mitchell I* because it neither explicitly authorized money damages or provided elaborate governmental control over Indian property).

168. *See, e.g.*, *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 734 (1982) (holding a cause of action "cannot be implied but must be unequivocally expressed"); *United States v. Testan*, 424 U.S. 392, 400 (1976) (holding a right of action against the United States must be made with specificity); *United States v. King*, 395 U.S. 1, 4 (1969) (holding waiver cannot be implied but must be unequivocally expressed).

169. *See supra* note 127 (describing Justice Thomas' plain meaning reasoning). In dissent, Justice Thomas drew a distinction between a fair inference and the fairly interpreted rule utilized in *Mitchell I*. *Id.* Simply put, the 1960 Act is silent on monetary compensation for damages and therefore cannot be fairly interpreted to provide damages. *See id.* In utilizing a fair inference standard, the majority allowed other facts and circumstances to influence their reading of the statute, which violates the precepts of plain meaning. *See HUHNS, supra* note 112, at 19 (stating that when a Court employs a plain meaning argument, the language of the text is so clear as to negate any need to resort to outside factors). Alternatively, Justice Thomas' approach is a more pure form of plain meaning argument.

170. *See United States v. White Mountain Apache Tribe*, 537 U.S. 486, 483 (2003) (Thomas, J., dissenting). In addition to promoting a plain meaning reading, another rule handed down in *Mitchell I* was the "limited trust" concept. *See Mitchell I*, 445 U.S. at 542. The General Allotment Act in *Mitchell I* also stated that the tribal lands were to be held in trust, yet the *Mitchell I* Court made clear that the existence of the word trust did not itself create a claim for money damages. *See White Mountain Apache Tribe*, 537 U.S. at 482 (Thomas, J., dissenting). This rule is workable because it provides an objective standard: if Congress intended to create a compensable trust, it would have done so – it would not have allowed the Federal Government unrestricted reign over a portion of the property. *See id.* at 483-84.

171. *See HUHNS, supra* note 112, at 53. Professor Huhn describes policy arguments by stating:

considerations useful in determining that the Court erred in deciding *White Mountain Apache Tribe*.<sup>172</sup> First, the control theory articulated in *Mitchell II* and relied upon in *White Mountain Apache Tribe* is a flawed theory that the Court should discard.<sup>173</sup> Second, the Court's use of common law trust principles is inconsistent with the trust relationship.<sup>174</sup> Third and most fundamentally, the trust doctrine is rooted in outdated concepts of Indian inferiority and barbarism, and should be eliminated in favor of Indian sovereignty.<sup>175</sup>

### 1. Control Theory is a Flawed Concept

The control theory, discussed *supra*, is a judicial phenomenon that was first articulated in 1980 in *Navajo Tribe v. United States*<sup>176</sup> and raised to talismanic significance by the Supreme Court in *Mitchell II*.<sup>177</sup> This theory is flawed in two ways: first, it is circular and over-inclusive, and second, it offers little in the way of direction for courts.<sup>178</sup>

The control theory of trust responsibility is flawed because it is

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“A policy argument construes the law not by consulting a dictionary, but by inquiring into the underlying purposes of the law. The meaning of the law is determined not by a literal definition of its terms, but by reference to the values that the law is intended to serve.” *Id.* (emphasis omitted).

172. See *supra* notes 159 – 170 and accompanying text.

173. See *infra* notes 176 – 188 and accompanying text.

174. See *infra* notes 189 - 194 and accompanying text.

175. See *infra* notes 195 – 220 and accompanying text.

176. *Navajo Tribe v. United States*, 224 Ct. Cl. 171, 183 (1980). The court stated:

In particular where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

*Id.* Prior to *Navajo Tribe*, many cases had held that when dealing with Indian property, the Government acted as a trustee. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296-300 (1942); *Menominee Tribe of Indians v. United States*, 101 Ct. Cl. 10, 18-20 (1944); *Menominee Tribe of Indians v. United States*, 102 Ct. Cl. 555, 562 (1945); *Navajo Tribe v. United States*, 364 F.2d 320, 322 (1966); *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. 340, 345, 512 F.2d 1390, 1392 (1975); *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 152-54, 550 F.2d 639, 652-53 (1977).

177. See *Mitchell II*, 463 U.S. 206, 225 (1983). The Court opined:

Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forest and property belonging to Indians. . . “[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties. . . even though nothing is said expressly in the authorizing or underlying statute. . . about a trust fund, or a trust or fiduciary connection.”

*Id.* (quoting *Navajo Tribe*, 224 Ct.Cl., at 183).

178. See *Rethinking*, *supra* note 29, at 428-29.

based on circular logic.<sup>179</sup> The Federal Government is bound by trust obligations arising from governmental control, yet oftentimes, the Government's control is necessary to adequately fulfill its trust obligation.<sup>180</sup> If the Government's control is justified by its obligation to the Indian tribes, then an obligation cannot be justified by control.<sup>181</sup>

The control theory is also over-inclusive in its possible applications.<sup>182</sup> If the trust obligation is removed as the predicate for control, and in absence of other authority, the mere fact that the Federal Government controls property cannot give rise to a fiduciary obligation.<sup>183</sup> The Federal Government exerts its control, vis-à-vis regulation, over much property, Indian and non-Indian alike.<sup>184</sup> If control on its own were enough to justify a fiduciary responsibility, the Government would owe an obligation to all property owners whose holdings are subject to regulation.<sup>185</sup>

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179. *See id.* at 428.

180. *See id.* at 428. The principal question should be, how is the Government's control over Indian property justified? *Id.* One common justification for pervasive federal control is protection of Native Americans and fulfillment of the trust responsibility. *Id.* *See Mitchell I*, 445 U.S. 535, 543 (1980) (holding that Congress intended the United States to hold lands in trust not for the Government to control, but to prevent alienation of the land and ensure immunity from state taxation); Keith Harper & Tracy A. Labin, *The 4<sup>th</sup> Annual Tribal Law & Governance Conference, Case Reconsideration: Brief for the Appellant*, 10 KAN. J.L. & PUB. POL'Y 419, 440 (stating "[i]n exchange for the tribes' relinquishment of vast parcels of their territory, the United States promised that it would protect the ability of Indian tribes to continue their traditional way of life. . . ."); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L. J. 175, 207 (2000) (stating "[w]hile individual treaties differed from tribe to tribe, all were oriented toward ensuring the perpetual availability of a sustained, land-based, traditional existence for the native nations. Nearly all promised a permanent homeland, and many included assurances of continued rights to fish, hunt, and collect plants for subsistence and trade"). *See also* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1061-62 (1974) (discussing the Secretary of the Interior's power to restrain alienation as an exercise of the trust responsibility).

181. *Rethinking, supra* note 29, at 428.

182. *See id.*

183. *Id.*

184. For example, see BUREAU OF LAND MANAGEMENT FACTS, available at <http://www.blm.gov/nhp/facts/index.htm> (last visited Oct. 9, 2004) (stating that The Bureau of Land Management is responsible for managing 262 million acres of land or about one-eighth of the land in the United States, in addition to about 300 million additional acres of subsurface mineral resources). Additionally, the Federal Government maintains a private property system for territory that, in its aggregate, is nearly the size of California. Richard A. Monette, *Governing Private Property in Indian Country: The Double Edged Sword of the Trust Relationship and the Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M.L. REV. 35, 64 (1995).

185. *Rethinking, supra* note 29, at 428. If the control theory was intended to be applied more narrowly – if it was not intended to include all property owners, the theory would necessarily have to distinguish between elaborate control over tribal property and elaborate control over other property. *Id.* at 428-29. However, the control theory makes no such distinction, absent the trust

Finally, the control theory provides little in the way of direction to courts that seek to wield it to impose a fiduciary obligation on the United States.<sup>186</sup> Additionally, the “narrow grounds on which the Court distinguished *Mitchell II* from *Mitchell I* are an indication of how much play the court can get out of [the notion of] comprehensiveness.”<sup>187</sup> The control theory sanctified in *Mitchell II* is problematic, mainly because of its lack of clarity.<sup>188</sup>

## 2. Common Law Trusts Are Inconsistent with the Trust Relationship

The Court’s use of common law trust principles is problematic because historically the Court has consistently found the federal Indian trust relationship to be unique.<sup>189</sup> The relationship between the Federal

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relationship. *Id.* at 429.

186. *Id.* “The theory explains when fiduciary duties are owed, yet it does not define the nature of those duties.” *Id.* Additionally, the theory seeks to impose fiduciary duties on the Government to exercise its control in the best interests of the tribe, yet oftentimes, the Indians’ perception of their best interests conflicts with the Government’s view of the Indians’ best interests. *Id.* The authors of *Rethinking* utilize the following example:

An Indian tribe sues the Government for a breach of duty because the Secretary of the Interior sold their property (under the Department’s control) for \$100,000, which is market value. The Tribe, because of the intense personal, political and spiritual significance of the land, would not have sold it for less than \$500,000. In this situation, the court would impose a fiduciary obligation on the Government based on its control, yet the theory provides absolutely no standards to determine whether the Government acted in the Tribe’s best interest – how can a court determine if the Government breached its fiduciary duty when it sold the land at market value?

*See generally Rethinking, supra* note 29, at 429.

187. Aitken, *supra* note 20, at 137. According to Aitken, the Court is providing itself “wiggle room” to define comprehensive in whatever manner will best reach the desired outcome. *Id.*

188. *See* Laura Rowley, *Student Comment, NRD Trustees: To What Extent Are They Truly Trustees?*, 28 B.C. ENVTL. AFF. L. REV. 459, 475 (2001) [hereinafter ROWLEY]. “The Court seemingly created a rule of liability without manageable standards because it failed to set parameters on how extensive a statute must be in detailing governmental duties in order for a court to find a claim for money damages.” *Id.* *See also*, O’Sullivan, *supra* note 24, at 137 (stating the Court’s opinion has been criticized for creating a rule of liability with no judicially manageable standards because the Court failed to state how extensive the control must be for a statute to impose an enforceable claim for money damages); Ellwanger, *supra* note 9, at 684 (stating the Court failed to “determine how extensive a statute must be in delineating governmental duties before it will state an enforceable claim for money damages”).

189. *See* ROWLEY, *supra* note 188, at 476 (calling the *Mitchell II* decision problematic because it “relie[d] on common law trust principles even though the Court ha[d] consistently found the federal-tribal trust relationship to be unique”); O’Sullivan, *supra* note 24, at 137 (stating “the Court conflates a common law trust. . . to find the implied right of action, even though the Court has consistently maintained that the trust relationship in federal Indian law is unique”). *See also* Ellwanger, *supra* note 9, at 689 (stating “the origin and basis of the federal – Indian trust relationship differ from those of a common law trust relationship. . . [t]he relationship was never

Government and Indian tribes is most often described as ward – guardian relationship.<sup>190</sup> As the dissent in *White Mountain Apache Tribe* observed, “a guardianship is not a trust. The duties of a trustee are more intensive than the duties of some other fiduciaries.”<sup>191</sup>

Even assuming common law trust principles are applicable, “it is well established that a trustee is not ultimately liable for the costs of upkeep and maintenance of the trust property.”<sup>192</sup> In fact, numerous portions of common law trusts run contradictory to fundamental notions of the federal – Indian trust relationship.<sup>193</sup> Additionally, the Federal

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described as a common law trust”). “The federal – Indian relationship is, however, *sui generis* and should not be governed by the common law of trusts – a separate and distinct body of law.” *Id.* at 687. See generally BLACK’S LAW DICTIONARY, *supra* note 47, at 1448 (defining *sui generis* as “[o]f its own kind or class; unique or peculiar”).

190. See, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (quoting Chief Justice John Marshall’s ward guardian principle); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (Stevens, J., dissenting) (stating “[t]heir relation to the United States resembles that of a ward to his guardian”); *Baker v. Carr*, 369 U.S. 186, 215 (1962) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)); *Aitken*, *supra* note 20, at 115-16 (stating Justice Marshall described the relationship as resembling that of a ward to his guardian); *O’Sullivan*, *supra* note 24, at 127 (quoting *Cherokee Nation* for the proposition that the relationship resembles that of a ward to his guardian).

191. *United States v. White Mountain Apache Tribe*, 537 U.S. 486, 483 n.1 (2003) (Thomas, J. dissenting) (quoting *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 573 (1990)). See also *Mitchel II*, 463 U.S. 206, 235 n.8 (1983) (Powell, J., dissenting) (quoting Restatement (Second) of Trusts § 7 (1959) for the proposition that “[a] guardianship is not a trust”).

192. *White Mountain Apache Tribe*, 537 U.S. at 487 n.2 (Thomas, J., dissenting). See Restatement (Second) of Trusts § 244 (1957) (stating “[t]he trustee is entitled to indemnity out of the trust estate for expenses properly incurred by him in the administration of the trust”); 3 A. Scott, W. Fratcher, *The Law of Trusts* § 244 p. 325 (4th ed. 1988) (stating “[the trustee] is entitled to indemnity for liabilities properly incurred for the payment of taxes, for repairs, for improvements. . . .”). It hardly makes sense that the United States should pay to repair the trust property under theories of common law when the same law allows for the trustee to be compensated for such repairs. See *White Mountain Apache Tribe*, 537 U.S. at 487 n.2 (Thomas, J., dissenting). Additionally, it has been long established that a “trustee is not an insurer of the trust property.” *United States v. Mason*, 412 U.S. 39, 398 (1973). It is also established that trustees are only under a duty to exercise such care and skill as would be reasonably expected in dealing with their own property. See 2 A. Scott, *Trusts* 1408 (3d ed. 1967). Therefore, if trust property is diminished in value, the trustee is not liable unless they did not exercise such care. See *id.* at 1419. The *White Mountain Apache* tribe did not allege that the United States treated the property any different than it would its own property.

193. See Ellwanger, *supra* note 9, at 689 (stating “several aspects of a common law trust do not apply in a federal-Indian relationship”). For instance, at common law, a variety of damages are available for breach of trust, whereas the same is not true in federal - Indian trust scenarios. See *id.* Additionally, a common law trustee may resign in the event of a conflict of interest, while the federal trustee may not. *Id.* at 690. Finally, the judiciary is powerless to remove the Government as trustee, in contrast to its equivalent power under the common law of trusts. *Id.* See also, Restatement (Second) of Trusts Topic 2. Distinctions, Introductory Note, at 15 (1959) (cautioning against confusing various types of fiduciary relationships). “There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, *although the term “trust” is sometimes used loosely to cover such relationships.* It is important to differentiate trusts

Government may unilaterally abrogate treaties up to and including eliminating the trust relationship itself.<sup>194</sup>

### 3. The Trust Doctrine is Outdated and Should be Eliminated

The trust doctrine, the cornerstone of federal Indian law, is rooted in colonialist notions of Indian inferiority, dependence and barbarism.<sup>195</sup> In the modern era, this presumption untenable, completely immoral, and contradictory to notions of international human rights.<sup>196</sup> The trust

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from these other relationships, since many of the rules applicable to trusts are not applicable to them.” *Id.* (emphasis added). One such relationship, a guardianship, is not a trust. *See id.* The majority in *Mitchell II* stated “[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds).” *Mitchell II*, 463 U.S. 206, 225 (1983). However, this is an example of the Court utilizing a loose definition of trust, because “two persons and a parcel of real property, without more, do not create a trust. Rather, ‘[a] trust . . . arises as a result of a manifestation of an intention to create it.’” *Id.* at 235 n.8 (quoting Restatement (Second) of Trusts § 2). Once again, this is circular logic, because the Court implied intent by creation of the trust yet, the trust cannot be created without intent – which is lacking in both the General Allotment Act (*Mitchell II*) and the 1960 Act (*White Mountain Apache Tribe*). *See id.* One scholar notes “[w]here no congressional intent exists with respect to responsibilities and duties in an area of Indian affairs, it would be unwise to find that the government is a common law trustee.” Ellwanger, *supra* note 9, at 690. Another common law trust principle that rings in favor of the Government is that “[u]nder established rules of private trust law, the settlor, as creator of the trust, is free to alter the terms of the trust even if doing so harms the beneficiary’s interest.” Wood, *supra* note 35, at 1512.

194. Jill De La Hunt, Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REF. 681, 687 (1984).

195. *See* Clinton, *supra* note 5, at 129 (stating “the federal trust doctrine under which the federal government asserts a trusteeship over Indian tribes also has colonialist roots”); Tadd M. Johnson & James Hamilton, *Rules of the Game: Sovereignty and the Native American Nation: Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1253 (1995) [hereinafter JOHNSON & HAMILTON] (describing paternalistic policies based on the assumption that American Indians were incapable of managing and governing their own affairs); Newton, *supra* note 34, at 218 (stating “one key to the Court’s finding of a congressional guardianship power over Indians was its view of their [the Indians] racial and cultural inferiority”); Sager, *supra* note 2, at 777 (stating “[t]he foundational principles of our modern Federal Indian law represent nearly one thousand years of racial discrimination. . . .”); SKIBINE, *supra* note 135, at 10 (stating “the concept of a trust with Indian tribes originated in colonial times and is overall a paternalistic doctrine with racist overtones”); Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 425 (2000) (stating “a degree of paternalism inheres in the federal trust responsibility. . . .”); Alex Tallchief Skibine, Book Review: *Braid of Feathers: Pluralism, Legitimacy, Sovereignty, and the Importance of Tribal Court Jurisprudence*, by Frank Pommersheim, 96 COLUM. L. REV. 557, 569 (1996) (agreeing with the author that “because the trust doctrine has never completely shed its colonial heritage, it should be totally reformulated”).

196. *See* Sager, *supra* note 2, at 756 (stating that arguments declaring that “civilized” people are justified in depriving Indians of their land because the civilized people will use the land more efficiently conflict with modern doctrines of international human rights). Self-determination for indigenous people has gained popularity as the normative standard in international law. *Id.* at 747. Additionally, “[i]nternational law in the twentieth century increasingly demonstrates an underlying

doctrine must be discarded and replaced by a new relationship, one evolving out of respect for our country's indigenous people and including the normative goals of Indian sovereignty and self-determination.<sup>197</sup>

History shows that Native Americans are not, and were not, "fierce savages," "savage Indians," "wild uncivilized Indians," or "an inferior race of people."<sup>198</sup> To the contrary, Native Americans possibly inspired the Revolution,<sup>199</sup> impressed the Founders,<sup>200</sup> employed democratic

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abhorrence of colonial-type systems, favoring self-determination, self-government, and the right of a people to be independent." *Id.* at 780. *See also*, James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, n.138 (1994) (stating "colonial institutions of government [are] contrary to self-government"); Harper & Labin, *supra* note 180, at 437-38 (stating "continued adherence to these racist beliefs as the doctrinal justification for Congress wielding super-constitutional powers is facially repugnant to modern domestic and international law" and that such arguments are in "direct contradiction to the prevailing concept in both international and domestic law of the equal dignity of indigenous people") (internal quotations omitted).

197. *See, e.g.*, SKIBINE, *supra* note 135, at 10 (stating "[t]he time to re-think or re-invent the trust doctrine has passed. The doctrine should be discarded so that a new relationship can begin."). *See also*, Clinton, *supra* note 5 (detailing the wrongs done upon Indian tribes in the name of the trust doctrine and offering approaches to redefine the trust doctrine); *Rethinking*, *supra* note 29, at 429-30 (proposing a new "autonomy principle" for federal – Indian relations, replacing the trust doctrine). Professor Clinton states his position this way:

Certainly, the elements of the doctrine which justify the exercise of plenary federal authority, federal usurpation of the management of or decision making about Indian resources, or federal efforts to "enlighten" Indians by depriving them of their tribal traditions and culture represent a part of the legacy of conquest and properly should be jettisoned by a decolonized federal Indian law as relics of America's colonialist past.

Clinton, *supra* note 5, at 134.

198. *See* Sager, *supra* note 2, at 754-55 (quoting Supreme Court decisions steeped in culturally biased rhetoric). *See, e.g.*, *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 61 (1946) (Reed, J., dissenting); *United States v. Chavez*, 290 U.S. 357, 364 (1933); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *United States v. Coe*, 170 U.S. 681, 682 (1898); *United States v. Teschmaker*, 63 U.S. 392, 401 (1859); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Anderson v. Mathews*, 163 P. 902, 904 (Cal. 1917).

199. *See* Sager, *supra* note 2, at 769. "British spy reports prior to the Revolutionary War 'blamed the Iroquois and other Indians' notions of liberty for the colonists' resistance to British rule.'" *Id.* (quoting BRUCE E. JOHANSEN, *FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS, AND THE RATIONALE FOR THE AMERICAN REVOLUTION* 18 (1982)). In a 1744 meeting between the Iroquois and colonists, Chief Canassatego urged colonists to unite, drawing on the experiences of Iroquois Confederacy:

Our wise forefathers established union and amity between the Five Nations. This has made us formidable. This has given us great weight and authority with our neighboring Nations. We are a powerful Confederacy and by your observing the same methods our wise forefathers have taken you will acquire much strength and power; therefore, whatever befalls you, do not fall out with one another.

*Id.* at 770 (quoting JOHANSEN, *supra* at 61-62). One author suggests that American Indians empowered the colonists to believe that political power was held by the people and that this notion "justified the American Revolution and ultimately the United States Constitution." *Id.* at 771

ideals in their own political structure such as women's suffrage, separation of powers, freedom of religion, referendum, veto and recall.<sup>201</sup> Regardless of the actual influence Indians had on the drafting

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(quoting ROBERT VENABLES, *AMERICAN INDIAN INFLUENCE ON THE AMERICA OF THE FOUNDING FATHERS, IN EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 73, 112 (1992)) (internal quotation marks omitted).

200. See Sager, *supra* note 2, at 769-72. In 1751, Benjamin Franklin observed:

It would be a very strange Thing, if Six Nations of Ignorant Savages should be capable of forming a Scheme for such a Union, and be able to execute it in such a Manner, as that it has subsisted Ages, and appears indissoluble; and yet that a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary, and must be more advantageous; and who cannot be suppose to want an equal Understanding of their Interests.

*Id.* at 771 (quoting BENJAMIN FRANKLIN, *THE WRITINGS OF BENJAMIN FRANKLIN* 42 (Albert Henry Smyth ed., 1905) (1751)). Thomas Jefferson observed that certain Indian tribes never submitted themselves to any "coercive power" or government. *Id.* at 770 (quoting *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 207 (Adrienne Koch & William Peden eds., 1993)). Some scholars are adamant that the Constitution is an integration of political theories, heavily influenced by the Iroquois Confederacy and its Great Law of Peace. See *id.* at 770 (stating "[t]he Founding Fathers selectively borrowed from the American Indian's political and ethical system, synthesizing European culture with first hand experience with the American Indian, 'living proof,' . . . 'that human societies could and did live in liberty.'" (quoting VENABLES, *supra* note 199, at 77-81)); DONALD A. GRINDE, JR., *IROQUOIS POLITICAL THEORY AND THE ROOTS OF AMERICAN DEMOCRACY, IN EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 227 (1992) (postulating that the American political system is a synthesis of Native American and European political theories). Professor Robert J. Miller concluded:

Native Americans played a significant role in shaping the United States Constitution and had a profound impact on several of the Founding Fathers. Indian Tribes had both a positive and negative influence on many of the actual provisions and on the important basic themes of the Constitution. The Framers were positively influenced by Indian ideas regarding government and human freedom.

Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 AM. INDIAN L. REV. 133, 133-34 (1993) [hereinafter MILLER]. In a 1989 article, Dr. Gregory Schaaf stated "[a] recent search into the origins of the Constitution revealed remarkable parallels with the Great Law of Peace." Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323, 323 (1989). Dr. Schaaf, however, is very generous with his accolades to the Iroquois Confederacy, suggesting that the Constitution was modeled after the Great Law of Peace. See *id.* *Contra*, Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295, 297-98 (1990) (arguing that Dr. Schaaf went too far in his theory in that there is a severe lack of historical evidence on which to base such a theory). Jensen argues that that the Iroquois Confederacy was never mentioned by Madison, or anyone else, as a model for the Constitution. *Id.* at 300. To the contrary, the only reference to Indians at the Convention was concern for the security of the frontier and the applicable provisions enumerated in the document itself. *Id.* at 299-300. Even though the Founders were enlightened, Jensen writes, they still considered Indians to be "savages" and barbarous persons having no experience with law and government. *Id.* at 304. "A people considered to be without law and government, as the founders saw the Indians, can hardly be considered a model for the U.S. Constitution." *Id.*

201. See MILLER, *supra* note 200, at 143. "The Iroquois had created a civil system of government that provided checks and balances to prevent the concentration of individual power and

of the Constitution, one thing is perfectly clear from the evidence available: Native Americans, at the time of the Revolution and before, were anything but savages, barbarians, incompetent and unable to defend themselves.<sup>202</sup>

Indians were also once a sovereign people, with all the rights, benefits and expectations of a sovereign state.<sup>203</sup> Chief Justice John Marshall recognized Indian sovereignty through his opinions in the Cherokee Cases.<sup>204</sup> After the Revolution, the fledgling American government moved to establish a relationship with sovereign Indian tribes.<sup>205</sup>

Two significant pieces of evidence indicate that the Framers of the

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also maintained a wide range of personal freedoms.” *Id.* The Iroquois constitution provided for yearly tribal meetings at which tribal chiefs voted on Confederacy policies. *Id.* The Great Law of Peace further separated military and civilian authority by disallowing a peace chief from also being a war chief, thus limiting the amount of centralized power given to one person. *Id.* See also Sager, *supra* note 2, at 772 (stating “chiefs were treated as servants of the people, not their masters”) (internal quotes omitted).

202. See *supra* notes 198–201. It is fairly obvious that Native Americans, specifically the Iroquois Confederacy, were eloquent and thoughtful, in addition to being fierce warriors. *Id.*

203. See, e.g., Sager, *supra* note 2, at 746 (stating “Indian Nations were once separate fully sovereign nations”); SEIELSTAD, *supra* note 135, at 683 (stating “the concept of tribal sovereignty predates the ratification of the Constitution and the formation of the United States”); Thompson, *supra* note 195, at 428 (stating “[t]ribal governments were thus historically sovereign entities that exercised their own autonomy over tribal matters” and “tribes have inherent sovereignty”).

204. See *Worcester v Georgia*, 31 U.S. 515, 557 (1831) (recognizing “Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries. . . .”); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) (stating the Cherokee tribe was “a distinct political society, separated from others, capable of managing its own affairs and governing itself”); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); (stating “North America. . . was held, occupied, and possessed, in full sovereignty, by various independent tribes or nation of Indians, who were sovereigns of their respective portions of the territory. . . .”).

205. See De La Hunt, *supra* note 194, at 682-83 (stating “[t]he first treaties between the United States and Indian nations resembled the European – Indian agreements concluded between sovereign nations”). After the war, the emerging American government “acknowledged Indians’ sovereign self-determination and even considered that Indian Nations might unite with them as separate states.” Sager, *supra* note 2, at 774. While debating on the Articles of Confederation, the Continental Congress negotiated a treaty with the Delaware Nation, part of which invited friendly tribes to “join the present Confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress. . . .” *Id.* (quoting Article VI, Treaty with the Delawares, 7 Stat. 13, 14 (1778)). The Founding Fathers even went so far as to recognize Indian sovereignty in one of the early drafts of the Articles of Confederation: “A perpetual Alliance, offensive and defensive, is to be entered into by the United States assembled as soon as may be with the Six nations, and all other neighboring Nations of Indians; their Limits to be ascertained, their Lands to be secured to them, and not encroached on.” *Id.* at 775 (quoting MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 257 (1940)). Nell Jessup Newton stated that “the framers regarded Indian tribes as sovereign nations.” Newton, *supra* note 34, at 200. There is ample evidence that the early Americans respected Indian sovereignty, but simply lost sight of that recognition as the United States’ military and economic power grew. See Sager, *supra* note 2, at 775.

Constitution intended the Indian Nations to be sovereign nations: The Indian Commerce Clause<sup>206</sup> and the Treaty Clause.<sup>207</sup> Utilizing an intra-textual argument, the fact that the Framers specifically enumerated and differentiated between foreign states and Indian tribes in the Commerce Clause, indicates that the Framers considered Indian tribes on par with foreign states.<sup>208</sup> Additionally, under a plain meaning argument, the fact that Federal Government enters into treaties with Indian nations indicates the Government's recognition of them as sovereign nations.<sup>209</sup> Modern leaders such as President Clinton and President Reagan have reiterated the government-to-government relationship between Indian tribes and the Federal Government.<sup>210</sup>

It is time to forgo empty words and ceremonial actions and implement a policy focused on elements of self-determination,

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206. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause states: "The Congress shall have power. . . to regulate Commerce with foreign Nations, and among the several States, and *with the Indian tribes.*" *Id.* (emphasis added).

207. U.S. CONST. art. II, § 2, cl. 2. The Treaty Clause states: "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties. . . ." *Id.*

208. See Harper & Labin, *supra* note 180, at 432-35 (arguing that the Indian Commerce Clause is an insufficient basis for plenary control over Indian affairs by contrasting it to the Interstate and Foreign Commerce Clauses).

What the Court has never explained, and indeed cannot, is why the Framers would have so carefully chose to use identical language to describe congressional authority over commerce with Indians and the states and foreign nations, while intending to confer radically different types of powers – one virtually absolute and the other significantly limited.

*Id.* at 433. It is a common principle that "'identical words used in different parts of the same act are intended to have the same meaning.'" *Id.* (quoting *Comm'r of the Internal Revenue Service v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993)). This precept is especially true when the terms are in close proximity. *Id.* Supreme Court jurisprudence has recognized that the Constitution limits the ability of Congress to interfere with local and foreign concerns via the Commerce Clause. *Id.* at 432-33. The *Kagama* Court, while authorizing plenary Congressional power over Indian tribes rejected the Indian Commerce Clause as a basis for that power. See *United States v. Kagama*, 118 U.S. 375, 378 (1886). Additionally, "[t]he Framers did not grant Congress the authority to regulate *the affairs of* Indian tribes and their members, but only the power to regulate *commerce with* Indian tribes." Harper & Labin, *supra* note 180, at 432 (internal quotes omitted) (emphasis added). The Framers intended Congress to regulate commerce with foreign nations and Indian tribes because they were recognized as being sovereign.

209. See BLACK'S LAW DICTIONARY, *supra* note 47, at 1507 (defining a treaty as an "agreement between two *nations* or *sovereigns*") (emphasis added).

210. Harper & Labin, *supra* note 180, at 438. In 1994, President Clinton acknowledged, the "unique government-to-government relationship" between the Indians and the United States. *Id.* (quoting President William Jefferson Clinton, Tribal Leaders Event, Washington, D.C., April 29, 1994). President Clinton stated: "[t]oday I vow to honor and respect tribal sovereignty based upon our unique historical relationship." *Id.* See also, Keith Howell, *The Bureau of Indian Affairs: The American Approach*, Saskatchewan Indian, available at <http://www.sicc.sk.ca/saskindian/a89jul05.htm> (last visited Sept. 3, 2004) (stating that in 1983, President Reagan issued an American Indian policy statement reaffirming the two parties government-to-government relationship).

autonomy and sovereignty.<sup>211</sup> Perhaps the United States should reshape the immoral trust doctrine into a sort of moral “autonomy principle.”<sup>212</sup> The autonomy principle would be founded on three pillars of fundamental American morality: self-determination,<sup>213</sup> promise keeping,<sup>214</sup> and freedom.<sup>215</sup> Instead of using notions of dependence,

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211. See Sager, *supra* note 2, at 784 (stating “[a]s we enter the twenty-first century, we must do better than to use obsolete nineteenth century reasoning, and medieval philosophical principles that dispossess indigenous people of their sovereign rights”).

212. See *Rethinking*, *supra* note 29, at 429.

213. See *id.* at 429-34. Self-determination considers the right of all peoples to determine their cultural and political futures. INTERNATIONAL INSTITUTE FOR SELF-DETERMINATION, *available at* <http://www.selfdetermination.net> (last visited Sept. 12, 2004). See also *Rethinking*, *supra* note 29, at 430 (stating “[t]he principle of self-determination guarantees the right of all people to freely determine their political status and freely pursue their economic, social and cultural development”) (internal quotations omitted). While self-determination does not implicate absolute sovereignty, it does require the Government to respect indigenous people’s right to exercise control over their own affairs. *Id.* at 430-31. The principle of self-determination has purportedly been adhered to by the United States in both the Executive and Legislative branch. See *id.* at 430. See also *id.* at n.42, n.43. In 1994, President Clinton signed into law the Tribal Self Governance Act Amendments of 1994, which amended the Indian Self-Determination and Education Assistance Act by directing the Secretary of the Interior to implement the tribal self-governance program. See Johnson & Hamilton, *supra* note 195, at 1269-70. See also *supra* note 210 (detailing Presidents Reagan and Clinton’s statements on Indian self-governance and sovereignty); Message of President Nixon to Congress, 116 CONG. REC. 23132 (1970) (stating “[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions”). The U.N. charter specifically calls for “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” *Rethinking*, *supra* note 29, at 430 n.42 (quoting UNITED NATIONS CHARTER, art. I, para. 2). Additionally, the U.N. Commission on Human Rights expressed an interest in the attempts for aboriginal self-determination in Australia. See Dr. William Jonas, *An Australian Perspective on Self-determination*, *available at* <http://www.unhchr.ch/Huridocda/Huridocda.nsf/TestFrame/cf03e35f75a32a36c1256c68004df6ce?Opendocument> (last visited Sept. 28, 2004) (describing aboriginal Australians’ quest for self-determination). Dr. Jonas is adamant that self-determination is integral in allowing indigenous people to participate fully in society. *Id.* at 14.

This is the core of the right to self-determination. It is about achieving the full and effective participation of Indigenous peoples in Australian society on equal terms — not on the basis of ‘sameness’, but through the recognition of the cultural distinctiveness and diversity of Indigenous peoples. The historical treatment of Indigenous people has prevented us from participating fully in Australian society and has left us trapped in a disempowered position at the bottom of society.

*Id.*

214. See *Rethinking*, *supra* note 29, at 431. Justice Black stated: “Great nations, like great men, should keep their word. *Supra* note 1 (quoting Justice Hugo Black). “The United States has repeatedly promised in its Indian treaties that the tribes are entitled to govern themselves.” See *id.* (citing numerous Indian treaties). By even entering into treaties, the United States recognizes the tribe’s sovereignty and therefore its autonomy. See *id.* See also *supra* note 209 (defining treaty). The morality of truthfulness and promise keeping is ingrained in the fabric of our country.

215. *Rethinking*, *supra* note 29, at 432. Freedom is fundamental to our democracy. See U.S. CONST. amend. I (announcing the freedoms of religion, speech, press and association). Much like for our founding fathers with respect to the Crown, “[u]nless tribes can govern themselves, the tribe

incompetence and bigotry in attempting to apply the trust doctrine, courts could employ the above fundamental American and democratic ideals in evaluating Indian claims.<sup>216</sup>

A second — and more progressive — approach would be true Indian sovereignty,<sup>217</sup> by establishing an internationally recognized “domestic nation.”<sup>218</sup> A better and more feasible alternative would be statehood for the collective Indian Nation.<sup>219</sup> Statehood would provide

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members’ [freedom] to live according to their own values will be endangered.” *Rethinking, supra* note 29, at 432. The United States must allow tribes to decide issues basic to and affecting their affairs. *Id.*

216. *Rethinking, supra* note 29, at 439-40 (stating “[t]he principle of autonomy springs from democratic ideals; those who profess to respect such ideals must also respect the Indians’ right to autonomy. Our treatment of the Indians thus reflects the quality of our devotion to democracy”). Not lost on this analysis are the stirring words of the Declaration of Independence: “We hold these truths to be self-evident, that *all men are created equal*, that they are endowed by their Creator with certain *unalienable Rights*. . . .” DECLARATION OF INDEPENDENCE, *available at* <http://www.ushistory.org/declaration> (last visited Sept. 3, 2004).

217. *See Sager, supra* note 2, at 787 (stating the “relationship between the United States and Native American Indian Nations should rightfully and properly be reestablished as one between full and separate sovereign nations”).

218. *See id.* at 786 (stating “[s]ome Indian Nations are even pursuing declarative recognition as independent states, claiming to be an international personality”). The international qualifications for statehood commonly include a people, a territory, a government and the capacity to enter into relations with other nations. Dr. Makau Wa Matua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113, n.3 (1995) (citing Restatement (Third) of Foreign Relations Law of the United States 202 (1987)). Clearly, tribes satisfy all four requirements and the Treaty Clause, Indian Commerce Clause and Governmental recognition of government-to-government relations strengthens the argument that tribes have the capacity to enter into relations with other nations. *See supra* notes 206-210 (analyzing the Indian Commerce Clause and Treaty Clause as indicia of sovereignty and Presidential statements recognizing government-to-government relationship).

219. *See Sager, supra* note 2, at 787 (stating “a . . . strategy for Indian sovereignty might lie in the formation of a united Indian Confederacy”). If the colonial Iroquois could facilitate a multi-tribe, long distance and multi-territory Confederacy, then it would only seem reasonable that modern tribes could do the same. *See Miller, supra* note 200, at 143 (describing the Iroquois Confederacy’s political structure). Since Indian Reservations are currently distinct territory from the states in which they are situated, Indian Nation statehood could be as easy as garnering local political support, establishing a centralized government, composing a state constitution and petitioning Congress for admission as a state. *See generally* U.S. COUNCIL FOR PUERTO RICO STATEHOOD: STATEHOOD ISSUES, *available at* <http://www.prstatehood.com/statehood/index.html> (last visited Sept. 3, 2004). Statehood would still ultimately subject the Indian Nations to Federal authority, but by eliminating the trust doctrine and its plenary control, the Government would be denied any control over Indian land greater than its control over non-Indian land. *See Rethinking, supra* note 29, at 436. Therefore, the Indian state’s land would be subject only to the power of eminent domain. *Id.* Statehood would provide Indian tribes with autonomy, self-determination, ethnic identity and political clout via a governor, state legislature and representation in Congress, while providing for full participation and inclusion in American society. *See generally* Jonas, *supra* note 213, at 14 (identifying participation in the national society as the core of the right to self-determination).

Indian tribes with autonomy, self-determination, ethnic identity and political clout via a governor, state legislature and representation in Congress, while providing for full participation and inclusion in American society.<sup>220</sup>

## V. CONCLUSION

This Note advocated that the Court in *White Mountain Apache Tribe* decided the case incorrectly by subjecting the reasoning and theories to analysis under fundamental legal arguments.<sup>221</sup> However, it went further in offering justifiable policy concerns about the doctrines and philosophies that the judiciary relies upon in its federal Indian law jurisprudence.<sup>222</sup> Finally, this Note offered possible alternatives for allowing Indian Nations to retain their sovereignty and self-determination.<sup>223</sup>

Currently, the only recourse Native Americans have in the courts is monetary compensation for their losses. No amount of money can ever compensate Native Americans for the loss of life, land, dignity and culture that conquerors inflicted upon them. Reparation will only truly be accomplished when — and only when — Indians have their land, culture, pride, and future restored.

*Joel A. Holt*

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220. See generally Jonas, *supra* note 213 (identifying participation in the national society as the core of the right to self-determination).

221. See *supra* notes 118-211 and accompanying text.

222. See *supra* notes 171-211 and accompanying text.

223. See *supra* notes 212-220 and accompanying text.