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The Trust Doctrine: A Source of Protection for Native American Sacred Sites

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Sacred sites constitute an integral part of Native American indigenous religion. In the past, Native Americans have challenged encroachment on these sites by relying on the free exercise clause of the first amendment.

1. Throughout this Comment, the terms "native," "Native American," and "tribe" are used interchangeably. Each term refers generally to Native American tribes.
2. Native American religions are highly diverse and difficult to generalize accurately. Nonetheless, certain commonalities exist among all indigenous North American cultures. Typically, Native Americans practice site-specific religions, attaching religious significance to the particular site where an event occurred, rather than to the event itself. A. HULTKRANTZ, BELIEF AND WORSHIP IN NORTH AMERICA 126 (1981). In native heritage, sacred land can neither be divided nor sold. OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 107-09 (E. Cahn ed. 1961). At these sites, natives use "vision quests" to establish communication with the spirits and gods of their religions. R. UNDERHILL, RED MAN'S RELIGION 96-97 (1965). After these visions, the communicator receives spiritual rejuvenation and enhanced survival skills. Id. at 97-99. Believers obtain visions after a period of fasting and self-sacrifice. Id. at 97. Young native boys, when denied the opportunity to conduct vision quests, become laconic and unmotivated. Id. at 98-99. Vision quests constitute an integral part of Native American survival in the world today. Id. at 96-105. In order to conduct successful quests, the practicing native needs complete isolation and serenity. See ENCYCLOPEDIA, supra, at 528.

In Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986), rev'd sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988), the government appealed an injunction granted by the United States District Court for the Northern District of California. Northwest Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 951 (N.D.Cal. 1982). The district court enjoined the government from constructing a road that would run through a group of sacred sites on the grounds that such a desecration would violate the natives' first amendment right to free exercise of religion. In affirming the injunction, the circuit court noted the importance of complete serenity to the continued use of the area by the particular tribes involved. Peterson, 795 F.2d at 692. In doing so, the court accepted the tribes' assertions that serenity was essential to the site's use, thus lending support to the natives' claims that desecration of the sites would virtually prohibit them from practicing their religion. The Supreme Court eventually vacated that portion of the Ninth Circuit's opinion. Lyng, 108 S. Ct. at 1321. The Court declined to find a free exercise clause violation, id. at 1324-27, but did not deny the importance of serenity to the continued vitality of the area as a sacred site. Id. at 1326.

3. See, e.g., Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (government's granting of private permits to expand a ski area located near a sacred site challenged as violative of free exercise clause), cert. denied, 464 U.S. 956 (1983); Badoni v. Higginson, 638 F.2d 172 (10th
Invariably, those challenges failed. Given the United States Supreme Court’s recent decision in *Lyng v. Northwest Indian Cemetery Protective Association*, the free exercise clause appears an ineffective legal theory upon which Native Americans may seek protection of their sacred sites.

Native American tribes possess a unique relationship with the United States government. The courts characterize the relation as that of a trust, casting the Federal Government in the role of the Native Americans’ protector. The “trust doctrine,” which imposes a fiduciary duty on the Federal Government, provides Native Americans with a means of challenging gov-
government action which violates this duty. This doctrine presents interesting implications for securing sacred site protection, including whether the government's fiduciary duty requires it to safeguard such sites.

This Comment proposes that the trust doctrine includes a duty to protect Native American sacred sites. First, this Comment will examine the judicial origins of and developments in the trust doctrine. Second, it will define the scope of the doctrine by exploring legislatively and judicially created rights secured to Native Americans through the trust doctrine. Next, this Comment will show that, because sacred sites constitute an essential part of Native American life, sacred sites resemble those property rights that the trust doctrine protected in the past. Thus, this Comment will conclude that the trust doctrine constitutes a source of protection for Native American sacred sites.

relationship, these terms are used interchangeably in federal Indian law. See, e.g., W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 34-35 (2d ed. 1988) (In describing the relationship, "trust relationship" and "ward-guardian" are used interchangeably). [The author notes that one would not normally cite to a nutshell as scholarly authority, but the area of federal Native American law lacks a current treatise and handbook beyond the 1982 revision of Felix Cohen's HANDBOOK OF FEDERAL INDIAN LAW. See 1982 HANDBOOK, supra note 6. Judge Canby's nutshell fills this scholarly void and is accepted by writers in the field as a substantive work worthy of citation. See generally Frickey, Scholarship, Pedagogy, and Federal Indian Law, 87 MICH. L. REV. 1199 (1989) (Canby's nutshell presents developments in the law as "intellectual problems," not merely "dry legal rules" and fills a gap in scholarly material available in the area.)

It is difficult to define, at this point, exactly what the fiduciary duty owed Native Americans by the United States requires the government to do. This Comment will explore the scope of the duty and examine the issue of whether the duty can be expanded to areas historically not protected.


11. If the trust doctrine does secure such protection, it must extend to sacred sites located both on and off reservation land, just as hunting and fishing rights extend both on and off reservation land. See W. CANBY, supra note 9, at 296-98. To do otherwise would, at best, be a hollow victory. A decision only protecting sacred sites located on reservations would result in virtually no protection against state action that desecrates sites located on public land. This is precisely the danger Native Americans seek to protect themselves against because of the vast number of sites located on public land. See Lyng, 108 S. Ct. at 1320 (thousands of sites fall within public property).
I. BIRTH OF THE TRUST DOCTRINE: THE CHEROKEE CASES

In 1831, the Supreme Court first suggested the existence of a trust relationship between the United States and Native Americans in Cherokee Nation v. Georgia. Cherokee Nation presented a constitutional challenge to Georgia's attempt to extend its state laws to residents of the Cherokee reservation. The Cherokee brought the case directly to the Supreme Court under the Court's grant of original jurisdiction, asserting that the dispute arose between a state and a foreign state. The suit presented the issue of whether the Cherokee tribe constituted a foreign state under article III of the Constitution.

Chief Justice Marshall's majority opinion concluded that the Cherokee did not constitute a foreign state. Although Chief Justice Marshall recognized that the Cherokee's sovereignty resembled that of a foreign state, he distinguished Cherokee sovereignty from that possessed by a foreign nation because the tribe existed completely within the geographic borders of the United States. Rather, the Court characterized the Cherokee as "a domestic dependent nation . . . in a state of pupilage . . . [t]heir relation to the United States resembles that of a ward to his guardian." Because of this

13. Id. at 15.
14. Id. at 15-16.
15. Article III, § 2 of the Constitution, at the time of Cherokee. (before passage of the Eleventh Amendment) provided that:

The judicial Power of the Supreme Court shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority; . . . -to Controversies to which the United States shall be a party; -to Controversies between two or more states; -between a State and Citizens of another State; -between Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2.

If the Cherokee tribe qualified as a foreign state, then it could bring its dispute directly to the Supreme Court under the Court's grant of original jurisdiction. Cherokee Nation, 30 U.S. (5 Pet.) at 15-16.

17. Id. at 19-20.
18. Id. at 17. The Court reached this conclusion by relying on Native Americans' acceptance of the protection of the United States Government in treaties entered into between the two sovereigns.
characterization, the Court held the action outside the Court’s grant of original jurisdiction.\textsuperscript{19}

Curiously, however, the Chief Justice did not relate the trust principle to any specific creating document.\textsuperscript{20} Generally, a trust does not arise unless, among other requirements, both a creating instrument and a present declaration of an intent to create the trust exist.\textsuperscript{21} Because those elements were lacking in \textit{Cherokee Nation}, the Court did not delineate a private, express trust.

Chief Justice Marshall looked to the Constitution’s general treatment of Native Americans\textsuperscript{22} and the broad scheme of both the Hopewell Treaty,\textsuperscript{23} which established relations between the Cherokee and the United States, and other existing treaties.\textsuperscript{24} He noted that the treaties both granted the Cherokee the right to live in their territory uninterrupted by United States’ citizens and acknowledged the Cherokee’s right to protection from the Federal Government.\textsuperscript{25} Furthermore, the Constitution’s structure implied that Native American tribes were separate entities from the newly formed United States.\textsuperscript{26} Accordingly, Chief Justice Marshall characterized the Cherokee as “a distinct political society . . . capable of managing its own affairs and governing itself.”\textsuperscript{27} In broad terms, \textit{Cherokee Nation} articulates the proposition that the United States owes duties to Native American tribes arising out of a special relationship between the two entities.\textsuperscript{28}

\textsuperscript{19} \textit{Id.} at 20.
\textsuperscript{20} \textit{See id.} at 17-20. Though Chief Justice Marshall generally looked to the Constitution, \textit{id.} at 18, and the treaties, \textit{id.} at 17, those documents provided guidance, but were not controlling. \textit{See id.} at 17-20.
\textsuperscript{21} \textit{Restatement (Second) of Trusts} § 23 (1959).
\textsuperscript{22} The Constitution, at that time, treated Native American individuals and tribes as separate from the United States. \textit{See U.S. Const.} art. I, § 2, cl. 3 (representation only to include taxed “Indians”); \textit{id.} § 8, cl. 3 (regulate commerce with the “Indian Tribes”). Thus, there appeared no question that the framers intended to treat the natives separately from those considered full citizens. While the Chief Justice did not find the constitutional argument persuasive enough to support the assertion that the Cherokee possessed the status of a foreign state, it most definitely implied that the native nations retained some form of sovereignty. \textit{See infra} text accompanying notes 25-28.
\textsuperscript{23} Hopewell Treaty (Treaty with the Cherokee), 7 Stat. 18 (Nov. 28, 1785).
\textsuperscript{24} \textit{Cherokee Nation}, 30 U.S. (5 Pet.) at 17.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{See supra} note 22.
\textsuperscript{27} \textit{Cherokee Nation}, 30 U.S. (5 Pet.) at 16.

Reid Peyton Chambers, former Associate Solicitor for Indian Affairs for the United States Interior Department, advances two interpretations for Chief Justice Marshall’s conclusion in
In *Worcester v. Georgia,* Chief Justice Marshall further elaborated on the nature of the trust relationship. The Court stated that although the Cherokee, through treaty, acknowledged themselves to be under the protection of the United States, "protection" did not imply destruction of the weaker nation. The treaties of the United States define the "Indians" as a separate nation with whom only the Federal Government could negotiate. The Court considered the Cherokee a "distinct community occupying its own . . . territories." Hence, Georgia's jurisdiction could not penetrate the borders of the Cherokee Nation.

In defining the Cherokee as a distinct nation, the Court clarified its position in *Cherokee Nation.* In *Cherokee Nation* the Court relied on the Constitution, the treaties with native tribes, and the laws enacted under the Indian Commerce Clause as establishing the Native American tribes as a separate nation. But Chief Justice Marshall's reasoning did not definitively dispel the concurring Justices' notions in *Cherokee Nation* that the treaties, although entered into with a tribal sovereign, extinguished the Cherokee's

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Catholic University Law Review [Vol. 38:705

29. 31 U.S. (6 Pet.) 515 (1832), overruled on other grounds, *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). In *Worcester,* the Court had jurisdiction because the case was brought by a non-native missionary challenging Georgia's law banning non-natives from the reservation as violating the Constitution and treaties with the Cherokee. *Id.* at 537-41.

30. *Id.* at 554-63. Though *Cherokee Nation* laid the foundation for the trust doctrine, the new relationship called for a greater elaboration.

31. *Id.* at 551-52, 561. The concurrences in *Cherokee Nation* argued that the treaties entered into with the United States compromised the Cherokee's sovereignty. *See Cherokee Nation,* 30 U.S. (5 Pet.) at 26-27 (Johnson, J., concurring) and 38-40 (Baldwin, J., concurring).


33. *Id.*

34. *Id.* at 560.

35. *See supra* text accompanying notes 12-29.


37. *See id.* at 25-26, 34 (Justices Johnson and Baldwin each wrote a separate concurring opinion); *id.* at 25-26 (Johnson, J., concurring); *id.* at 34 (Baldwin, J., concurring).
sovereignty. In *Worcester*, Chief Justice Marshall looked to the charters creating the colonies and noted that the colonists intended to "civilize" the natives, not exterminate them. Likewise, he found that the Hopewell Treaty, and those that followed, guaranteed the Cherokee Federal Government protection, but did not implicitly destroy the Cherokee's sovereignty. Chief Justice Marshall concluded that the Federal Government's role as trustee included an obligation to ensure the Cherokee their land and sovereignty, subject to negotiated cessations and liabilities. The trusteeship role also encompassed government protection of the Native Americans' right to self-government from state encroachment. Thus, the Supreme Court, in *Worcester*, dismissed the argument by those concurring in *Cherokee Nation* that the Native American tribes stood as a conquered nation and emphasized the natives' right both to their aboriginal lands and to self-government.

Taken together, the "Cherokee cases" establish the trust relationship between the United States and the Native Americans. The decisions recognize the Native American nations as domestic sovereigns within the jurisdiction of the Federal Government and the boundaries of the United States.

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38. *Id.* at 26, 38. Justices Johnson and Baldwin, in their concurring opinions, characterized the relationship as one between a conquering nation and a subject people. Both Justices looked to the Treaty of Hopewell in 1785, which received the Cherokee into the protection of the United States, and concluded that the treaty represented the Cherokee's acknowledgement of their dependent character. See *id.* at 26-27, 38-40; see also Chambers, *supra* note 9, at 1216 n.21. Chief Justice Marshall rejected this theory in *Worcester*. *Worcester*, 31 U.S. (6 Pet.) at 551-54.

39. *Worcester*, 31 U.S. (6 Pet.) at 546. Chief Justice Marshall looked beyond the relationship between the colonies and the Native Americans to the relations between Britain and the natives. *Id.* at 546-48. Finding that relation to be one of "powerful friend and neighbor," he concluded that the same role was imparted on the United States when the colonies broke from British control. *Id.* at 552.

40. *Id.*

41. See *id.* at 555-56, 560-62.

42. *Id.* at 561.

43. See *id.* at 549-53, 560-61; cf. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 26-27, 38-40 (1831) (concurring justices characterizing natives as a conquered people by virtue of their acceptance of federal government protection secured to them through treaty).


46. See, e.g., Chambers, *supra* note 9, at 1215-16; Newton, *supra* note 28, at 204.

ate with and exercise jurisdiction over the tribal nations. Furthermore, the Cherokee cases impart a trusteeship to the Federal Government to ensure that the states do not encroach upon the natives' land base and tribal right to self-government. Thus, these cases define the original parameters of the trust doctrine.

II. THE TRUST DOCTRINE AFTER CHEROKEE: THE EMERGENCE OF A PATERNALISTIC GOVERNMENT

After Chief Justice Marshall's Cherokee decisions, the trust doctrine swung full circle. Subsequent to establishing the trust relationship in the Cherokee cases, the Court departed from the notion that government should ensure tribal autonomy and sovereignty. It adopted a characterization of Native American tribes as helpless and dependent nations. Fifty years after the Cherokee cases, the Court affirmed Congress' self-assumed broad legislative powers over native affairs by deferring to congressional policy judgments. This trend began in 1886 and continued unabated until 1919, when the Court resumed limited judicial review of congressional and executive actions. Not until 1980 did the Court reject its holdings of the late nineteenth and early twentieth century regarding broad, unchecked congressional and executive power over Native American affairs. The degree to which the Court deferred to federal legislation mirrored the contemporaneous levels of political hostility toward the tribes. Hence, an effective examination of the trust doctrine's evolution necessarily entails an evaluation of the country's corresponding political tides.

49. Id. at 561.
50. See supra text accompanying notes 12-49.
51. See infra text accompanying notes 69-102; see also Chambers, supra note 9, at 1225.
54. See Kagama, 118 U.S. at 375.
55. See Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919) (disposing of tribal land under public land laws would be an act of confiscation, not guardianship).
56. Id.
58. See Kagama, 118 U.S. at 383-85.
59. See infra text accompanying notes 61-102.
The Trust Doctrine

A. The Trust Doctrine During the Allotment Era (1871-1928)\(^{60}\)

In the Appropriations Act of 1871, Congress outlawed the practice of entering into treaties with the natives.\(^{61}\) In the years immediately preceding this action, substantial numbers of white settlers commenced the westward expansion.\(^{62}\) These settlers, craving title to the Native Americans’ vast land holdings, unavoidably clashed with the Native American tribes.\(^{63}\) To satisfy the resulting political demand, Congress pursued courses of action designed to eventually pass title of Native American land to the new western settlers.\(^{64}\)

To achieve this end, Congress formulated a plan involving both long and short term goals. In the short term, Congress sought to confine the Native Americans to their reservation land. By confining the natives to their reservation land and allotting each individual tribe member a parcel of land, Congress hoped to eventually reduce the total native land stock. White society viewed native tribal customs, which stressed communal property ownership, as a barrier to assimilating the Native Americans into western culture’s private property system.\(^{65}\) Confinement also helped facilitate Congress’ long term goal of assimilating the Native American into western culture. Congress pursued this goal by introducing the natives to the private property system while also educating them, both religiously and socially. These practices weakened Native American morale, thus contributing to the weakening of the Native American nation’s sovereignty.\(^{66}\) Accordingly, Congress pursued far reaching legislation designed to eliminate Native American communal property customs.\(^{67}\) Congress ceased using treaties as the mode of negotiation, and moved toward a goal of ridding America of all vestiges of tribal sovereignty.\(^{68}\)

\(^{60}\) See 1982 HANDBOOK, supra note 6, at 127. The “Allotment Era” approximately spanned the years 1871 to 1928. Newton, supra note 28, at 207. The Allotment Era in American policy officially began with passage of the Dawes General Allotment Act of 1887, General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1982)), facilitating the breakup of tribal reservation land through transfers or “allotments” to individual tribe members. The Act only authorized allotments to individual natives and cessation of the “surplus” to the government. Id. § 331. Under the Allotment Act, all reservation land deemed “surplus,” after allotting up to 160 acres per tribe member depending on its intended use, was to be surrendered to the government for the public domain or for sale to a homesteader. Id.

\(^{61}\) Ch. 120, § 1, 16 Stat. 544, 566 (1871) (current version at 25 U.S.C. § 71 (1982)).

\(^{62}\) 1982 HANDBOOK, supra note 6, at 128.

\(^{63}\) Id. at 128, 132.

\(^{64}\) Id. at 128-39.

\(^{65}\) Id. at 128-29.


\(^{67}\) 1982 HANDBOOK, supra note 6, at 130-34.

\(^{68}\) Id.
The Supreme Court’s holdings during the Allotment Era reflected congressional and popular sentiments. In two major decisions, *United States v. Kagama* and *Lone Wolf v. Hitchcock*, the Court affirmed major legislative actions affecting Native Americans. These decisions indicated that the Court would not interfere with congressional goals. In addition, the *Kagama* and *Lone Wolf* decisions significantly diminished tribal sovereignty by approving Congress’ professed goals of allotment, which reduced the total native land stock, and assimilation, which demoralized the Native American nation.

In *United States v. Kagama*, the Court validated the Major Crimes Act which extended federal criminal jurisdiction over Native Americans within reservations. In *Kagama*, the Court relied on its opinion in *Cherokee Nation v. Georgia*, describing the Native Americans as the “wards of the nation,” to significantly circumscribe the scope of tribal sovereignty. The Court reasoned that, as wards, the natives virtually depended on the Federal Government for their existence. Furthermore, the Court viewed the Major Crimes Act as a manifestation of the government’s “duty of protection” arising from the Native Americans’ status as a helpless, weak community. In addition, it viewed extension of federal criminal jurisdiction as a natural consequence of the Native American tribes’ existence within the United States’ borders. Thus, the Court implicitly rejected the notion of dual sover-

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69. See supra note 60.
71. 118 U.S. 375 (1886).
72. 187 U.S. 553 (1903).
73. *Kagama*, 118 U.S. at 383-84; *Lone Wolf*, 187 U.S. at 566-68.
74. See Newton, supra note 28, at 222.
75. 1982 *HANDBOOK*, supra note 6, at 128-38. After each tribe member received his allotment portion, the excess was either retained by the government or sold to western settlers. See also supra note 60 (explaining allotment system).
76. F. PRUCHA, supra note 66, at 671-73; see also Chambers, supra note 9, at 1225-27 (discussing the general effect of *Kagama* and *Lone Wolf* as destroying the inherent powers of tribal self-government).
77. 118 U.S. 375 (1886).
80. 30 U.S. (5 Pet.) 1 (1831).
82. Id. at 383-84.
83. Id.
84. Id. at 384.
85. Id.
eignty. Relying on the Appropriations Act of 1871 as Congress’ rejection of the concept of a domestic Native American nation, the Court in *Kagama* concluded that the Major Crimes Act constituted a necessary element to the government’s execution of its duty as trustee of a “helpless nation.”

The holding in *Kagama* implicitly rejected previous Supreme Court dictum that rebuffed the characterization of the native tribes as conquered peoples. The *Cherokee* cases established that the Federal, rather than the State, Government could exercise jurisdiction over the native tribes. These opinions also indicated that the Federal Government should preserve tribal sovereignty. *Kagama*, though, acknowledged that through the course of dealing with the Federal Government, the Native American tribes lost their original independent qualities. Moreover, *Kagama* affirmed Congress’ paternalistic approach, represented by Congress’ assimilation policies, by basing its holding on a broad reading of Congress’ duty as trustee. Thus, *Kagama* imposed no limits on Congress’ authority as trustee, contrary to the implications of *Cherokee Nation* and *Worcester*.

Judicial deference to congressional Native American policy continued with the Supreme Court’s decision in *Lone Wolf v. Hitchcock*. In *Lone Wolf*, several tribes challenged an allotment sale of surplus tribal land on the ground that the government sold the land without the tribe’s approval. In arguably the Court’s most explicit approval of turn of the century native policy, the Court held that Congress’ authority over Native American tribes

86. *Id.* at 381 (“They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations.”). *But see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832) (Congress treats Native Americans as distinct political communities), overruled on other grounds, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).*
87. 118 U.S. at 384.
91. *Kagama, 118 U.S. at 381.*
92. *Id.* at 383-84. By granting Congress broad authority over tribes, the Court afforded Congress discretion over Native Americans. *See supra note 6; infra note 97 (discussion of the relationship between standard of review and resulting deference to Congress and the Executive branch). The Court affirmed Congress’ actions despite the presence of a reasonable argument that the Native Americans should not be subject to complete federal control. *See Chambers, supra note 9, at 1224.*
93. *30 U.S. (5 Pet.) 1 (1831).*
95. *187 U.S. 553 (1903).*
96. *Id.; see supra note 60.*
constituted a political question, and thus was not subject to judicial review.97 The Court's decision in *Lone Wolf* cleared the way for Congress to adopt a paternalistic role, determining the Native American's future without regard to the native's own interests.

The Court affirmed the right of Congress to unilaterally abrogate its treaties with native tribes if Congress found the action in the best interests of both the Native Americans and the United States.98 The Court also noted that Congress' trusteeship allowed it to "change the form of Indian investment" from land to money without breaching its fiduciary duty.99 The Court attached a presumption of good faith to Congress' dealings with Native Americans which restricted judicial examination of the adequacy of consideration paid for tribal land.100 Thus, the Court removed the balance of power that judicial review provided and freed Congress to determine the natives' future as Congress saw fit.101 The Court implied that Native Americans, ill-equipped to manage their own affairs, would benefit from congressional management.102

Precluding judicial review necessarily broadened Congress' ability, as trustee, to pass legislation affecting the Native Americans.103 Courts traditionally apply the political question doctrine when presented with a dispute between coequal federal branches.104 Presumably, the Constitution provides necessary checks and balances between coequal branches of the Federal Government.105 If the Court finds no express limit within the Constitution, the Court should defer to the decision of the corresponding branch.106 Likewise, when the dispute is between voters and Congress, the voting privilege provides citizens with a mechanism by which to publicize its opinion of Con-

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97. *Lone Wolf*, 187 U.S. at 565. The political question doctrine, or, as it may be more properly called, the "doctrine of nonjusticiability," *Constitutional Law*, supra note 6, at 102, calls for judicial abstention when the issue is one "best resolved by the body politic." *Id.* As a consequence of the political question doctrine, the government conduct complained of is immune from judicial review. *Id.*


99. *Id.* at 568.

100. *Id.*

101. *Id.* at 566-68; see *Constitutional Law*, supra note 6, at 102.

102. *Lone Wolf*, 187 U.S. at 566 (circumstances may arise which demand that Congress act to preserve the best interest of Native Americans).

103. *Supra* note 97.

104. See generally *Constitutional Law*, supra note 6, at 102-10 (discussing the application of political question doctrine by the Supreme Court when faced with disputes which are best resolved by the political process or where the particular constitutional power involved was not granted completely to one branch of government).

105. *Id.* at 103.

106. See *id.* at 109.
However, at the time of the *Lone Wolf* decision, very few Native Americans possessed the status of citizen, or the right to vote and thus lacked a meaningful tool by which to promote their interests. Accordingly, the Court’s decision in *Lone Wolf* expanded Congress’ trusteeship powers by vesting Congress with the tools necessary to pursue an extremely paternalistic approach towards those who lacked the usual corresponding power to voice their opposition. Together, *Kagama* and *Lone Wolf* endowed Congress with a broad, paternalistic trusteeship. The Court’s decisions in these cases resulted in extreme judicial deference to Congress’ judgments. The decisions also reflected the prevalent cultural prejudice against Native Americans by casting them as helpless, dependent, and inferior peoples. Thus, the Supreme Court rejected assessments of Native Americans as domestic sovereigns and subjected them to broad and virtually unchecked legislative powers.

**B. The Road Back to Cherokee: 1930 to the Present**

As the judicial interpretation of the trust doctrine in *Kagama* and *Lone Wolf* reflected the political atmosphere of the era, the political climate similarly affected subsequent developments in the trust doctrine. In later years, Native Americans experienced considerable progress in achieving...
judicial recognition of individual and tribal rights.\textsuperscript{120} In addition, an exami-
nation of judicial activity during these years reveals a gradual return to the reasoning of the Cherokee cases. 121

1. First Steps: 1934 - 1968

In 1934, the Supreme Court took the first step122 toward limiting the deference afforded Congress in the past. In United States v. Creek Nation,123 the Creek Tribe sued to recover the value of land erroneously ceded to the Federal Government because of the government's inaccurate survey of the boundary to Creek Nation land.124 After the government appropriated the land involved in the erroneous survey, the Creek instituted the action. The government never disputed the misappropriation, but challenged the Creek's valuation of the land. Because, although quite unusual for this time period, the Creek held their land in fee,125 the facts provided the Court a unique opportunity to limit its past holdings. The Court acknowledged Congress' power to manage Native American land, but did not characterize the power as plenary.126 The Court held Congress' power subject not only to the inherent limitations in a trust relationship, but also to any pertinent constitutional restrictions.127 By applying such limitations to Congress' power, the Court began moving away from the expansive discretion previously conferred upon Congress.

In Seminole Nation v. United States,128 the Court retreated further from the position that Congress retained plenary power over the Native Americans.129 In Seminole Nation, the Court applied established principles of pri-
vate trust law.\textsuperscript{130} to hold the government liable for the actions of an intermediary trustee.\textsuperscript{131} In this case, the Commissioner of Indian Affairs knowingly disbursed tribal funds held in trust for the Seminole Tribe to the corrupt Tribal Council.\textsuperscript{132} Because the government paid the funds to the Council at the Council's request, the government contended it should be free from liability.\textsuperscript{133} The government maintained that its obligation ran, by treaty, between itself and the Council, and that government liability would result in double payments to the Council.\textsuperscript{134}

The Court rejected this argument and applied established fiduciary principles to hold the government accountable to the beneficiary Seminole tribe members.\textsuperscript{135} The Court based its holding on the maxim that a principal fiduciary is liable for the actions of an intermediary fiduciary, if the principal knows of the intermediary's wrongdoings.\textsuperscript{136} In short, \textit{Seminole Nation} makes the standards pertaining to a private fiduciary applicable to Congress. Though a private express trust served as the focus for the litigation, this case marked the first extension of traditional fiduciary principles to the Federal Government, despite similar language marking government tribal relations in the past.

Up to this point, the Court had moved towards rejecting \textit{Lone Wolf} and \textit{Kagama}, yet had not explicitly renounced them. Not until 1968 did the Court begin to directly limit those holdings.\textsuperscript{137} By 1980, the Court would effectively overturn its past position.\textsuperscript{138}

\textbf{2. The Turning Point: Menominee Tribe v. United States}

In 1968, the Supreme Court, in \textit{Menominee Tribe v. United States},\textsuperscript{139} di-

\textsuperscript{130} \textit{Seminole Nation}, 316 U.S. at 296 (citing 4 G. BOGERT, TRUSTS \& TRUSTEES §§ 901, 955 (1935), and 3 A. SCOTT, TRUSTS § 321.1 (1939), and \textit{RESTATEMENT TRUSTS} § 321 (1935)).

\textsuperscript{131} \textit{Id.} at 296. The Tribal Council for the Seminole Nation acted as the intermediary trustee. \textit{Id.}

\textsuperscript{132} \textit{Id.} at 295. The Dawes Commission, a government commission responsible for supervising the disbursement of the funds, fully documented the Council's corrupt nature. \textit{Id.}

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} at 296; see supra note 130.

\textsuperscript{136} \textit{Seminole Nation}, 316 U.S. at 296.

\textsuperscript{137} \textit{See infra} text accompanying notes 139-44.

\textsuperscript{138} United States v. Sioux Nation, 448 U.S. 371 (1980); \textit{see infra} text accompanying notes 161-70.

\textsuperscript{139} 391 U.S. 404 (1968)
rectly limited its holding in *Lone Wolf*. In *Menominee Tribe*, the Court confirmed Congress' right to unilaterally abrogate its treaties with Native American tribes, but Justice Douglas, writing for the majority, provided that the Court would require explicit proof of congressional intent to terminate or modify a treaty with the Native Americans. Without explicit congressional intent to change a treaty, the treaty would remain as originally interpreted. Thus, by assigning to Congress the burden of showing clear evidence of an intent to alter treaty rights, the Court decreased the significance of *Lone Wolf*, which previously afforded Congress virtually unlimited discretion in its dealings with Native Americans.

3. Progress in the Lower Courts

In 1973, the United States District Court for the District of Columbia, in *Pyramid Lake Paiute Tribe v. Morton*, imposed a strict fiduciary obligation on the executive branch to protect Native American interests. In *Pyramid Lake*, the court enjoined the Secretary of the Interior from diverting water from a tribal lake to a nearby irrigation district until the Secretary gave due consideration to the Paiute Tribe's interests. The district court imposed an expansive obligation on the executive branch to accommodate the Tribe's interests. The court required the Secretary to liberally construe his obligation to the Native Americans. Thus, by 1973 at least one federal court had subjected the executive branch to broad limitations requiring liberal protection of Native American interests.

In 1975, the United States Court of Appeals for the First Circuit, in *Joint

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144. *Id.*
146. *Id.* at 256.
147. Recently, in *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court modified the scope of this duty by refusing to reopen the water rights decree when faced with a renewed challenge by the Paiute Indians. *Id.* at 134-44. See *infra* note 210 for an analysis of the impact of *Nevada* on future trust doctrine litigation.
150. *Id.*
151. *Id.* But see *supra* notes 147-148; *infra* note 210.
Tribal Council of Passamaquoddy Tribe v. Morton,\textsuperscript{152} further extended the Supreme Court's holding in Menominee Tribe.\textsuperscript{153} In Passamaquoddy, the Federal Government appealed from a declaratory judgment in the district court which declared that the Tribe fell within the purview of the Non-Intercourse Act,\textsuperscript{154} thus entitling the Tribe to federal protection.\textsuperscript{155} The court held that the Non-Intercourse Act established a trust relationship between all Native American tribes and the government.\textsuperscript{156} The court also established a canon of construction for statutes or treaties relating to Native Americans.\textsuperscript{157} The court held that such legal documents should be construed "liberally [in favor of Native Americans] and in a non-technical sense, as the Indians would naturally understand them."\textsuperscript{158} Thus, Passamaquoddy built on the foundation laid by the Supreme Court in Menominee Tribe,\textsuperscript{159} using the Non-Intercourse Act to establish the existence of a trust relationship running from the government to all native tribes and providing a liberal canon of construction in favor of Native Americans. Together, Pyramid Lake\textsuperscript{160} and Passamaquoddy indicated a substantial departure from the Supreme Court's holdings in Lone Wolf and Kagama.

4. Rejection of Lone Wolf: United States v. Sioux Nation

Finally, in United States v. Sioux Nation,\textsuperscript{161} the Supreme Court completely rejected Lone Wolf v. Hitchcock.\textsuperscript{162} As with United States v. Creek Nation,\textsuperscript{163} Sioux Nation involved a challenge to the price the government paid for Native American reservation land.\textsuperscript{164} The Court overturned Lone Wolf on three different grounds.\textsuperscript{165} First, the Court removed the presump-
tion of good faith which *Lone Wolf* attached to compensation paid by Congress for Native American lands.\textsuperscript{166} Second, the Court held that federal courts should engage in limited judicial review of congressional determinations of the natives' best interests, by thoroughly and impartially examining the historical record.\textsuperscript{167} Third, the Court held the political question doctrine inapplicable to congressional relations with Native Americans.\textsuperscript{168} Accordingly, *Sioux Nation* summarily rejected *Lone Wolf* once again, by subjecting congressional determinations to judicial review, and by removing the presumption of good faith that *Lone Wolf* attached to congressional actions.

The Court's holding in *Sioux Nation* inherently rejected governmental paternalism towards Native Americans. *Lone Wolf* placed federal native affairs beyond the reach of the federal courts, thus essentially approving Congress' role as the Native Americans' paternalistic guardian.\textsuperscript{169} By rejecting *Lone Wolf*’s holdings, the Court also rejected *Lone Wolf*’s result. *Sioux Nation* brought Native American affairs back into a courtroom no longer slanted towards Congress.\textsuperscript{170} The Court's removal of the presumption of good faith in connection with the compensation paid for native land,\textsuperscript{171} together with the Court's decision to review Congress' determinations,\textsuperscript{172} effectively dispelled the notion that Congress could best determine Native Americans' interests. Today, because Congress' authority is more limited, and the government can no longer practice federal paternalism towards Native Americans, the trust doctrine more closely resembles the concept envisioned by Chief Justice Marshall in the *Cherokee* cases.\textsuperscript{173} Unfortunately, *Sioux Nation* does not guarantee that the Court will refrain from substituting its judgment for the judgment of Congress, thereby practicing judicial paternalism.\textsuperscript{174}

166. *Id.* (relying on Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

167. *Id.* at 413.

168. *Id.*

169. *Lone Wolf* v. Hitchcock, 187 U.S. 553, 555-56 (1903) (Congress' dealings with Native Americans constitute political questions, placing those dealings beyond broad judicial review). See supra notes 95-110 and accompanying text.

170. See *Sioux Nation*, 448 U.S. at 412; supra notes 163-68 and accompanying text. Prior to *Sioux Nation*, Congress historically enjoyed plenary power over Native Americans, with which the Court chose not to interfere. See *Lone Wolf* v. Hitchcock, 187 U.S. 553, 565 (1903). Thus, Congress retained a judicial advantage over challenging Native Americans because neither the natives nor the Court could question Congress' authority.

171. *Sioux Nation*, 448 U.S. at 413.

172. *Id.*

173. See supra text accompanying notes 12-49.

174. See infra text accompanying note 239.
III. RIGHTS SECURED THROUGH THE TRUST DOCTRINE

Though the Supreme Court waffled on the trust doctrine issue, lower federal courts applied the doctrine to secure for Native Americans basic land rights such as the right to possession, the right to receive income generated from the land, the right to preserve water sources, and the right to 

175. One issue which potential trust doctrine litigants must address is how to state a cause of action sufficient to withstand a motion to dismiss. After establishing subject matter jurisdiction and a waiver of sovereign immunity, see Newton, Enforcing the Federal-Indian Trust Relationship After Mitchell, 31 CATH. U.L. REV. 635, 636 n.10 (1982) (subject matter jurisdiction and sovereign immunity are now settled issues in federal Native American law), a potential litigant must state a cause of action sufficient to withstand a motion to dismiss. See FED. R. CIV. P. 12(b) (listing grounds for motion to dismiss). In National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985), the Supreme Court held that claims arising under 28 U.S.C. § 1331 (1982) include claims based on the federal common law in addition to the Constitution, treaties, and laws of the United States. Farmers Union, 471 U.S. at 850. Native American possessory rights based on aboriginal title are federal common law rights. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-36 (1985). Furthermore, the right of occupancy need not be based on treaty, statute or government action. Id. at 236. Although the Supreme Court recently limited Native Americans' right to sue for monetary damages, United States v. Mitchell 445 U.S. 535, 538-40 (1980) (Mitchell I), their right to sue for equitable relief remains an open question. See Newton, supra, at 678-80. Therefore, a suit seeking injunctive relief based on the federal common law right of occupancy should withstand a motion to dismiss.

A suit for injunctive relief will adequately protect Native American interests, particularly when one considers the unique and uncompensable nature of sacred sites, see supra note 2; infra text accompanying notes 249-69, and the government's cost inherent in a monetary judgment. An injunction will merely require the government to refrain from acting, thus protecting the sacred site while avoiding the cost of a monetary judgment.

176. See supra text accompanying notes 122-73.

177. See, e.g., Cramer v. United States, 261 U.S. 219 (1923) (as the native tribes' guardian, the United States could cancel land patents it issued to private third parties); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) (enjoined Secretary of Interior from listing tribal lands as part of public stock).


178. See, e.g., United States v. Sioux Nation, 448 U.S. 371 (1980) (compensation sought for lands taken by the federal government which were secured to the Sioux through an earlier treaty); Seminole Nation v. United States, 316 U.S. 286 (1942) (funds paid in exchange for land).

The Trust Doctrine

hunt and fish without state interference. Traditionally, the Court used the trust doctrine only to secure rights mentioned either explicitly or implicitly in past treaties, specific statutes, or agreements between native tribes and the United States. In one case, though, the Supreme Court relied on the cultural importance of tribal unity as a means of precluding de novo habeas corpus review of tribal court decisions in federal court. Two recent cases indicate that the federal courts may be abandoning the practice of strictly reading creating documents to determine the rights reserved in those documents. Therefore, in order to discern the nature, scope, and dimension of the trust doctrine, one must scrutinize the rights Native Americans previously secured through it. Only then can one attempt to make predictions about the doctrine's future course.

A. Real Property

Typically, courts secure tribal lands or income from land to Native Americans through the trust doctrine by using it to curtail government activity that encroaches on tribal rights to property. For many reasons, Native Americans view land as their most important asset. Originally, Native Americans exerted their tribal domain through their land holdings, which despite the fiduciary duty owed the Paiute by the Secretary of the Interior, because the decree was subject to res judicata considerations. See, e.g., Menominee Tribe v. United States, 391 U.S. 404 (1968) (hunting and fishing rights); United States v. White, 508 F.2d 453 (8th Cir. 1974) (hunting rights); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp 1001 (D. Minn. 1971) (hunting and fishing rights). But see United States v. Dion, 476 U.S. 734 (1986) (Congress can abrogate hunting rights secured through treaty).


181. See Chambers, supra note 9, at 1214.

182. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 68-71 (1978) (tribe's right to define membership is central to its existence as an independent community); see also F. PRUCHA, supra note 66, at 1186-90.

183. Menominee Tribe, 391 U.S. at 404; White, 508 F.2d at 454.


185. The Supreme Court's lack of continuity in the area of federal Native American law makes it extremely difficult to predict the future course of the trust doctrine, but continued writing and theorizing in the area will, perhaps, make an impression upon Congress and the courts. See Frickey, supra note 9, at 1213 (the Court's decisions display unpredictability and inconsistency).

186. See, e.g., Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977) (recover funds from land wrongfully appropriated); Seminole Nation v. United States, 316 U.S. 286 (1942) (funds paid in exchange for land); Cramer v. United States, 261 U.S. 219 (1923) (cancel land patent issued by government to private third parties because the natives possessed aboriginal title over lands involved); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) (preventing tribal lands from being listed as public stock); see also F. PRUCHA, supra note 66, at 1172-79.

187. See supra note 2 and accompanying text; infra text accompanying notes 249-64.

188. See 2 W. WASHBURN, supra note 119, at 941 (native political organization rooted in the land).
they held communally as a tribe. Consequently, tribal power and land holdings were inextricably tied together. Furthermore, Native Americans depended on the land for their daily existence. Most tribes depended on the fertility of the land for survival, whether they were agrarian or hunters.

B. Hunting and Fishing Rights

In several cases, Native Americans successfully defended tribal hunting and fishing rights through invocation of the trust doctrine. In each case, the courts evaluated the terms of the original treaties to determine whether the agreements preserved hunting and fishing rights. In *Menominee Tribe v. United States*, the Supreme Court broadly construed the terms of the Wolf River Treaty to encompass hunting and fishing rights. Although the treaty referred to neither right specifically, the Court reasoned that Native American culture and existence included hunting and fishing. The Court then looked to the federal obligation to “supervise” the tribes as the source of the Federal Government’s obligation to ensure the tribe uninterrupted exercise of their rights. Thus, although the Wolf River Treaty did not specifically ensure the right to hunt and fish, the Court liberally construed the treaty in *Menominee Tribe* in favor of the tribe. In doing so, the Court implicitly expanded the scope of the trust doctrine, although the Court did not indicate whether it would do so in the absence of a treaty on which to base its broad reading.

190. See 2 W. *Washburn*, supra note 119, at 941.
191. See *Encyclopedia*, supra note 2, at 530-35 (discussion of regional differences between native North American religions and cultures).
195. 10 Stat. 1064 (1854).
197. *Id.*
198. *Id.* at 406.
199. *Id.* at 413 (federal obligations towards Indians).
200. *Id.* at 405-06.
201. That the Court implicitly expanded the scope of the doctrine follows inversely from its failure to discuss any limits on or alternative grounds for its decision. See *Menominee Tribe*, 391 U.S. at 405-06.
C. Water Rights

In addition to protecting native tribe rights to hunt and fish, courts also protected water levels in tribal lakes through the trust relationship. In *Pyramid Lake Paiute Tribe v. Morton*, the tribal lake provided the Paiute Tribe with its principal source of food and livelihood. In addition, the Tribe inhabited the shores of and the area surrounding the lake. The United States District Court for the District of Columbia relied upon a previous memorandum decision of the Supreme Court that established the government’s initial obligation to maintain the lake and its feeder river “as a natural spawning ground for fish and other purposes beneficial to and satisfying the needs of the [Paiute] Tribe.” Faced with the Secretary of Interior’s assertion that he made a “judgment call” as to the allocation of water, the district court, through the trust doctrine, imposed a broad duty on the government to accommodate Native American interests, despite the government’s competing interest of supplying water to a nearby irrigation district. Accordingly, the Paiutes secured the right to initial maintenance of their tribal lake. The court’s holding necessarily implies that such initial maintenance constitutes an essential need of the tribe.


204. *Pyramid Lake*, 354 F. Supp. at 254; see also F. PRUCHA, supra note 66, at 1179-83.


206. Id. at 255.

207. Id. at 256.

208. Id. The court did not go so far as to require the government to maintain the lake’s water level at the expense of all other interests. The court only required the government to broadly construe its obligations to the tribe and to reassess its plan in light of the resulting obligations. Id.

209. Id. at 256-57; see also W. CANBY, supra note 9, at 41-42.

210. This inference follows because the court relied on a Supreme Court holding which looked to similar language to impose a duty of maintenance on the government. See *Pyramid Lake*, 354 F. Supp. at 254-55. This follows simply by examining the types of rights secured through the trust doctrine. See W. CANBY, supra note 9, at 37-43 (discussing the different rights historically secured through the trust doctrine).

The Supreme Court’s decision in *Nevada v. United States*, 463 U.S. 110 (1983), lessens *Pyramid Lake’s* impact with respect of continued maintenance of tribal waters. In *Nevada*, the Court held that, based on principles of res judicata and the unique nature of riparian rights litigation, it would not reopen past water decrees. Id. at 143. In addition, the Court also said in dictum that when a government official is charged with two conflicting duties, the fiduciary duty owed Native Americans under the trust doctrine and a duty to the general public, the trust doctrine’s duty must yield to that owed the general public. Id. at 141-42.

But, for several reasons, *Nevada* need not completely destroy the trust doctrine’s applicability to water rights cases. First, *Nevada* applies to the reopening of previous decrees. Id. at
D. Rights of Cultural Importance

In addition to representing the proposition that the trust doctrine secures to native tribes hunting and fishing rights, *Menominee Tribe v. United States*\(^{211}\) demonstrates that the trust doctrine secures rights of cultural importance as well. In *Menominee Tribe*, although the Court relied on the trust doctrine to secure hunting and fishing rights to the Tribe, it did so through a broad interpretation of the Wolf River Treaty.\(^{212}\) The Court reasoned that the Treaty secured the Menominee "their way of life"\(^{213}\) and that their way of life necessarily included the right to hunt and fish.\(^{214}\) Likewise, in *United States v. White*,\(^{215}\) the United States Court of Appeals for the Eighth Circuit found that certain rights constituted such an integral part of Native American life that they need not be specifically mentioned in a treaty.
for a court to find such rights reserved.\textsuperscript{216} Thus, through the trust doctrine, Native Americans can secure rights of cultural significance as well as possessory land rights.

Native Americans have successfully employed the trust doctrine to secure several rights essential to their physical survival\textsuperscript{217} and their culture.\textsuperscript{218} The trust doctrine has formed the basis for protecting tribal lands\textsuperscript{219} and securing funds generated from the land.\textsuperscript{220} The courts have also applied the trust doctrine to preserve Native Americans' continued hunting and fishing rights,\textsuperscript{221} whether such rights constituted native cultural heritage or were specifically reserved through treaty.\textsuperscript{222} The trust doctrine has also afforded initial maintenance of the water level of a tribal lake.\textsuperscript{223} Accordingly, federal courts have used the trust doctrine as a means by which to impose on the government the obligation of protecting the basic needs of the Native American tribes.\textsuperscript{224}

\textsuperscript{216} White, 508 F.2d at 457. After noting that early treaties did not reserve hunting and fishing rights the court stated: "The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, which was 'not much less necessary to the existence of the Indians than the atmosphere they breathed,' remained in them unless granted away." Id. (citation omitted).


\textsuperscript{218} See, e.g., Menominee Tribe, 391 U.S. at 406 (hunting and fishing rights constituted part of native lifestyle at the time the Wolf River Treaty was negotiated); White, 508 F.2d at 457 (use of hunted eagles in religious rituals is an integral part of native life such that the tribe would assume that any treaty secured such a right).

\textsuperscript{219} See, e.g., Cramer v. United States, 261 U.S. 219, 236 (1922) (Court cancelled a land patent issued by government to a private third party based on the Native Americans' possessory title); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 114 (1918) (preventing tribal lands from being placed on public stock listing).


\textsuperscript{221} See, e.g., Menominee Tribe, 391 U.S. at 404 (hunting and fishing rights); White, 508 F.2d at 457 (hunting rights); Pyramid Lake, 354 F. Supp. at 258 (fishing rights); Leech Lake Band, 334 F. Supp. at 1006 (hunting and fishing rights).

\textsuperscript{222} Supra text accompanying notes 211-20.

\textsuperscript{223} See Pyramid Lake, 354 F. Supp. at 258. But see Nevada v. United States, 463 U.S. 110 (1982) (Court refused to reopen a previously issued water decree, despite the Secretary of Interior's fiduciary duty owed the Paiute, based on grounds of res judicata); see supra note 210.

\textsuperscript{224} See F. Prucha, supra note 66, at 1165-70.
IV. DEFINING THE SCOPE OF THE TRUST DOCTRINE: ENCOMPASSING ESSENTIAL AND CULTURAL POSSESSORY LAND RIGHTS BASED ON NATIVE AMERICANS' SUBJECTIVE DETERMINATIONS

The unique relationship of Native American tribes with the United States gives rise to legally enforceable duties incumbent upon the government to uphold. Chief Justice Marshall originally characterized the trust relationship in the Cherokee cases and relied on the natives' status as "domestic dependent nation[s]" to conclude that the Federal Government owed an obligation of protection to the Native American tribes. The obligation imposed upon the Federal Government by the Cherokee cases served as a basis for federal preemption of state activity in the area of tribal sovereignty. Hence, it originally appeared that the Court linked the concept of legally enforceable duties to protect the Native Americans' separate identity to the tribes' status as domestic sovereigns.

At the turn of the century, the Court permitted Congress to pursue and exercise heavily paternalistic policies towards Native American affairs. Decisions such as United States v. Kagama and Lone Wolf v. Hitchcock allowed Congress to implement, virtually unchecked, policies designed to destroy the Native American tribal system. In 1980, the Supreme Court, in United States v. Sioux Nation, reversed those decisions and in doing so, implicitly rejected Congress' ability to act paternalistically on behalf of Native Americans.

The Court's decision in Sioux Nation makes it possible for Native Americans to assert their valuations of their interests. It indicates the Court's willingness to disturb congressional determinations of Native American interests if the surrounding historical circumstances do not reasonably support

225. See supra text accompanying notes 7-10.
226. Though the Supreme Court has curbed Native Americans' ability to sue for monetary damages, United States v. Mitchell, 445 U.S. 535, 538-40 (1980), the question of equitable relief remains open. See Newton, supra note 175, at 678-80.
227. See supra note 41.
229. Id. at 17-20.
231. Id. at 550-51.
232. See id.
233. 118 U.S. 375 (1886).
234. 187 U.S. 553 (1903).
Rejecting government paternalism grants Native Americans a participatory role in asserting and determining interests that warrant federal protection. Although the fiduciary obligation remains necessary to insure government protection of Native American interests, the fiduciary duty does not justify government's determination of those interests absent any input from tribal representatives.

By rejecting Congress' paternalistic practices, the Court effectively eliminated the judiciary's ability to practice paternalism. The same reasoning that precludes paternalistic congressional and executive appraisals of Native Americans' best interests, precludes similar judicial appraisals as well. Substituting a federal court's judgment for that advanced by the native tribe eliminates the effect of Sioux Nation, and results in judicial paternalism. Thus, federal courts, when faced with suits brought under the trust doctrine, should accept as legitimate the interests advanced by the native tribe.

Historically, the trust doctrine secured Native American tribes' essential material needs. Courts generally protected the natives' right to their land, their right to hunt and fish, and their right to protect their tribal interests. The contrary position, that courts protect the Native Americans' essential needs as seen from western culture's perspective, does not withstand scrutiny. See, e.g., Sioux Nation, 448 U.S. at 414 (congressional actions which damage native rights are actionable). Formal education arguably reflects "white America's" assessment of what is "best for the Native American." See F. Prucha, supra note 66, at 687. This is not to understate the value Native Americans place on education. The difference between their interest in hunting and education, for example, is that hunting is viewed as an aboriginal right. See Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1004 (D. Minn. 1971). Formal education, on the other hand, was not seriously introduced to Native Americans until the missionaries went out among the tribes in the late eighteenth century in an attempt to educate the Native Americans. F. Prucha, supra note 66, at 690. When the reformers did begin to educate the natives, the studies were limited to those subjects considered important to the missionaries. Id. at 690-92.

In addition, systematic refusal to acknowledge the natives' self-assessment of their interests reflects the logic of Lone Wolf and Kagama because it essentially shifts the power to the federal government to decide which Native American interests warrant protection. The Supreme Court flatly rejected this position several years ago. See Sioux Nation, 448 U.S. at 412-13.

The Court's Sioux Nation decision indicates its willingness to examine Congress' determinations of the Native Americans' best interests in light of surrounding historical circumstances. Id. Together, the Court's willingness to review state actions and the limits placed on federal government activities, allow Native Americans enough judicial review to effectively assert their interests in a judicial forum.

236. Id. at 413-14.
237. See supra text accompanying notes 169-72.
238. See generally Sioux Nation, 448 U.S. at 371 (rejection of plenary power of Congress).
239. The contrary position, that courts protect the Native Americans' essential needs as seen from western culture's perspective, does not withstand scrutiny. See, e.g., Sioux Nation, 448 U.S. at 414 (congressional actions which damage native rights are actionable). Formal education arguably reflects "white America's" assessment of what is "best for the Native American." See F. Prucha, supra note 66, at 687. This is not to understate the value Native Americans place on education. The difference between their interest in hunting and education, for example, is that hunting is viewed as an aboriginal right. See Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1004 (D. Minn. 1971). Formal education, on the other hand, was not seriously introduced to Native Americans until the missionaries went out among the tribes in the late eighteenth century in an attempt to educate the Native Americans. F. Prucha, supra note 66, at 690. When the reformers did begin to educate the natives, the studies were limited to those subjects considered important to the missionaries. Id. at 690-92.
240. See W. Canby, supra note 9, at 37-43.
241. See cases cited supra note 186.
In doing so, courts have construed the terms of treaties broadly to include rights that constitute an integral part of native culture and survival. In addition, the United States Court of Appeals for the First Circuit construed the Non-Intercourse Act broadly and concluded that it created a general trust relationship between the Federal Government and all native tribes, regardless of whether a specific treaty exists which creates such a relationship. Therefore, it appears that government action that adversely affects Native Americans' basic needs violates the government's fiduciary duty owed Native Americans.

Analysis of the rights and interests protected by the trust doctrine raises the question of whether the doctrine would also encompass protection of a tribe's intangible and spiritual needs. So long as those needs rise to the level of needs essential to the tribe's continued existence, the trust doctrine should also protect those needs.

A. Extending the Trust Doctrine to Protect Sacred Sites

Native Americans' essential needs entail more than just the material needs of land, food, water, and protection of tribal assets. Native Americans believe their future depends on their sustained communication with the spirit world, communication possible only at sacred sites. Religion pervades every aspect of Native American lives and makes natives unable to compartmentalize their lifestyles into distinct religious and secular components.

Native American tribes generally practice site-specific religion, worshiping the geographical location where a particular event occurred rather than praising the event itself. Native Americans worship sacred sites because of their belief in the particular site's importance to the spirit

243. See, e.g., Sioux Nation, 448 U.S. at 371 (grant compensation for lands secured through treaty and later taken by government); Seminole Nation v. United States, 316 U.S. 286 (1942) (funds paid in exchange for land).

244. See supra text accompanying notes 210-16.


247. Passamaquoddy, 528 F.2d at 379.

248. Several scholars have noted and explored the possibility of extending the trust doctrine's applicability in the future to encompass other interests not traditionally protected. See W. Canby, supra note 9, at 42-43; Chambers, supra note 9, at 1225; Clinton, Isolated in Their Own Country: A Defense of Protection of Indian Autonomy and Self-Government, 33 Stan. L. Rev. 979 (1981); see also Note, supra note 28.

249. See supra note 2.

250. See Michaelson, American Indian Religious Freedom Litigation: Promises and Perils.


251. Id.

252. Id.; see also supra note 2.
world. Depending on the site, the natives may believe it is the origin of the world, of life in general, or of the spirit of the tribe or a particular individual. Similarly, tribes may worship the site because of the force they believe it exerts over a tribe member's hunting skills, or ability to communicate, or general day-to-day existence. Although native indigenous religions are numerous and diverse, sacred sites are universally indispensable to Native American religion and thus essential to the natives' continued cultural existence.

B. Comment

The trust doctrine should encompass protection for Native American sacred sites. Typically, courts apply the doctrine to protect rights secured through treaties, statutes, or agreements. Courts have displayed a willingness to broadly construe the relevant terms of these legal documents. Moreover, the Supreme Court has recognized the primacy of Native American notions of their basic needs, rather than the Federal Government's perceptions. Therefore, based on the importance placed on sacred sites in Native American culture, the trust doctrine's analysis should extend to curb government action that adversely impacts on Native American sacred sites.

Regardless of how irrational the natives' religious beliefs may appear to a federal court, the importance of the site to the natives constitutes the only relevant consideration. Because Sioux Nation requires courts to accept the tribe's assessment of their best interests, courts should accept the assertion that sacred sites are indispensable to Native Americans' future existence. Not only do Native Americans believe the sites ensure their material exist-

253. See supra note 2; see also Michaelson, supra note 250, at 47-50.
254. See supra note 2.
255. Id.
256. Id.
257. The American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1982), arguably could create a claim to protect sacred sites, but the Supreme Court construed the statute otherwise. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1328 (1988). The Supreme Court held that AIRFA does not create a cause of action for Native American plaintiffs. Id. at 1328; see also 98 CONG. REC. 21,443, 21,445 (1978) (Cong. Udall stated, "[This Act] has no teeth in it."). Nevertheless, AIRFA does acknowledge the importance of religion.
259. Chief Justice Marshall employed phrases such as "a home to be held as Indian lands are held." Menominee Tribe v. United States, 391 U.S. 404, 405-06 (1968); see supra notes 190-99, 209-214 and accompanying text.
260. See supra note 239.
ence, they also believe their worship provides the tribe with vitality and secures the continued existence of the world.\textsuperscript{261} To Native Americans, these sacred sites are as essential as food and shelter.\textsuperscript{262} In fact, they believe that without the sites, they would lose their ability to hunt, and thus would surrender their future existence.\textsuperscript{263} Therefore, it is possible that Native Americans view their sacred sites as their most important tribal asset. The reasoning behind trust doctrine precedent\textsuperscript{264} amply supports the assertion that courts should accept these characterizations and include sacred sites within the realm of trust doctrine protection.

Including sacred sites within the trust doctrine is also consistent with the dicta of prior cases. For example, in \textit{Menominee Tribe v. United States}\textsuperscript{265} the Court broadly construed the clause “a home to be held as [Native American] lands are held,”\textsuperscript{266} to include hunting and fishing rights within the rights secured by the treaty.\textsuperscript{267} In light of both the importance placed on sacred sites in native culture and the inseparability of secular and spiritual concepts in native life, Native Americans should have an inherent right to undisturbed use of the sacred sites.\textsuperscript{268} Therefore, extending the trust doctrine to protect sacred sites is consistent with values deemed important to Native Americans by the Supreme Court.

The trust doctrine should protect Native Americans' spiritual as well as material needs. This type of protection is sufficiently similar to protecting the material needs that previously warranted defense from government encroachment. Native American religious needs rise to the same level of importance in native culture as the right and ability to hunt and fish.\textsuperscript{269} In addition, the courts have expressed the importance of preserving a tribe's cultural identity. Extending the trust doctrine to encompass sacred sites achieves cultural protection of Native American tribes. In fact, limiting trust protection to only material needs eventually will result in the loss of Native American culture because of the importance of sacred site worship to individual and tribal survival. Thus, extension of the trust doctrine is consists-

\textsuperscript{261} See supra note 2; see also Michaelson, supra note 250, at 47-50.
\textsuperscript{262} See generally supra note 2 (discussion of indispensability of sacred sites generally to the lives of Native Americans).
\textsuperscript{263} Id.
\textsuperscript{264} See supra note 239 and accompanying text.
\textsuperscript{265} 391 U.S. 404 (1968).
\textsuperscript{266} Id. at 405-06.
\textsuperscript{267} Id. at 406; see also supra text accompanying notes 190-99.
\textsuperscript{268} In addition, this protection must extend to sites both on and off reservation land. See supra note 2.
\textsuperscript{269} See supra note 2.
tent with, and necessary to protect the values encompassed by the trust doctrine.

C. The Compelling State Interest Test: Accommodating Native American and Government Interests

The government's fiduciary duty compels it to protect Native American interests. The government, however, also faces a competing duty owed to all the nation's citizens. Blind deference to the trust doctrine will compromise the government's competing duty owed the general public whenever the two duties clash. Applying the compelling state interest test\(^\text{270}\) will effectively accommodate both the government's interest in managing its National Park and Forest land\(^\text{271}\) and the Native Americans' interest in maintaining the integrity of their sacred sites. Through legislation,\(^\text{272}\) Congress has acknowledged the importance of Native American religion to the future existence of native culture.\(^\text{273}\) Given the existence of such legislation, and the trust obligation the government owes Native Americans, courts should enjoin government action which negatively affects a sacred site, absent a congressional mandate requiring affirmative interference with a sacred site.\(^\text{274}\) This approach allows for the execution of Congress' laws but precludes discretionary acts by government officials not ordered by Congress. It also provides courts with evidence of a determination by Congress that the importance of the required action outweighs the government's trust responsibility. This approach frees federal judges from balancing the two competing interests while still affording the government the necessary latitude to function.

\(^{270}\) See supra note 6.

\(^{271}\) Native Americans assert hunting and fishing rights off the reservation because many of the traditional hunting and fishing areas are not located on the reservation. See supra note 11. Therefore, logically, when those sites are not located on the reservation, the protection of sacred sites must also extend off the reservation. See 1982 HANDBOOK, supra note 6, at 228 (numerous sacred sites are located off the reservation).


\(^{273}\) Id.

\(^{274}\) Congress had never directed the Department of the Interior to build the Gasquet-Orleans (G-O) road, the government action which spawned Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1321-22 (1988). In fact, the Forest Service originally decided not to build the road because of the adverse impact the road would have on the nearby sacred sites. Id. at 1322. Once the Forest Service reversed its decision, in an effort to protect the surrounding area, Congress passed the California Wilderness Act of 1984, Pub.L. 98-425, 98 Stat. 1619 (1984) (codified at 16 U.S.C. § 1132 (Supp. IV 1986)). In the Wilderness Act, Congress declared the affected land a wilderness area, thus making all commercial activity illegal, including logging. Congress excepted from wilderness designation a small strip of land previously set aside for the G-O road. Id. Thus, it appears that Congress did everything short of passing a law forbidding the Secretary of Agriculture to act.
V. CONCLUSION

As a result of the Supreme Court's recent decision in Lyng, Native Americans can no longer look to the first amendment for protection of their sacred sites. Yet the importance of these sites to native culture, and perhaps actual survival, mandates that Native Americans look for alternative legal grounds through which to secure the integrity of sacred sites. The trust doctrine presents such a possibility. The trust doctrine imposes a duty on the government to protect a tribe's basic needs. In the past, the courts have only dealt with basic material needs, but federal courts now construe these needs through the Native Americans' own assessment of importance. Because religion, to which sacred sites are essential, is also a basic need of the Native American, the trust doctrine should encompass protection of sacred sites.

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