The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure

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ARTICLE

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By Ezra Rosser*

“To write the story of my soul
I trace in the silence and stone
of Black Mesa.”
—Jimmy Santiago Baca,
Black Mesa

I. INTRODUCTION

In 1973, armed Indians occupied Wounded Knee. The mixed group of traditionalist and American Indian Movement activists surrendered seventy-one days later but the occupation inspired Senator James Abourezk of South Dakota to introduce S.J. Resolution 133, which established the American Indian Policy Review Commission. The 1977 Abourezk Commission’s final report recommended two fundamental concepts to guide federal tribal policy:

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1. JIMMY SANTIAGO BACA, BLACK MESA POEMS (1952).

2. In this paper I will use a range of terms for Native Americans, including Indians, tribes, tribal members, indigenous peoples, including the names of individual tribes in either their English or native language names (i.e. Navajo and Diné). There is no clear line on what the appropriate name is for different people and often individual Native Americans have their own idiosyncratic preferences, which change dependant on to whom they are talking. Coming from the Navajo Nation but being Anglo, I generally prefer to be called a Biliguana but at times it makes more sense to have others call me “Anglo” or “White” or, among friends, “hick.”

1. That Indian tribes are sovereign political bodies, having the power to determine their own membership and power to enact laws and enforce them within the boundaries of their reservations.

2. That the relationship which exists between the tribes and the United States is premised on a special trust that must govern the conduct of the stronger toward the weaker.\(^4\)

The report’s assertion of the two concepts of self-determination and trust, as independent concepts whose roles are separate from each other, reflects the treatment by scholars who express the idea that meaningful trust and sovereignty do not necessitate a trade-off between them. The relationship and arguable trade-off between the two Abourezk Commission concepts can be seen in the United States Supreme Court’s treatment of two Indian law cases during its 2003 term.\(^5\)

By accepting certiorari in *United States v. Navajo Nation*\(^6\) and *United States v. White Mountain Apache Tribe*,\(^7\) the United States Supreme Court agreed to revisit the complex issue of damage payments from the United States for breach of trust owed to Indian Tribes.\(^8\) This issue was last explored by the Court in *United States v. Mitchell*\(^9\) ("Mitchell I") and in *United States v. Mitchell*\(^10\) ("Mitchell II"). The Court’s consideration of the trust doctrine in these two cases offers a unique and rare glimpse into the federal-tribal relationship’s nature since the Court currently considers a disproportionately small number of Indian law cases,\(^11\) concerning Indian claims for damages grounded on federal breach of trust.\(^12\) Therefore, *Navajo Nation*

\(^4\) *Id.* at 228.

\(^5\) I am somewhat reluctant to criticize the failure to acknowledge the trade-off because there does exist the danger that my description of the trade-off will be appropriated by those who desire federal control over the timing and nature of the trade-off. As I hope I succeed in making clear, the fall back norm must be the trust responsibility which only the individual tribes have the power to alter or leverage as it fits their needs for increased independence or sovereignty.


\(^7\) 537 U.S. 465 (2003).

\(^8\) See generally *Navajo Nation*, 537 U.S. 488; *White Mountain*, 537 U.S. 465.


\(^12\) Former Native American Rights Fund ("NARF") attorney Tracy Labin told the audience at Yale Law’s *Rebellious Lawyering Conference* panel on the trust relationship,
and *White Mountain* play a crucial role in defining the federal-tribal relationship as tribes and the federal government continue to interact across the range of programs and issues where their interests meet, cross, or conflict.\(^{13}\)

In this article, I explore *Navajo Nation* and *White Mountain* with a forward focus on how tribes might be able to best navigate the complexities of tribal sovereignty and the tribal trust relationships as informed by the Court’s recent decisions. It is a controversial decision to analyze Indian law cases from the perspective of someone more concerned with where tribes will go from here rather than where they were in the past. A focus upon the past is a natural outgrowth of the unique history of Native American tribes; a telling of the frequent wrongs suffered upon tribes at the hands of the United States Government (as well as the period prior to the American Revolution) forms a powerful backdrop for legal claims of continued wrongs being committed against tribes.\(^{14}\)

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13. *See* Bill McAllister, *Supreme Court Reviews U.S. Trust to Indians*, DENGHER POST, Dec. 3, 2002, at A7 (“The high court’s decision will have a major impact on more than 500 federally recognized tribes nationwide and on the governments and businesses that deal with them.”) [hereinafter McAllister, *Court Reviews*]; *see also* Charles Lane, *A Tale of Two Reservations*, WASHINGTON POST, Dec. 2, 2002, at A19 (“Lawyers for the tribes and for the government have told the court that its decisions will help define the terms under which the government owes Native Americans a duty to manage their reservations in the tribes’ best interests—and the rules under which the government is liable for damages if it fails to do so.”).

Legal writing—books, articles, and even newspaper columns—typically proceeds in a standard pattern: a description of how cases used to be decided, followed by a description of the wrong way they are currently decided.\textsuperscript{15} I do not suggest that such scholarship should be understood as simplistic complaint narratives, for surely such scholarship not only serves as a recording of historical wrongs but also adds insight to contemporary challenges faced by tribes.\textsuperscript{16} “Nonetheless, my own judgment is that room remains for scholarly work that criticizes federal Indian law from the inside and that assumes that the legal interpretive community is not closed to arguments in this field.”\textsuperscript{17} The implicit criticism found in my choice to look forward rather than backward, when considering the nature of trust and sovereignty, is a reflection of the troubled state of Indian law and the consequent need to find a new tribal law and leadership paradigm.

In \textit{Navajo Nation}, the Court ruled for the Government and denied the tribe its $600 million damage claim.\textsuperscript{18} In \textit{White Mountain}, the Government’s breach was held to constitute grounds for a money damage claim.\textsuperscript{19} The underlying theme of these two cases must be that self-determination\textsuperscript{20} matters or, in
the language of the Court, control matters. Thus, in these cases a critical determination is whether the Government or the tribe has effective control. To the extent the two decisions emphasize control as a “theory of government responsibility,”\textsuperscript{21} they should be celebrated within the Indian community.\textsuperscript{22} However, the false decontextualization of the right to self-determination from the actual situation facing tribes as they attempt to use their sovereign rights found in the decisions is troublesome. The challenge for Indian scholars and leaders alike is recognizing that the future of tribal progress will involve a trade-off between self-determination and the trust duties of the federal government. The trust doctrine is certainly not “obsolete.”\textsuperscript{23} Some tribal governments might be better served by acknowledging that their place has changed, and perhaps should change even more. The desire to have one’s cake and eat it too pervades Indian Law scholarship,\textsuperscript{24} which fails to acknowledge that such a trade-off exists.\textsuperscript{25} Although barriers still exist that prevent full exercise of tribal self-determination, the inclination


\textsuperscript{22} Cf. Harvard Note, supra note 12, at 428 (arguing that the control theory “fails because it is either logically circular or overinclusive”).

\textsuperscript{23} See Wood, supra note 12, at 1472-75.

\textsuperscript{24} Professor Robert Laurence is the only person I have found who has been willing to acknowledge that this is his desire on an issue of Indian law, specifically on whether tribal sovereignty is a common law or constitutional doctrine. Robert Laurence, A Memorandum to the Class, in Which the Teacher is Finally Pinned Down and Forced to Divulge His Thoughts on What Indian Law Should Be, 46 ARK. L. REV. 1, 6 (1993) (“My dream world would probably be to have my cake and eat it too: that is to say, to ratchet the sovereignty doctrine higher now, and then to lock it in place by declaring it to be a constitutional doctrine.”).

\textsuperscript{25} In a student comment, Rodina Cave advocates a “final break from the guardian-ward trust doctrine,” because it is “inconsistent with Congress’s recent policies of promoting tribal self-determination and self-governance.” Rodina Cave, Comment, Simplifying the Indian Trust Responsibility, 32 ARIZ. ST. L.J. 1399, 1400 (2000). However, the note does not suggest that a trade-off exists between the trust doctrine and self-determination if the trust doctrine is recast from guardian-ward to a common law relationship. Id. But see Ellwanger, supra note 12, at 687 (“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.”).
by scholars and leaders to pretend the trade-off does not exist, or
to blindly rely upon the government fulfilling tribally favored
trust obligations by denying the trade-off, threatens the future of
tribal control of each tribe’s future.

Prior to the Court issuing its decisions in February 2003,
those in the Indian law community were deeply concerned that
the Navajo Nation and White Mountain cases might be used by
the Rehnquist Court to “rewrite the rules of Indian law”
covering damage awards for federal breach of trust.26 “If the
justices want to say that the trust responsibility is an
‘anachronism,’ these cases could be the vehicles for such a
ruling,” according to University of Colorado law professor
David Getches.27 Indian cases are not held in high esteem; they
are dismissed by the parties, Justices, and scholars, and at times
even the Government considers such claims as mere quibbles
over procedure.28 Justices have purportedly referred to such
claims as “chickenshit cases,”29 and scholars have described
Indian law decisions as merely reflecting a preference for
“disadvantaged groups” without independent intellectual
grounding.30 Even scholars whose careers have been devoted to
Indian law have described the recent Indian law decisions as
reflecting a “rudderless exercise in judicial subjectivism.”31

The very act of seeking “justice” through the United States
court system is problematic because doing so essentially places

B7 [hereinafter Getches, Scales].
27. McAllister, Eyes on Court, supra note 12, at A35.
28. Brief for the Navajo Nation at 47, United States v. Navajo Nation, 537 U.S. 488
(2003) (No. 01-1375) (“The Navajo Nation’s claim is not a quibble over procedural
niceties, as the Government contends.”).
29. Frickey, supra note 17, at 383.
30. Id. at 424. Frickey explained:
If I am right that the Justices perceive the canon as designed to promote a public
value that favors Indians as a downtrodden minority, the Justices are not alone.
The two principal recent commentaries on the substantive canons treat the Indian
law canon the same way. William Eskridge categorizes that canon as part of a
cluster of canons that protect discrete and insular minorities—“Carolene
groups”—against legislative oppression. Similarly, Cass Sunstein calls the
Indian canon “the most conspicuous example” of an interpretive principle that
favors “disadvantaged groups.”

Id.
tribal fate in a foreign judiciary that has often protected its own interests at the expense of tribal interests. Indeed, the largest legal organization working on behalf of Native Americans, the Native American Rights Fund ("NARF"), has, along with the National Congress of American Indians, recently launched the Tribal Supreme Court Project. According to its former lead attorney, Tracy Labin, the Project’s primary goal is to prevent, as best as possible, Indian law cases from reaching the United States Supreme Court because the Court has recently done a great deal of damage to established Indian law precedent.

"Tribal interests have lost a whopping 82% of all cases in the Supreme Court in the last [ten] years. Even convicted felons seeking reversal of convictions do better: Criminals win 36% of the time, while tribes win only about 20% of their cases."

Although the threat previously has come from the legislative or executive branches, now tribes find themselves “in a period of ‘[j]udicial [t]ermination.’”

In Navajo Nation and White Mountain, ultimately, “the Court gave one victory each to the federal government and to Native Americans . . . .” Yet, from some perspectives within the Indian community, because of the contextual possibility that the Court might come out more strongly against tribal interests, even the loss felt like a victory. The Court’s consideration of

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32. See Frickey, supra note 17, at 389 (“In short, a legal claim was defined as one found within the legal system of the colonizing government.”); Robert A. Williams, Jr., Jefferson, The Norman Yoke, and American Indian Lands, 29 ARIZ. L. REV. 165, 167 (1987) (describing Federal Indian law as “a brute reflection of the interests of a conquering nation grooping for its own unique colonizing syntax and grammar . . .”).

33. See Frickey, supra note 17, at 419 (“First, respect for tribal sovereignty may be harder to generate when the Court has confidently declared for a century that congressional power over tribes is plenary.”).


35. Labin, supra note 12.

36. Getches, Scales, supra note 26, at B7; see also Labin, supra note 12 (stating that in the Rehnquist Court “tribes have lost 80% of cases before the United States Supreme Court”).


39. The high degree of contextualization needed to view Navajo Nation and White Mountain as victories also holds for the Mitchell decisions. Nell Jessup Newton, Indian
the two cases was dangerous; "[n]evertheless, given the arguably unsympathetic climate on the High Court towards Indian tribal rights, the two decisions, even one which was unfavorable, were cause for moderate rejoicing."  Navajo Nation was a victory to the extent that the Court did not use it to eviscerate the very concept of the Mitchell II trust responsibility. This still remaining trust responsibility involves situations in which the tribe has partial control which falls short of the rights and degree of control possessed by the Navajo Nation in approving the leases at issue (as contrasted with White Mountain where the federal control was largely undisputed).  That both the Navajo Nation and the White Mountain decisions fit within the Mitchell I and Mitchell II framework rather than embarking on more sweeping restructuring of the trust relationship can be viewed as a victory. Indeed, attorneys for the Navajo Nation made it clear that they were skeptical that the Court would adhere to precedent, fearing the Court would instead use the case as an opportunity to reconsider trust damages and void Mitchell II. However, although Indian advocates have reason to celebrate the Court’s avoidance of dicta and more narrow

Claims in the Courts of the Conqueror, 41 AM. U. L. REV. 753, 790-91 (1992) (noting the barriers the Mitchell claimants have faced and stating, “Yet, in the world of Indian claims, Mitchell is regarded as a victory.”); see also Wood, supra note 12, at 1521 (“Overall, the Mitchell cases should signal a victory for native interests because they reaffirm the trust doctrine.”).

40. Supreme Court Deals a Win and a Lesson, INDIAN COUNTRY TODAY, Mar. 14, 2003 (emphasis added) [hereinafter Supreme Court Deals].

41. Under this perspective Indian interests won by avoiding dicta, for the Court’s sole focus on fitting the situations into the Mitchell I and Mitchell II framework contrasts sharply with the Court’s more sweeping decisions concerning tribal jurisdiction. See generally Nevada v. Hicks, 533 U.S. 353 (2001); see also Labin, supra note 12 (“[T]he opinions are being written so broadly that they are striking out whole parts of Supreme Court jurisdiction in opinions that are much broader than they need to be for the cases before them.”).

42. Bill McAllister, High Court Rules Against, For Indians, DENVER POST, Mar. 5, 2003, at A7 [hereinafter McAllister, High Court] (“The two cases had been closely followed by tribes concerned that the high court might redraw the government’s responsibility toward them.”).

43. In the Navajo Nation’s Brief for Respondent, the hope that the Court would not abandon established rules of judicial interpretation was brought up multiple times: “Stare decisis mandates adherence to Mitchell II here and compels affirmance of the Court of Appeals’ determination . . . .” Brief for Respondent at 29, Navajo Nation (No. 01-1375).

"The Government’s arguments here generally repackage its unsuccessful arguments in Mitchell II." Id. at 44. “[T]his Court has no reason to reconsider Mitchell II.” Id. at 50.
consideration of the two tribes’ claims, it remains impossible to declare that both decisions unequivocally support the tribes.

An emphasis on the unfriendly context is required in order to declare that the Navajo and White Mountain Apache tribes won. Courtroom disputes invite dichotomous thinking, analysis that emphasizes either/or reactions to the final decisions. If one starts with the idea that the Court would either hold the Government to the most exacting fiduciary standard, or would hold the Government to a lesser standard, the paired decisions cannot be viewed as a victory. As I will discuss, even the White Mountain decision leaves the substance of the money damage claim unanswered. The victory for tribes that was derived from the Court’s decisions—the reinforcement of tribal self-determination—is a victory which tribes may be unwilling to fully accept, and one that may not be appropriate for some tribes.

In their filings, the Government and the tribes acknowledged that a great deal rode on the decisions reached by the Court in these two cases. The White Mountain Apache tribe claimed that the Government owed them $14 million for breach of trust, while the Navajo tribe claimed $600 million. As the Government’s Navajo Nation petition made clear, “[t]he practical implications of the court of appeals’ decision are significant.” In fact, the Government’s Navajo Nation petition for writ of certiorari began its “Reasons for Granting the Petition” with a discussion of the large money damages involved. The argument that the amount at stake was so large

44. Frickey, supra note 17, at 437-38 (“The major blows struck to the Marshall legacy by the Rehnquist Court up to this point, then, are in dicta.”).
45. McAllister, High Court, supra note 42 (“[T]he Court’s] rulings proved inconclusive.”).
46. White Mountain, 537 U.S. at 476 n.4.
47. Navajo Nation, 537 U.S. at 500; White Mountain, 537 U.S. at 469.
The Federal Circuit held that the United States may be liable to the Navajo Nation (Tribe) for up to $600 million in damages for breach of trust in connection with a mineral lease agreed to by the Tribe and a private company, without finding that the government violated any specific statutory or regulatory duty.
Reply Brief for Petitioner at 1, Navajo Nation (No. 01-1375).
49. Petition for Certiorari at 13, Navajo Nation (No. 01-1375).
that the Court should find the United States was not subject to suit for money damages for breach of trust was at best curious, though it might also be viewed as little more than the Government, through the judiciary, deciding not to pay what was owed as a consequence of actions of the Department of the Interior.

Despite the $614 million directly at stake in these two cases, the majority of the filings—from both the Government and the tribe—were concerned with the effect on future lawsuits of a decision favorable to the tribes. The Government repeatedly emphasized the “bedrock importance” of the general sovereign immunity and then urged the Court to ensure the greatest expansive of this immunity to prevent the Government from being exposed to enormous potential liability. In fact, fear that a tribal victory would lead to further damage claims and liability placed the Navajo Nation advocates in the irregular position of defending the “limits on the Government’s potential liability.” They even went so far as to say that the limits were “appropriate.” Concern that the Court’s decision would be geared towards preventing future claims led to a tribal defense of the “Mitchell framework” and its “stability and predictability.”

The concern about future damage suits was more than mere

50. For a statement of the question presented by the case, see Petition for Certiorari at 2, United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (No. 01-1067) (“This case concerns the threshold standard that governs in determining whether the United States is subject to suit for money damages for an alleged breach of fiduciary duty in connection with property that it holds in trust for an Indian Tribe.”).
52. Petition for Certiorari at 10, White Mountain (No. 01-1067); see also Reply Brief for Petitioner at 8, Navajo Nation (No. 01-1375) (mentioning “bedrock principles of sovereign immunity”).
53. Oral Argument at 28, White Mountain (No. 01-1067) (stating that “there are more than [fifty-six] million acres of land that the Government holds in trust” that would thus be subject to damage claims); see also Petition for Certiorari at 21, White Mountain (No. 01-1067) (describing “the potential liability of the United States for millions of dollars in damages”); Reply Brief for Petitioner at 8, Navajo Nation (No. 01-1375).
54. Brief for Respondent at 38, Navajo Nation (No. 01-1375).
55. Id.
56. Id.
conjecture; rather, it reflected ongoing litigation—in particular that involving the Cobell trust fund.\textsuperscript{57} The Government’s argument that a decision for the tribes “could expose federal taxpayers to a flood of costly litigation” was a partial description of the argument.\textsuperscript{58} However, despite vague discussion of the “recurring importance in the lower courts,”\textsuperscript{59} the Government’s references to the \textit{Cobell v. Norton}\textsuperscript{60} litigation are at best thinly veiled.\textsuperscript{61} The importance of cases not directly before the Court came across when the Government critiqued the White Mountain tribal position by saying that the tribe failed in its “attempt to downplay the importance of this case.”\textsuperscript{62}

More was at stake in \textit{Navajo Nation} and \textit{White Mountain} than simply the outcome of future cases. The ability of tribes to recover monetary damages for breach of trust was and is at the essence of the very existence of meaningful trust. “With hundreds of millions of dollars at stake, the federal government [tried] to convince the Supreme Court . . . that it took good care of tribal lands—but owe[d] nothing even if it did [not].”\textsuperscript{63} The

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\item[59.] Reply Brief for Petitioner at 10, \textit{White Mountain} (No. 01-1067); \textit{see also} Petition for Certiorari at 11, \textit{White Mountain} (No. 01-1067).
\item[60.] The broad reasoning of the court of appeals could subject the United States to large money-damages claims in Indian breach-of-trust litigation, without any evidence whatsoever that Congress intended to expose the treasury of the United States to such liability. Indeed, the decision in this case already has been relied upon by the Court of Federal Claims to expose the United States to significant potential liability for alleged breach of trust in other pending Indian litigation. Petition for Certiorari at 11, \textit{White Mountain} (No. 01-1067).
\item[61.] \textit{McAllister, Eyes on Court, supra} note 12, at A35.
\item[62.] Indeed, some lawyers involved in the massive lawsuit over Interior’s handling of the [six]-year-old lawsuit about the balances in more than 300,000 Indian trust accounts say a principal reason the dispute has not been settled is the Justice Department’s hopes that the high court will use the two cases to redefine the government’s responsibility. \textit{Id; see also} \textit{McAllister, Court Reviews, supra} note 13, at A7 (“It may also affect a separate, [six]-year-old lawsuit Norton [the Secretary of Interior] faces over her responsibilities for managing individual trust accounts for more than 300,000 Indians. Norton has been held in contempt of court in that dispute.”); \textit{see also} Petition for Certiorari at 23-25, \textit{White Mountain} (No. 01-1067) (discussing the argument that “The Court of Appeals’ Decision Can Be Expected To Have Serious Adverse Consequences For The Government”).
\item[63.] Reply Brief for Petitioner at 9, \textit{White Mountain} (No. 01-1067) (citation omitted).
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Navajo Nation managed to convince the Court of Federal Claims that the Government had breached the duties of care, loyalty, and candor. However, the court agreed with the Government that the duty was only general and did not give rise to monetary damages. The Government advocated the same position to the Supreme Court in Navajo Nation and in White Mountain where it claimed to accept the trust responsibilities, but denied that such duties were legally enforceable “in a suit for money damages.”

The Court decisions in White Mountain and Navajo Nation arguably split on whether or not damages were needed to enforce trust duties. In White Mountain, the Court rejected the Government’s argument and held that the right to money damages, and not simply injunctive relief, was necessary in order for the trust responsibility to be real suggesting that relief must be limited to an injunction to toe the fiduciary mark in the future, it would bar the courts from making the Tribe whole for deterioration already suffered, and shield the Government against the remedy whose very availability would deter it from wasting trust property in the period before a Tribe has gone to court for injunctive relief.

The Court was willing to stand behind the assertion of White Mountain Apache’s Attorney, Robert Brauchli, that “without a remedy, without a right to enforce it, you have no right at all.” As Professor Laurence noted, “If the trust responsibility is to exist at all, it ought to mean something real and be enforced with teeth.” Yet, by not awarding the Navajo Nation damages, the Court arguably kept the teeth but did not sharpen them. To

65. See Petition for Certiorari at 10, Navajo Nation (No. 01-1375).
66. Id. at 19.
67. See Petition for Certiorari at 20, White Mountain (No. 01-1067).
68. White Mountain, 537 U.S. at 478-79.
70. Laurence, supra note 24, at 15.
understand the Court's split, I begin with analysis of Navajo Nation where the Court stated that the claim did not give rise to monetary damages, and then discuss the White Mountain decision.

II. UNITED STATES V. NAVAJO NATION

A. Leasing Navajo Resources

In 1964, the original lease, which became the subject of United States v. Navajo Nation, was agreed to by the Navajo Nation and Sentry Royalty Company (whose rights Peabody subsequently acquired) and was approved by the Secretary of the Interior. Lease 8580 covers land on top of Black Mesa, located twenty-five miles west of Kayenta, Arizona. Together with additional leases for the Kayenta Mine, also located on top of Black Mesa, Peabody leased 64,858 acres through agreements with the Navajo and Hopi Nations. The Navajo Nation did "not receive adequate recompense" from the terms of the original lease; however, the lease did have a provision that allowed for reasonable adjustment of the rate at the end of twenty years. The tribe and Peabody began negotiations and the tribe requested that the Bureau of Indian Affairs ("BIA") determine the appropriate royalty rate. The BIA was prepared to recommend that the royalty rate be raised to 20%; however,

75. Petition for Certiorari at 5, Navao Nation (No. 01-1375).
76. See Letter from Area Director, Navajo Area Office, Bureau of Indian Affairs, Donald Dodge to Kenneth R. Moore, Peabody Coal Company, June 18, 1984 (Joint Appendix at 8-9, United States v. Navajo Nation, 537 U.S. 488 (2003) (No. 01-1375)).
77. Id. This adjustment was supported by the BIA's Energy and Mineral Resources section of the Office of Trust Responsibility. Dr. Vijai N. Rai, A Report on the Issue of Royalty Rate Adjustment for Lease No. 14-20-0603-8580 (Kayenta Coal Mine) Navajo Reservation (Joint Appendix at 88, Navajo Nation (No. 01-1375)) ("We recommend that the Area Director's decision to adjust the royalty rate to 20[%] of the gross value of the coal mined from the subject lease be sustained.")
after Peabody’s lobbyist, Stan Hulett, a close personal friend of Secretary of Interior, Don Hodel, lobbied the secretary, the BIA held back its recommendation to raise the royalty rate. The BIA did not inform the tribe of the *ex parte* communication, and the tribe’s subsequent negotiations with Peabody concluded with the tribe signing a lease with a much lower royalty rate than the Secretary of the Interior approved.

1. **The Black Mesa and Kayenta Mines**

Leasing of land for exploitation was emblematic of BIA practices: “the BIA has consistently favored one method of exploiting Navajo resources—leasing resources to non-Indians.” The Department of the Interior estimates that coal reserves on Indian land “amount to around [seventy] billion tons, around 5% of the total deposits of the country.” In 2000, the Black Mesa Mine produced 4,625,345 short tons of coal, while the Kayenta Mine produced 8,485,952 tons. Together they compose the twelfth largest coal mine in the United States and form the largest coal strip mine operation in the world. The long-term value of Black Mesa is estimated to be as high as $100 billion.

The coal is used to power the Navajo Generating Station in Page, Arizona, located next to Lake Powell, and the Mohave Generating Station near Laughlin, Nevada. The seven million

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78. Peabody hired Hulett after the president of Southern California Edison Company recommended him because Hulett was a “former upper level Department of Interior employee” believed to “have some influence with the current Secretary of Interior.” Peabody Coal Memorandum from E.L. Sullivan to F.L. Barkofiske (July 22, 1985) (Joint Appendix at 101, *Navajo Nation* (No. 01-1375)).
79. Petition for Certiorari at 9, *Navajo Nation* (No. 01-1375).
80. UNDER SACRED GROUND, supra note 74, at 113. “A total of approximately 540 square miles of reservation land has been leased to coal mining corporations.” *INDIAN RESERVATIONS IN THE UNITED STATES*, supra note 14, at 197. Mary Christina Wood argued, “the modern rush for Indian land will likely take the form of leasing and development.” Wood, supra note 12, at 1483-84.
81. *INDIAN RESERVATIONS IN THE UNITED STATES*, supra note 14, at 189.
83. Id.
84. *Native Americans and the Environment*, supra note 73.
tons of coal delivered to the Navajo Generating Station each year is transported on a dedicated pipeline between the mine and the power plant. The Navajo Generating Station at times receives negative publicity regarding the high amount of pollution associated with it. Although the pollution can help make the sunsets at Lake Powell absolutely incredible, it is having a negative impact on the Grand Canyon. The rest of the coal is delivered to the Mohave power plant via a coal slurry, a pipe that pumps coal by mixing the coal with water so that it flows through the pipe. Annually, Peabody uses 1.3 billion gallons of pristine water in order to move its coal to Laughlin. This high demand for water has lowered Black Mesa’s water aquifer and brought additional controversy to Peabody’s operations. As a result, the wells of Hopi and Navajo families on the mesa have begun drying up. The Mohave plant produces electricity for 1.5 million Las Vegas and Southern California homes while one of the major uses of power from the Navajo Generating Station is to pump water over mountains from northern Arizona to the much drier areas of Phoenix and Tucson.

86. Native Americans and the Environment, supra note 73.
87. INDIAN RESERVATIONS IN THE UNITED STATES, supra note 14, at 205.
88. The Navajo Generating Station does emit less pollution than some other, smaller, power plants in the area. See Rick Moore, San Juan Could Clean Up Its Act, ALBUQUERQUE J., Aug. 16, 2002, at A15. The pollution that is a direct result of the plant is in addition to the damaging environmental effects of mining itself. See Judith V. Royster, Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources, 29 TULSA L.J. 541, 614-17 (1994).
89. Chris Fordney, Bad Airdays: Air Pollution in National Parks, NATIONAL PARKS, May 1, 2001, at 32, available at 2001 WLNR 6143322 (“Despite cleanups at the Navajo Generating Station near Grand Canyon National Park in Arizona, the view across the Grand Canyon, about ten miles, is frequently impaired.”).
91. Id.
93. Michaels, supra note 90, at Y13.
94. Id.
95. Nies, supra note 85.
2. The Mines’ Benefits to the Diné

The Navajo Nation and the Diné do benefit from the mining on Black Mesa. Every Diné family can pay $35 for the right to haul a truckload of coal from Peabody’s mines for personal use and employees get eight free truckloads.96 The fact that Black Mesa low-sulfur subbituminous coal97 is of a higher quality than even other Navajo Nation coal is evident from the fact that, at flea markets across the reservation, coal from Black Mesa sells for more than coal from the Shiprock or Gallup mines.98 Even the development of paved roads on the Navajo Nation owes itself primarily to the general spread of mining on the reservation.99 For some Diné families, the most significant benefit from the Black Mesa mines comes from mining jobs. The Black Mesa mines employ roughly 850 Native Americans, most of them Navajos.100 Mining jobs are among the best paying jobs on the reservation.101 The Diné family and clan structure is much more extended than Anglo families,102 a single mine employee often supports a large number of relatives.103 “There can be no doubt that the forced development of mineral resources on reservations by non-Indian mining companies has brought a number of advantages to the reservations involved, advantages which they would not have had without letting these businesses operate on their land.”104

Personally, having grown up as an Anglo child of a teacher in Kayenta,105 I fear that I might exaggerate the impact of the

96. Interview with Zelma King (Mar. 15, 2003).
98. Personal observation at Shiprock, New Mexico flea market (Jan. 2003).
99. INDIAN RESERVATIONS IN THE UNITED STATES, supra note 14, at 177 (“The decisive initiative for the construction of roads [on the Navajo Nation was] . . . the exploration and mining of mineral resources . . . .”).
100. Land Use History of North America, supra note 97.
101. Personal observation.
103. Personal observation.
104. INDIAN RESERVATIONS IN THE UNITED STATES, supra note 14, at 203.
105. Anglo generally are not allowed to live on the reservation; however, necessary professionals are allowed to live in special housing areas so long as they continue to serve in such a capacity. Anglo primarily work as teachers with the BIA or public schools; as
Black Mesa Mine on the Kayenta area and mining generally on the reservation. In Kayenta, taxes from the mine are used to fund the public school, which has some of the best facilities in the state. Housing in Kayenta is divided into five physically separate areas: public school teacher housing, BIA’s teacher and BIA’s Indian Health Services’ employee housing, a hill of individual private housing of poorer families, a 2001 public housing project, and a trailer park full of the Black Mesa Mine employees. Mine employees are the most likely to own newer vehicles and also to have the ability to financially support their extended family. Furthermore, though the schools and Indian Health Services generally hire educated persons, which translates into hiring a relatively larger number of Anglos, the mining jobs offer Diné with less education the chance to earn a significant salary, even by Anglo standards.

Though, even with a generous definition of those who fall in the township, Kayenta has a population of only 5000; given the benefits of the Black Mesa mines, it is not surprising that Kayenta enjoys an importance that exceeds many other reservation cities. Kayenta is the first city on the Navajo Nation to establish itself as an independent municipality complete with powers independent from Window Rock, the capital of the nation. Although Kayenta’s proximity to world famous doctors and medical professionals with the United States Department of Health and Human Service’s Indian Health Service; and as managers for mines. My father worked for the Kayenta Unified School District and married a Diné teacher who worked in the same public school.

106. The reservation is not the result of a single treaty between the Navajo people and the United States Government; instead it is the result of a long series of treaties, Executive Orders, Congressional Acts, and land purchases. See INDIAN RESERVATIONS IN THE UNITED STATES, supra note 14, at 42 (showing map with overlay of the timing of the territorial development of the reservation lands).

107. Personal observation; Interview with James Rosser (former president of local teacher’s union) (Apr. 20, 2003).

108. Personal observation.

109. Indeed, in the mid-1970s for example, “[t]he total amount of the mining-related wages the Navajos received... equaled all other mining revenues.” INDIAN RESERVATIONS IN THE UNITED STATES, supra note 14, at 203 (citations omitted). This fact can be attributed both to the low royalty rates and to the power of good jobs. Id.


Monument Valley explains some of its relative commercial development. Black Mesa’s explanatory power should not be diminished.\footnote{12}

B. \textit{Mitchell I} and \textit{Mitchell II}: Impacting Trust Responsibility

The Navajo Nation’s claim that the Government breached its trust responsibility to the tribe, which established grounds for a monetary damage award, rested upon likening its claim to the claim upheld by the Court in \textit{United States v. Mitchell}\footnote{13} (\textit{Mitchell II}). The Quinault tribe, or Quinault allottees, sued the Government for mismanagement of timber resources found on the reservation.\footnote{14} In \textit{United States v. Mitchell}\footnote{15} (\textit{Mitchell I}), the Court ruled that the General Allotment Act was a bare trust that did not make the Government subject to claims for monetary damages from the mismanagement of the tribe’s timber resources.\footnote{16}

However, in \textit{Mitchell II}, written by Thurgood Marshall, the Court found that the Department of the Interior exercised “comprehensive,”\footnote{17} “pervasive”\footnote{18} control over the tribe’s timber resources and upheld the verdict by the Court of Claims that the Government was subject to suit.\footnote{19} The Court noted the general importance of sovereign immunity and that the Indian Tucker Act by itself did not constitute a waiver, for “[a] substantive right [to sue for damages] must be found in some other source of law . . . .”\footnote{20} The other source of law must be of the type that “can fairly be interpreted as mandating

\footnotesize{112. It is important to keep in mind that Kayenta’s commercial development is only large relative to other Navajo cities. Kayenta has a Holiday Inn, the Wetherill Inn, a Hampton Inn, a large grocery store, a trading post, three gas stations, a laundry mat, six restaurants and as of 2002 a movie theater. Such a level of development is a dramatic contrast with the rest of the reservation; for example, the movie theater is the only one operating on the reservation (Window Rock and Tuba City have buildings which used to be used to show movies, however, because of the fear of gang violence in Window Rock and the prohibitive cost of renovating the theater in Tuba City, they are closed indefinitely).}

\footnotesize{113. 463 U.S. 206 (1983).}

\footnotesize{114. See generally id.}

\footnotesize{115. 445 U.S. 535 (1980).}

\footnotesize{116. Id. at 546.}

\footnotesize{117. Mitchell II, 463 U.S. at 209.}

\footnotesize{118. Id. at 219.}

\footnotesize{119. Id. at 228.}

\footnotesize{120. Id. at 216.}
compensation . . . ,”121 The Court noted that “a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.”122 However, the Court went on to locate the establishment of the fiduciary obligations with “the statutes and regulations at issue in this case” which together with the existence of the trust relationship made the Government “liable in damages for the breach of its fiduciary duties.”123

In Mitchell II, “the Supreme Court first articulated the Control Theory of the trust doctrine.”124 In Navajo Nation, the Court ruled that the coal mining regulations did not translate into the same damage mandating duties as were found in Mitchell II.125 The Federal Court of Appeals

analogized the degree of federal involvement with respect to mineral leasing on Indian lands under the [Indian Mineral Leasing Act (“IMLA”)] and its implementing regulations to the degree of federal involvement with respect to forest management on Indian lands, which this Court held in Mitchell II gave rise to a fiduciary duty that, if breached, would support a claim for money damages.126

In oral argument on December 2, 2002, Paul Frye, the Navajo Nation attorney, made the same analogy as frequently as possible: declaring the BIA oversight of timber in Mitchell II to be “absolutely parallel” to BIA oversight of coal leasing,127 with “the same overlay of comprehensive Federal control and regulation.”128 Although the dissent, as well as some of the Justices’ questions during oral argument129 indicated agreement

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121. Id. at 216-17 (quoting United States v. Testan, 424 U.S. 392, 400 (1976) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))).
123. Id. at 226.
124. Aitken, supra note 51, at 134.
125. Navajo Nation, 537 U.S. at 514.
126. Petition for Certiorari at 11, Navajo Nation (No. 01-1375).
128. Id. at 29-30.
129. See id. at 20.

Question: whatever the details of the regs are here, there certainly was a highly detailed set of something that governed how the Government would behave in this particular lease complexity, a very complicated situation. And therefore, regardless of what they said, there was also, because of that complexity, an obligation for the Government to use reasonable, prudent care no matter what
with Frye and the Federal Court of Appeals; ultimately, the majority of the Court disagreed with the analogy to Mitchell II. After stating that “the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions,” the Court denied that such prescriptions existed with respect to coal leasing.\footnote{Navajo Nation, 537 U.S. at 506.} The majority decided that Navajo Nation could not be likened to Mitchell II: “As we see it, the statute and regulations at issue do not provide the requisite ‘substantive law’ that ‘mandat[es] compensation by the Federal Government.’”\footnote{Id. at 507 (quoting Mitchell II, 463 U.S. at 218).}

The majority opinion downplayed the events that gave rise to the Navajo Nation’s claim, vaguely referring to actions against the tribe which might be considered highly questionable. At the close of the decision, Ginsburg wrote for the majority: “However one might appraise the Secretary’s intervention in this case, we have no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages . . . .”\footnote{Id. at 514.} Reading just the opinion, with only a brief reference to the Secretary’s “intervention,” the majority effectively reduced the Government wrong-doing to a minor note in the case.

C. The Events Leading to the Showdown at the Supreme Court

In July 1985, then Secretary of Interior Dan Hodel, “suppressed a well-supported decision to raise royalties” and as a result forced the Navajo Nation “to negotiate with Peabody at a decided bargaining disadvantage.”\footnote{Brief for Respondent at 2, United States v. Navajo Nation, 537 U.S. 488 (2003) (No. 01-1375).} The Secretary’s decision came after a report was prepared that simply awaited his signature and would have raised the royalty rate to 20%.\footnote{Id. at 7.}
March 1984, with the twenty-year period before adjustment coming to an end, the Chairman of the Navajo Tribal Council requested a rate increase which in June 1984 was adjusted by the BIA area director from 37.5 cents per ton, approximately 2% of gross proceeds,\(^{136}\) to 20% of gross proceeds.\(^{137}\) This rate adjustment was well supported by studies of the Bureau of Mines and was lower than the BIA’s Minerals Division recommendation.\(^{138}\) Peabody filed a formal appeal, a lengthy process, while the tribe wanted a quick decision.\(^{139}\)

“Peabody then retained Stanley Hulett, a former aide and friend of Secretary Hodel,” to lobby the Secretary on its behalf.\(^{140}\) The majority acknowledged that the Navajo Nation did not attend and was not informed of this ex parte meeting.\(^{141}\) In an understated or muted observation, O’Connor noted in oral argument, “Certainly it was unfortunate, to say the least,” that a Peabody lobbyist had private conversations with the Secretary to dissuade approval of the higher rate.\(^{142}\) Following this meeting, Hodel sent a letter telling the parties that the appeal decision was “not imminent” and that they should continue to try to resolve the royalty dispute “in a mutually agreeable fashion.”\(^{143}\) This memorandum misled the Navajo government into thinking that the 20% was not an acceptable rate, and consequently, the Navajo Nation’s final negotiated lease agreement with Peabody was entered into without the knowledge that the Government

\(^{136}\) Petition for Certiorari at 4, *Navajo Nation* (No. 01-1375).

\(^{137}\) Id. at 5.

\(^{138}\) Brief for Respondent at 5, *Navajo Nation* (No. 01-1375) (“The Bureau of Mines recommended adjusting the royalty rate to 20%; BIA’s Minerals Division to 24.4%.”). The Government claimed that the final agreement between the tribe and Peabody recognized the tribe’s right to tax up to 8%, allowing realization of up to 20.5%; however, this was not taken seriously by the Court. See Petition for Certiorari at 8, 25 n.12, *Navajo Nation* (No. 01-1375) (“[T]he Tribe at a minimum would be required to establish that the Secretary could not reasonably have believed that the overall outcome of the approval decision—the lease amendments themselves—was in the Indian mineral owner’s best interest. The Tribe has made no such claim.”). The royalty rate dispute in the coal context mirrors similar royalty disputes in oil royalty rates. See UNDER SACRED GROUND, supra note 74, at 54 (stating that “Navajo crude should . . . command higher than average prices” according to an independent Bureau of Mines study rejected by oil companies).

\(^{139}\) Petition for Certiorari at 5-6, *Navajo Nation* (No. 01-1375).

\(^{140}\) Id. at 6.

\(^{141}\) *Navajo Nation*, 537 U.S. at 497.

\(^{142}\) Oral Argument at 4, *Navajo Nation* (No. 01-1375).

\(^{143}\) Petition for Certiorari at 6-7, *Navajo Nation* (No. 01-1375).
found the 20% rate appropriate.\textsuperscript{144}

Although the majority described this sequence of events without judging “the Secretary’s intervention”\textsuperscript{145} and noting that \textit{ex parte} interventions were not specifically disallowed,\textsuperscript{146} the Navajo position presents a much darker way of understanding these events:

“Mr. Frye: “The Secretary was not doing what he thought was fair . . . . Peabody sent his best friend in there with his pocket full of Peabody’s money and . . . that’s in the records. It’s $13,000 for a couple of hours of work. And he says, my clients have learned that there is a decision coming down that’s going to hurt them. Put a stop to it. And the Secretary did. There was no independent judgment . . . [the $13,000] was for the lobbyist. And frankly, he was underpaid for this—this bit of skullduggery.”\textsuperscript{147}

Despite the small caveat in the memorandum to the parties that the letter was not a final determination,\textsuperscript{148} the Secretary “ultimately approved a lease of Navajo coal for far less than every federal study had found reasonable, all in violation of applicable statutes, departmental regulations, and the core trust

\textsuperscript{144} Brief for Respondent at 10, \textit{Navajo Nation} (No. 01-1375) (“Vollmann’s letter [stating the rate was still under consideration] misled the Navajo leadership, who thought that it, coupled with a message that Hodel wanted negotiations begun anew, signaled that the Department could not support the 20% figure on the merits.”). The meeting’s resulting memo according to the Navajo brief “misled” the tribe about the value of the coal. \textit{Id}. at 2, 40 (“The Department’s false and cryptic communications reasonably led the Navajo leadership to conclude that the Department believed the 20% figure was vulnerable on the merits.”).

During oral argument the importance of the meeting was identified in a question to the Government lawyer: “But wasn’t it fairly clear that had this conversation not taken place, that the adjustment would have been put into effect that the tribe wanted?” Oral Argument at 10, \textit{Navajo Nation} (No. 01-1375). In his dissent, Justice Souter wrote that the Secretary’s actions deceived “the Tribe about the status of Peabody’s appeal skew[ing] the subsequent bargaining process, and the resulting royalty rate, in Peabody’s favor.” \textit{Navajo Nation}, 537 U.S. at 520 n.4 (Souter, J., dissenting). The letter was sent despite the fact that the BIA “usually” sided with the Bureau of Land Management and United States Geological Survey. \textit{See INDIAN RESERVATIONS IN THE UNITED STATES, supra} note 14, at 204.

\textsuperscript{145} \textit{Navajo Nation}, 537 U.S. at 514.

\textsuperscript{146} \textit{Id}. at 492 (“Nothing in § 396a or the IMLA’s implementing regulations proscribed the \textit{ex parte} communications in this case, which occurred during an administrative appeal process largely unconstrained by formal requirements.”).

\textsuperscript{147} Oral Argument at 40, \textit{Navajo Nation} (No. 01-1375).

\textsuperscript{148} Petition for Certiorari at 7, \textit{Navajo Nation} (No. 01-1375).
duties of loyalty, candor, and care.”

A telling moment occurred during oral argument when a Justice likened Navajo Nation to the Mitchell facts but added that, instead of the Government simply being the only foresters with tribal members not allowed into the forest:

[O]ne day a forester working for the Government introduces some termites into the trees, and lo and behold, there doesn’t happen to be a particular anti-termite regulation. I think [you would] read Mitchell II as even though there’s no anti-termite regulation, still there was a duty of care there for the Government not to behave that way . . . .

Immediately after this connection was made to Mitchell II, Scalia stated, “Termites are good for trees.” Scalia’s comment could be dismissed simply as noise, yet, his comment is representative of the majority’s dismissal of the Navajo claims. If Government wrong-doing is seen as central, then the decision that Navajo Nation should be seen as a Mitchell I situation, which as a practical matter amounts to agreeing with Scalia that termites are good. For, if there is no remedy, it is hard to speak of a duty.

From an Indian perspective, Paul Frye’s summary of the case as the Government, through the Secretary, “colluding with Peabody Coal Company to swindle the Navajo Nation” is an accurate description of the violation of trust that occurred. “Although true for all tribes, at some time or another, the treatment of the Navajo by Secretary Hodel was clearly objectionable.” Even senior BIA employees recognized the objectionable nature of the events. Then Associate Solicitor for Indian Affairs, Tim Vollmann, sought to warn Hodel that, if the Navajo Nation learned all the details, the tribe “would likely sue.” Another BIA official, when presented with a memo he

149. Brief for Respondent at i, Navajo Nation (No. 01-1375).
150. Oral Argument at 21, Navajo Nation (No. 01-1375).
151. Id.
152. Id. at 30. Paul Frye stated that the negotiations with Peabody and the interactions with the Government at the time “never smelled right to me.” Labin, supra note 12.
154. Brief for Respondent at 9, Navajo Nation (No. 01-1375). Indeed, Paul Frye stated that Vollmann sent a memo “saying good God have they done this? If the Navajo Nation
was to sign suggesting Secretarial approval, refused to sign off on the recommendation because, in his own words, "I thought that I would be participating in a breach of trust."  

Even the Court of Federal Claims, which ruled against the tribe for reasons similar to those of the Supreme Court, was markedly more vocal on the "Secretary's intervention:"

Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events.

Souter's *Navajo Nation* dissent does more than simply allow for the possibility that *Navajo Nation* can be likened to *Mitchell II*, it describes in detail the deliberate Secretarial trust violations, which the Court of Federal Claims acknowledged. The intervention of the Secretary on Peabody's behalf "derailed the lease adjustment proceeding that would in all probability have yielded the 20[\%] rate" and thus, the Secretary intentionally put the tribe at a disadvantage.

The fact that the majority was not convinced that the Secretary's intervention gave rise to monetary damages can largely be attributed to the tribe's role in lease negotiations provided for in the Indian Mineral Leasing Act.  

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156. *Id.* at 13-14.
157. *Navajo Nation*, 537 U.S. at 520 (Souter, J., dissenting).
158. *Id.* (Souter, J., dissenting).
regulations in effect during the events at issue in this case provided that "Indian tribes . . . may, with the approval of the Secretary . . . or his authorized representative, lease their land for mining purposes." Following the July 1985 letter from the BIA encouraging Peabody and the tribe to negotiate, the Navajo Tribal Council approved the lease amendments in August 1987, which were finalized in November 1987. At the request of the parties, Secretary Hodel approved the amendments in December 1987. The critical questions before the Court were whether the regulations granted the Navajo Nation sufficient autonomy to meaningfully negotiate and what was the significance of Secretarial approval; essentially, the Court was asked to determine who was in control.

The tribe’s arguments centered on portraying the degree of federal control found in the “statutory and regulatory scheme governing Indian mineral leasing and development [as] no less comprehensive than the scheme governing Indian timber in Mitchell II.” The Court of Federal Appeals’ agreement with the Navajo Nation formed the basis of the Government’s appeal. Citing a lengthy list of laws and regulations, the tribe asserted that “[t]here [was] no principled distinction” between the relationship of the tribal decisions and Secretarial approval in place for Indian coal and that for Indian timber. As Professor

spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.


160. Petition for Certiorari at 3, Navajo Nation (No. 01-1375).

161. Id. at 8.

162. Id.; see also Secretarial Approval (Dec. 14, 1987) (Joint Appendix at 337-39, Navajo Nation (No. 01-1375)).

163. See Oral Argument at 18, Navajo Nation (No. 01-1375) (stating a conclusion from the Court, “if the tribe is the responsible party, then the Government is not”).

164. Brief for Respondent at 20, 28, Navajo Nation (No. 01-1375) (“Federal statutes and regulations govern virtually every aspect of coal mining activities on Navajo land, from the creation of leases to the reclamation of land. As the Court of Appeals determined, this statutory scheme parallels that involved in Mitchell II.”) (citation omitted).

165. Id. at 15.

It is worthwhile to quote the whole analogy between Navajo Nation and Mitchell II: There is no principled distinction between the statutory scheme governing Indian coal at issue here and that governing Indian timber in Mitchell II. Both statutes allow the Indian owners to convey the resource, but condition the ability on the Secretary’s approval. In both cases, the Secretary exercises comprehensive control and supervision over virtually every stage of resource development. Both regimes are designed to assure that the Indians receive the greatest benefits the resource can reasonably generate. Thus, here, as in Mitchell
Judith Royster advocated, the Secretary's "integral . . . central role" arguably meant that, despite the 1982 IMLA giving the "tribes greater control," the Secretary's "trust obligations ... remain[ed] intact."\textsuperscript{166} Not surprisingly, the Government argued the opposite that "the degree of control exercised by the Secretary with respect to timber management on Indian lands [was] much greater than the degree of any control exercised by the Secretary with respect to Indian mineral leases."\textsuperscript{167} Disagreements between parties are a normal part of litigation; however, the split in this case rested in large measure on understanding the ability of tribes to exercise meaningful self-determination.

The Navajo Nation and Peabody reached a negotiated royalty rate coupled with related provisions on the lease amendments; arguably, the Secretary's responsibility to critically examine the amendments stopped once the agreed rate was above the federally mandated minimum.\textsuperscript{168} However, a fair negotiation can be thwarted if one of the parties does not have the power to walk away or is not in an equal position to negotiate. The Navajo Nation suffers from rampant poverty, and "[lacks] the basic infrastructure needed to support a self-sustaining economy."\textsuperscript{169} Consequently, the royalties received from mineral extraction are of incredible importance to the Diné, for their government and people. For tribes such as the Navajo, "the mineral estate represents the best, if not the only, hope for economic development of the reservation."\textsuperscript{170} "Facing severe
economic pressures,' the Navajo Nation eventually caved in to Peabody's proposal for a facial royalty rate of [12.5]%.”\textsuperscript{171} The pressures faced by the tribe arguably make the negotiated agreement little more than a contract of adhesion.\textsuperscript{172} In natural resource exploitation leases, “once the leases were negotiated and in place, corporations could muster tremendous legal power to make certain they remained unaltered.”\textsuperscript{173} Although not strictly “legal power,” Peabody’s use of a close personal friend of Secretary Hodel to lobby on their behalf was representative of their “tremendous” power.

The Navajo claim of Government breach of trust relied heavily upon the unequal bargaining power of the Navajo Nation relative to Peabody. It is as a result of this power inequality that the Government could be thought to have such a duty, that the Secretarial approval requirement might entail a duty to the tribe. The Navajo Nation alleged in its briefs that the Government knew of the bargaining inequality and also knew that the tribe would get “beat up” as a result of Secretary Hodel’s decision to postpone the decision on the appeal and encourage the parties to go back to the negotiation table.\textsuperscript{174} The tribe went further by arguing that this imbalance required that the Secretary’s approval duty be understood as a duty to maximize the benefit to the tribe, which the tribe asserted was the primary purpose of the IMLA.\textsuperscript{175} The Federal Court of Appeals agreed with the tribe that a duty to maximize existed;

\textsuperscript{171} Brief for Respondent at 11, Navajo Nation (No. 01-1375) (citation omitted).
\textsuperscript{172} See Frickey, supra note 17, at 406. This would be true despite the fact that the Navajo Nation makes up 29.2% of the total United States reservation lands and therefore might be considered to be in one of the best positions relative to other tribes in terms of total power and ability to resist contracts of adhesion. See Indian Reservations in the United States, supra note 14, at 47.
\textsuperscript{173} Under Sacred Ground, supra note 74, at 97.
\textsuperscript{174} Brief for Respondent at 41, Navajo Nation (No. 01-1375).
\textsuperscript{175} The tribe cited Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 200 (1985), for the proposition that “IMLA’s ‘basic purpose’ is ‘to maximize tribal revenues from reservation lands,’” and Shoshone Tribe v. United States, 299 U.S. 476, 498 (1937) (Cardozo, J., for a unanimous Court), for the related proposition that “[s]poliation is not management.” Brief for Respondent at 15, 23, Navajo Nation (No. 01-1375). “The Secretary’s exercise of his approval power was required to conform to the basic purpose of IMLA, to maximize tribal revenues . . . .” Id. at 28, 43 (comparing it to the timber statutes, “[t]he principle goal of both statutory schemes is to ensure that the Indians receive the maximum benefit from their trust resources”).
however, the Supreme Court did not. 176

The Navajo Nation majority read the IMLA as mandating only a very narrowly defined duty on the part of the Secretary. "The Secretary is neither assigned a comprehensive managerial role nor . . . expressly invested with responsibility to secure 'the needs and best interests of the Indian owner and his heirs.'" 177 The Court noted that the royalty provided for by the lease amendment was above the ten cents per ton minimum and concluded that there was no "duty, enforceable in an action for money damages, to ensure a higher rate of return for the Tribe." 178 Justice Souter noted in his dissent that this was a very "minimal duty." 179 However, the Court imposed no further duty upon the Secretary. 180 Such a minor duty explained Secretary Hodel's willingness to promise Peabody that without any review "he would approve the lease amendments . . . " 181 The Court's position accorded with the position advocated by the Government. 182

176. It should be noted that I am not going to discuss the distinction made by the majority opinion between coal leases on the one hand and oil and gas leases on the other. This distinction was not briefed by either of the parties; yet, the opinion notes the distinction on several occasions and leaves open the possibility that the result would be different if the lease were not a coal lease. See Navajo Nation, 537 U.S. at 494 ("In line with the IMLA itself, the regulations treated oil and gas leases in more detail than coal leases."). 507 n.11 ("We rule only on the Government's role in the coal leasing process under the IMLA . . . [B]oth the IMLA and its implementing regulations address oil and gas leases in considerably more detail than coal leases. Whether the Secretary has fiduciary or other obligations, enforceable in an action for money damages, with respect to oil and gas leases is not before us."). ("[N]o provision of the IMLA or its regulations contains any trust language with respect to coal leasing.") (emphasis added).

177. Id. at 507-08; see also United States v. White Mountain Apache Tribe, 537 U.S. 465, 480-81 (2003) (Ginsburg, J., concurring) ("The coal-leasing provisions of the IMLA and its allied regulations, Navajo explains, lacked the characteristics that typify a genuine trust relationship: Those provisions assigned the Secretary of the Interior no managerial role over coal leasing . . .").


179. Id. at 515 (Souter, J., dissenting).

180. Id. at 495 ("No other limitation was placed on the Tribe's negotiating capacity or the Secretary's approval authority."); see Oral Argument at 35, Navajo Nation (No. 01-1375) (stating a question from the Court: "And as I read the statute and regulations, the Secretary's only obligation was to assure that a very low minimum [was] complied with. And after that, the negotiation was up to the tribe. Is that a fair representation [of] what the statute and regs require?").

181. Brief for Respondent at 13, Navajo Nation (No. 01-1375).

182. See Petition for Certiorari at 19, Navajo Nation (No. 01-1375) ("The Act's requirement of approval by the Secretary furnishes a general backstop protection, not a duty on the part of the Secretary independently to determine and impose on the parties the
The Court’s declaration that the Secretary’s duty was minimal was coupled with an affirmation of tribal self-determination that presents itself in the form of the Court’s position that the tribe controls mineral leasing. The Court highlighted the IMLA’s aim to “foster tribal self-determination” furthered by giving “Indians a greater say in the use and disposition of the resources found on Indian lands.”\textsuperscript{183} The Government filings for the case also advocated on behalf of tribal self-determination

the key provision of [the IMLA] transferred leasing authority from the Secretary to the Tribes. It provides that tribal lands, “may, with the approval of the Secretary . . . be leased for mining purposes, by authority of the tribal council or other authorized spokesmen.” Moreover, as the Court of Federal Claims explained, that provision squares with an important purpose of the IMLA—“to foster Indian self-determination,” an “ideal” that is “directly at odds” with the notion that the Secretary has full “control over leasing.”\textsuperscript{184}

Although the Court’s decision can certainly be critiqued on the grounds that it diminished the Government’s trust responsibility when the duty ought to amount to more than

\textsuperscript{183} Id. at 22 (“The United States has not assumed any specific fiduciary management duties with respect to the approval of a lease that contains a royalty rate at least equal to the minimum rate.”); Oral Argument at 18, Navajo Nation (No. 01-1375) (providing a Justice’s summary of the Government’s position: “I think the implication of your argument is that the approval is purely ministerial”); Reply Brief for Petitioner at 6, United States v. Navajo Nation, 537 U.S. 488 (2003) (No. 01-1375) (“The governing regulations thus refute the notion that the Secretary is obligated by the IMLA to ensure that every proposed lease agreed to by a Tribe will maximize the return to the Tribe.”); Oral Argument at 15, Navajo Nation (No. 01-1375). The Court questioned:

[A]ssume that the Secretary’s approval was required as a . . . matter of statute. Would that approval responsibility—in your judgment—carry any duty toward the tribe, anything comparable to a fiduciary duty toward the tribe not to approve an amendment if that amendment was not as good as . . . the tribe could have gotten? Mr. Kneedler: No. [In] our view there is no duty under this statute to maximize returns to the tribe.

Oral Argument at 15, Navajo Nation (No. 01-1375).

\textsuperscript{184} Navajo Nation, 537 U.S. at 494.

Petition for Certiorari at 17, Navajo Nation (No. 01-1375) (emphasis added) (citation omitted); see also Reply Brief for Petitioner at 3, Navajo Nation (No. 01-1375) (“[T]he IMLA and its implementing regulations give to the Tribes the authority to lease mineral resources as they see fit, and assign to the Secretary only a general oversight role in approving such leases.”).
simply ensuring that the minimum rate is met, the decision also has a powerfully pro-tribal side. The Court’s statement that “[t]he IMLA, designed to advance tribal independence, empowers Tribes to negotiate mining leases themselves, and, as to coal leasing, assigns primarily an approval role to the Secretary,” amounts to a strong proclamation in support of tribal sovereignty.\textsuperscript{185}

The Court found \textit{Navajo Nation} to be “within Mitchell I’s domain,”\textsuperscript{186} yet Ginsburg, the author of the \textit{Navajo Nation} decision, joined with the \textit{Navajo Nation} dissenters and found for the tribe in \textit{United States v. White Mountain Apache Tribe}.\textsuperscript{187} Had both decisions come out against the tribal interests, and had both cases fallen within Mitchell I’s domain, the possibility of the Court finding a Mitchell II duty would have been perceived by tribes as being severely limited, if not outright rejected for future cases. Instead Ginsburg joined the White Mountain majority and wrote a special concurrence stating that the White Mountain majority opinion “is not inconsistent” with \textit{Navajo Nation}.\textsuperscript{188} That Ginsburg felt required to state the consistency and argued that “\textit{Navajo} is properly aligned with Mitchell I [and] this case is properly ranked with Mitchell II,” arguably shows the separation between the justices on how narrow or broad the Mitchell II analysis should be.\textsuperscript{189}

\section*{III. \textit{UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE}}

\subsection*{A. A Background of White Mountain Apache Tribe’s Interaction with the United States}

In 1870, the United States established Fort Apache.\textsuperscript{190} A BIA school was established in 1923 at the Fort and possession was vested in the Secretary of the Interior.\textsuperscript{191} The legal status of
Fort Apache was changed by the Act of March 18, 1960, which declared that Fort Apache would "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."\textsuperscript{192} As the Government's need for Fort buildings diminished and the tribe sought to capitalize on the tourist value of the Fort, some of the Fort's buildings were turned over to the tribe for use as historical and cultural museums.\textsuperscript{193} When the Government sought to turn over additional buildings to the tribe the tribe refused to accept them until the Government had restored the buildings to the condition they would have been in had the buildings not been allowed to deteriorate.\textsuperscript{194} The White Mountain Apache Tribe brought suit against the Government for $14 million, the estimated cost of repairing the buildings.\textsuperscript{195}

The majority facially found for the tribe, ruling that by virtue of the Government's control over the Fort, compensation was mandated for the damage sustained to the tribe by the Government's breach of duties owed in relation to the Fort.\textsuperscript{196} "As we said in \textit{Mitchell II}, a statute creates a right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'"\textsuperscript{197} The Court highlighted that "[t]his 'fair interpretation' rule demands a showing demonstrably lower than

\textsuperscript{192} \textit{Id.} at 3-4.
\textsuperscript{194} The Court ultimately held for the tribe on this peripheral dispute, writing in a footnote that "it appears that the United States has not yet relinquished control of any of the buildings . . . ." \textit{White Mountain}, 537 U.S. at 470 n.2. The Government's position that it could escape liability by unilaterally "relinquish[ing] the control" it had over buildings at the Fort was thus rejected. Oral Argument at 66, United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (No. 01-1067).
\textsuperscript{195} \textit{White Mountain}, 537 U.S. at 469. There was considerable debate regarding the estimate. The tribe asserted that the $14 million was required to bring the buildings up to code while the Government insisted that this amount was enough to make the fort into a luxury hotel. This dispute was not at the heart of the Court's deliberation and did not address the trust relationship, thus it will not be considered here.
\textsuperscript{196} \textit{Id.} at 481.
\textsuperscript{197} \textit{Id.} at 472.
the standard for the initial waiver of sovereign immunity[,]" yet the mechanism used by the Court in its interpretation arguably expands the reach of United States v. Mitchell's (Mitchell II's) allowance for damage awards. The Government and the Thomas dissent focused upon the 1960 Act as the sole determinant of whether or not monetary damages were permitted. It was a natural move for those who disagreed with the tribe to liken the claim to the one found in United States v. Mitchell (Mitchell I). Yet, tribal advocates must admit that the Court's decision broke new ground, even if that ground could be forecast by combining common sense with the Mitchell II decision. Justice Thomas stated that, in basing its decision on a "fair inference" standard, "the Court engage[d] in a new inquiry." The dissent accurately summarized what the Court accomplished in White Mountain: "[T]he Court radically alters the relevant inquiry from one focused on the actual fiduciary duties created by statute or regulation to one divining fiduciary duties out of the use of the word 'trust' and notions of factual control." Though describing the Court's decision with the alarmist language of radical alteration, Justice Thomas correctly noted that the coming together of the Government's trust responsibility with its complete control led to the Court's comfort in facially siding with the tribe.

In Mitchell II, the Court emphasized two factors in its determination that money damages were warranted: the comprehensive management regulations and the elaborate governmental control over timber resources. The Government's position that both were required—that control alone was not

199. White Mountain, 537 U.S. at 469.
200. See, e.g., Petition for Certiorari at 15, White Mountain (No. 01-1067) ("[T]he 1960 Act is an even less likely source of a money-mandating obligation than the statute considered by the Court in Mitchell I.") (emphasis in original); see also White Mountain, 537 U.S. at 483 (Thomas, J., dissenting) ("The statute under review here provides no more evidence of congressional intent to authorize a suit for money damages than the General Allotment Act did in Mitchell I.").
202. See White Mountain, 537 U.S. at 483.
203. Id. at 482, 487 (Thomas, J., dissenting) (stating "[t]he Court today fashions a new test").
204. Id. at 487 (Thomas, J., dissenting); see United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (stating "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions").
sufficient—was rejected in the White Mountain decision. The Court agreed with language in Mitchell II that control can largely serve “as an independent ground for finding a fiduciary duty.” The tribe’s position that “control was key” in Mitchell II was not necessarily accurate either since there was a possibility that Mitchell II type management regulations, if found, could impose damages. “[C]omprehensive federal management of tribal assets, whether that management is established by comprehensive statutes and regulations or by actual pervasive federal control[,]” therefore, gives rise to a Mitchell II relationship. It should be noted that the definitive claim that “management or control is in the disjunctive” for the purpose of monetary damages will not be entirely resolved until a case involving tribal control yet government regulation reaches the Court. Nevertheless, the decision does declare affirmatively what Justice Thomas says it does, that control, together with the use of the word “trust,” can be enough to warrant damages for breach of trust.

205. Petition for Certiorari at 16, White Mountain (No. 01-1067). In Mitchell I and II the Court did not state, much less hold, that such control “alone” gave rise to the money-mandating obligation. To the contrary, the Court pointed to such control only after finding “the statutes and regulations [at issue] clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.” See id. at 16-17 (stating that in addition to control, detailed statutes are required for monetary damages) (citations omitted) (emphasis omitted); Reply Brief for Petitioner at 7, United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (No. 01-1067).

One of the most problematic aspects of the court of appeals’ decision in this case is that it redirects the inquiry called for by the Tucker Acts and this Court’s Mitchell decisions for determining whether the United States may be liable for damages for breach of trust from the terms of the governing statutes and regulations to a fact-bound examination of the extent to which the particular property at issue is subject to federal control or use.

Reply Brief for Petitioner at 7, White Mountain (No. 01-1067).


207. Royster, Equivocal Obligations, supra note 166, at 333; see also Ellwanger, supra note 12, at 681 (stating, “Thus, there are two possible sources of fiduciary duties—statutes and assumption of control”).

208. See Brauchi, supra note 69. The logical discontinuity between high level of regulation and true tribal control helps explain why regulation alone might not be sufficient but instead merely goes towards demonstrating control. This perspective on regulation was evident from one of Justice Ginsburg’s oral argument questions: “Mitchell II has a whole paragraph that says what’s key is who has control. And as I read it, it was that these specific instructions were an indication that the [United States] had exclusive control, but that the real thing was the control, who has control of this property.” Oral Argument at 22, White Mountain (No. 01-1067).
B. Government Control

In order to establish breach of trust, the Court had to affirm the tribe’s position that the Government had control over the Fort’s property. The attorney for the tribe, Robert Brauchli, stated during oral argument that the Government had “total, exclusive control.” Justice Ginsburg noted, “[I]t’s not disputed that this land has been operated by the [United States] Government, and the Government has exclusive control.” The Court agreed: “As to the property subject to the Government’s actual use, then, the 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 over the timber in Mitchell II.” The degree of control is greater than that found in Mitchell II, but, because of “the nature of this trust” establishing the control, there are not “detailed instructions” or “specific regulations” related to the Government’s control.

Government control over the Fort supports a claim for damages only if the Fort was meant to benefit the tribe, that is, only if the tribe had an ownership right over the property controlled by the Government. The Federal Circuit Court of Appeals characterized the Tribe’s interest in the Fort arising out of the 1960 Act as an indefeasibly vested future interest; however, Chief Judge Mayer dissented, believing that the 1960 Act created merely a contingent future interest. The Court and the dissent avoided framing the question in terms understandable only by property law professors, and instead focused upon whether the benefit from Government’s control as well as from the property itself is enjoyed by the tribe.

209. Oral Argument at 49, White Mountain (No. 01-1067).
210. Id. at 6.
211. White Mountain, 537 U.S. at 475.
212. See Oral Argument at 23, White Mountain (No. 01-1067).
213. White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1384 (Fed. Cir. 2001) (Mayer, C.J., dissenting). In its petition to the Court, the Government argued that the Federal Court of Appeals’ focus on degree of control and not the statute determining money damages “subjects the important immunity determination to an indeterminate fact-bound inquiry, and it contravenes the long-standing rule established by this Court’s decisions that an enforceable claim to money damages must stem directly from a statute, implementing regulation, or other substantive right established by positive law.” Petition for Certiorari at 11, White Mountain (No. 01-1067).
214. See White Mountain, 537 U.S. at 476, 484 (Thomas, J., dissenting).
Thomas's dissent echoed that of Chief Judge Mayer: "The Government's use of the land does not have to inure to the benefit of the Indians. Nor is there any requirement that the United States cede control over the property now or in the future."\footnote{Id. at 484, 486 (Thomas, J., dissenting) (stating "unlike Mitchell II, the bare control that is exercised by the United States over the property does not inure to the benefit of the Indians") (emphasis in original); Petition for Certiorari at 3-4, White Mountain (No. 01-1067) (allowing property for government use as school and administrative buildings "for as long as they are needed for that purpose").}\footnote{White Mountain, 537 U.S. at 476.} Judging by its fairly weak effort to respond to Justice Thomas and Judge Mayer's point regarding the Government's ability to never return the property to the tribe, the majority largely sidestepped the question of benefit. The Court simply noted that the 1960 Act should be read straightforwardly, and therefore, "it [made] 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."\footnote{See id. at 485 (Thomas, J., dissenting) ("[U]ntil 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 that have no foundation in the actual text of the relevant statutes.").} The Court's presumable intention standard closely corresponded to its fair inference standard; both danced around the dissent's point that the statutes never explicitly grant monetary damages or state that the property and the Government's control were to benefit the tribe.\footnote{See id. at 484-85 (Thomas, J., dissenting) (stating "the majority gives far too much weight to the Government's factual 'control' over the Fort Apache property, which is all that distinguishes this case from Mitchell I").} However, missing from the dissent's perspective,\footnote{This was noted in oral argument by Justice Breyer: So normally is it the case when you give or lease or give property to other people if they wreck the place, contrary to expectation, we imply into those promises or words that they had to take reasonable care? . . . If we normally do that in the law, why would we not do the same thing here where, indeed, in addition to what you normally have, you have this word trust and special relationship? Oral Argument at 25-26, White Mountain (No. 01-1067). The dissent expressed a concern that recognizing the significance of "trust" might harm tribes in the long run. "Instead, to}
“would read the trust relation out of Indian Tucker Act analysis; if a specific provision for damages is needed, a trust obligation and trust law are not.” Justice Souter questioned in oral argument whether the Government was actually “making the same argument under a statute that says in trust that . . . would be [made] under a statute that did not include the words, in trust, at all?,” and the Government lawyer, Gregory Garre, agreed. Lacking specific regulations, the dissent claimed that the majority found duties mandating monetary damages based on “control alone.” By isolating control, some members of the court argued, just as the Government did, that “trust” is meaningless, and does not add anything to the tribe’s claim.

However, “as the Court . . . observe[d], the Act expressly and without qualification employs a term of art (“trust”) commonly understood to entail certain fiduciary obligations . . . .” The Court used the notion of trust to inform its interpretation of the lack of specificity in the governing

the ultimate detriment of the Tribe, Congress might refrain from creating trust relationships out of apprehension that the use of the word ‘trust’ will subject the United States to liability for money damages.” White Mountain, 537 U.S. at 487 (Thomas, J., dissenting). However, this very concern is itself insignificant when the dissent’s reading of “trust” prevents the very recognition of trust relationships even where intended by Congress.

220. White Mountain, 537 U.S. at 477.

221. Oral Argument at 29, White Mountain (No. 01-1067). This point was made several times in the course of the oral argument where the Government attorney repeatedly minimized the trust duty even when the Justices called attention to this minimization. See id. at 14. “How would you describe the sum total of its duties? Mr. Garre: I think the— the principal duties are the ones that the Court has always recognized when it places land in trust: not to alienate the land and—and it immunizes it from State taxation.” Id. at 14-15, 18 (“In . . . effect, I think what you’re saying is that there are no trust duties.” Questioning, “you’re saying there is no trust responsibility whatsoever on the part of the trustee except not to alienate.” Mr. Garre responded, “Not enforceable in an action for monetary damages.”)

That the Government was aware of the power of trust combined with control is apparent from a footnote discussing the prior treatment of the case: “In this case, the court of appeals essentially divorced the immunity inquiry from the terms of the pertinent statutes and regulations and, instead, tied it to judge-made principles of common law and notions of federal control over trust property.” Petition for Certiorari at 23 n.10, White Mountain (No. 01-1067); see also Oral Argument at 17, White Mountain (No. 01-1067) (“Overlapping all this area is the notion that the Government has political and moral responsibility to the Indian tribes, and the Court has recognized that throughout its decisions . . . .”); accord Oral Argument at 16, Navajo Nation (No. 01-1375) (stating there is “a general moral and political duty” to the tribe).

222. White Mountain, 537 U.S. at 486 (Thomas, J., dissenting).

223. Id. at 480 (Ginsburg, J., concurring).
regulations.\textsuperscript{224} Therefore,

\[ \text{[w]hile it is true that the 1960 Act does not, like the statutes cited in [Mitchell II], expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee.} \textsuperscript{225} \]

A 1984 Harvard Law Review note, \textit{Rethinking the Trust Doctrine in Federal Indian Law}, asserted that “the mere fact of control cannot give rise to the trust,” because, if it did, the United States would “owe an obligation to all property owners . . . subject to regulation.”\textsuperscript{226} However, the note did not account for the possibility that the regulation granting the Government control would itself connect that control with the trust responsibility. This failure to recognize the role of control on trust undercuts the note’s claim of the overinclusiveness of the control theory based on its application to non-Indians as well as tribes.\textsuperscript{227}

\textit{White Mountain} was not a complete tribal victory. In a footnote, the Court put off all consideration of damages.\textsuperscript{228} Included in the postponed damage consideration was the possibility that the tribe might actually have to indemnify the Government for the costs of repairing the Fort buildings:

The proper measure of damages is not before us. We mean to imply nothing about the relevance of any historic

\begin{itemize}
  \item 224. The Government contended that “[n]one of the general Indian canons of statutory construction on which the Tribe now relies can alter, or override, the plain terms of the Act.” Reply Brief for Petitioner at 3, \textit{White Mountain} (No. 01-1067). The Court arguably responds that those canons related to the meaning of the trust relationship ultimately can alter how the Act is understood. \textit{Id.}
  \item 225. \textit{White Mountain}, 537 U.S. at 475. The dissent disagrees that such control is indeed control in the absence of specific regulations, instead describing it as “bare control.” \textit{Id.} at 486 (Thomas, J., dissenting).
  Here, by contrast [to Mitchell II], there are no management duties set forth in any ‘fundamental document,’ and thus the United States has the barest degree of control over the Tribe’s property. And, unlike Mitchell II, the bare control that is exercised by the United States over the property does not inure to the benefit of the Indians.
  \textit{Id.} (Thomas, J., dissenting).
  \item 226. Harvard Note, \textit{supra} note 12, at 428.
  \item 227. \textit{Id.} at 428-29.
  \item 228. \textit{White Mountain}, 537 U.S. at 476 n.4.
\end{itemize}
building or preservation standards. Neither do we address
the significance of the fact that a trustee is generally
indemnified for the cost of upkeep and maintenance . . . .
Nor do we reach the issue whether a rent-free occupant is
obligated to supply funds to maintain the property it
benefits from. 229

This footnote reserves a great deal, potentially the entire amount
of the $14 million claim, to the lower courts. 230 Not
surprisingly, the dissent picked up on the measurement of
damages, stating that, even if a damage claim against the
Government exists, "it is well established that a trustee is not
ultimately liable for the costs of upkeep and maintenance of the
trust property." 231 If damages were based on the general
indemnification of the trustee, then at most the tribe would be
awarded the difference between the cost of repairs and the cost
had the Government not deferred maintenance. 232 In fact, even
though the footnote put off consideration of damages, the
concurrence, joined by two of the five in the majority, favored
such a limited understanding of the damage measure. 233 The
Court's determination not to provide "any guidance on the
nature and scope" of the Government's duty by not detailing the
damage calculation must be acknowledged as a major caveat to
the tribe's victory. 234

On December 2, 2002, when the oral argument of Navajo
Nation followed White Mountain, Navajo Nation attorney Paul
Frye took that opportunity to begin his oral argument:

229. Id.
230. The Navajo Nation dissenners, who in White Mountain with Ginsburg were in the
majority, were similarly willing to reserve the question of damages or even potential
damages to the lower courts. Navajo Nation, 537 U.S. at 521 (Souter, J., dissenting) ("All
this is not to say that the Tribe would end up with a recovery at the end of the day.").
231. White Mountain, 537 U.S. at 486 n.2 (Thomas, J., dissenting).
232. If the indemnification requirement was placed on the tribe in this context then the
tribe would have had to pay the cost of repairs; therefore, the damage resulting from the
Government's breach is just the added cost resulting from the Government's failure to
perform standard upkeep.
233. White Mountain, 537 U.S. at 481 (Ginsburg, J., concurring) (stating "[t]o the
extent that the Government allowed trust property 'to fall into ruin,' I further agree, a
damages remedy is fairly inferable"); see also Oral Argument at 40, White Mountain (No.
01-1067) (asking whether trust duties "extend to a requirement that the United States spend
its monies rather than the tribe's monies to preserve the land").
234. White Mountain, 537 U.S. at 486 (Thomas, J., dissenting). Before the opinion
was released the attorney for the tribe noted that he hoped that damages would not be based
on the common law related to trusts. See Brauchli, supra note 69.
In listening to the Government, it's clear that the Government has not come to terms yet with the basic principle established in *Mitchell II*, that where Congress gives the Federal Government control of Indian property, that *control necessarily implicates trust duties*. And violations of trust duties, when the Government is exercising responsibilities, within the contours of those statutes and regulations, gives rise to a claim for money damages in the Court of Federal Claims.\(^{235}\)

Even though the Navajo Nation lost, the Court did come to terms with the basic principle of control being of decisive importance, it just disagreed with the Navajo Nation concerning the extent of Government control over coal mining.\(^{236}\) Thus, the *Washington Post*'s presentation of the Court's decision as based on the fundamental “question is... how specific the government's promises to Native Americans were in the 1960 law that gave the government control of Fort Apache and in the 1938 law that gave it veto power over Indian mineral leases” actually misstates the questions raised by the cases.\(^{237}\) Though *Mitchell I* and *II* suggested that the question presented in claims for damages from breach of trust was one of specificity, the Court responded in *Navajo Nation* and *White Mountain* by altering the question to one centered around control.\(^{238}\)

**IV. NAVAJO NATION AND WHITE MOUNTAIN: WHERE ARE WE NOW?**

The *United States v. Navajo Nation*\(^{239}\) and *United States v. White Mountain Apache Tribe*\(^{240}\) decisions together represent recognition of the importance of control, which tribal governments should seize upon in shaping their future relationships with the United States. When tribes lose a $600 million claim where the Secretary of the Interior acted against

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236. Even with these two cases added to the *Mitchell* cases, it remains “unclear how much ‘control’ is required before a right will be created.” Ellwanger, *supra* note 12, at 685. What Wood noted in 1994 still holds: “[T]he doctrine offers little predictability to Indian litigants challenging federal action.” Wood, *supra* note 12, at 1495.
238. See *supra* text accompanying notes 207-08.
the best interests of a tribe and when the critical question of damages was left undecided in a $14 million claim where the tribe’s property was allowed to be run down, the results should not be considered victories. However, by highlighting control, the cases do offer some guidance for tribes willing to be forward-looking rather than backward-focused. The Court’s unwillingness to hold the Government to its duties towards tribes that derive from its position as trustee should inform tribal self-government. The decisional split reflects the importance of control—actual (in White Mountain) and legal (in Navajo Nation)—that tribes need to deliberately accept or clearly place upon the Government in a manner that potentially conflicts with current understanding of the development of tribal government.

Deliberate tribal decisions regarding how each tribe wishes to define its relationship with the United States require tribes to recognize the complication caused by the Court’s inability to see from a tribal perspective, an inability presumably shared by the executive and legislative branches of the government. The split between the Court’s perspective and the tribal perspective came into stark relief during a memorable exchange between White Mountain Apache attorney, Robert Brauchli and Justice Scalia:

Mr. Brauchli: “The United States has no retention of ownership whatsoever. They have a use easement, and that’s all they have. A very limited right. And the benefit is what Congress said, and Congress said, we’re going to take this fort, which we established to kill Apaches and imprison them, and we’re going to give it to the White Mountain Apache Tribe. And they gave it, and it has value ....”

[Justice Scalia]: “I thought the fort was to protect white settlers. But ... you can describe it the way you like.”
Mr. Brauchli: “Well, it was to protect white settlers.”
[Justice Scalia]: “Okay.”
Mr. Brauchli: “[B]ut from my clients’ viewpoint, it was established to conquer them. So that’s what I’m here for, my client.”
[Justice Scalia]: “Yes, I understand.”

The logical disparity between Scalia’s initial point that the fort was to protect white settlers and his later statement that he understood, forces the conclusion that he did not actually understand at all. As David Getches noted regarding the Court as a whole, “[T]he subject matter [of Indian concerns] is culturally estranged from the decision maker.”

The cultural estrangement of the Court reflects that found in the United States generally. The Washington Post wrote “history buffs” on the Court “should be intrigued” by the cases, which feature, according to the article, “the era of [United States] westward expansion.” Non-Indian readers might themselves have difficulty seeing the problems presented with the Washington Post’s perspective, a fact attributed to the lack of understanding of the Indian viewpoint found throughout the United States. The tendency of Justices to attack Indian claims for breach of trust by couching such claims in terms of municipal duties, when such duties are lower, demonstrates a failure to understand the sui generis nature of the United States and tribal trust relationship. Ronnie Lupe, the former Chairman of the White Mountain Apache Tribe, noted in a speech at Harvard’s Kennedy School of Government, that tribes today “face a political atmosphere of severity and insensitivity toward the economic, social and legal problems that we Indian people face.” This insensitivity pervades the current Court and informs its decisions, even in cases decided facially for tribes.

The knee-jerk reaction of Indian law scholars to Navajo Nation and White Mountain without a doubt will be an

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White Mountain Apache scouts—engaged Apache bands, including the one led by Geronimo.”); Brauchli, supra note 69.


243. Lane, supra note 13, at A19.

244. See Oral Argument at 26-27, White Mountain (No. 01-1067) (stating Justice Scalia’s questioning of the nature of the trust duty by comparing it to the duty of Falls Church, Virginia). Scalia’s perspective focused on leveling trust duties to a single normative framework without regard to the unique place of the Indian trust duty can be seen as part of a more general attack on such differential interpretations. See supra text accompanying note 242.

245. See Oral Argument at 42, White Mountain (No. 01-1067).

instinctive comparison between the outcome of these two cases with the outcomes had the decision been written by Justices Thurgood or John Marshall. The standards for deciding Indian law cases initially put forth by John Marshall, described by Felix Cohen, and reinvigorated by Thurgood Marshall are applauded, with the critique of current decisions limited to a lament that the decisions do not reflect their pedigree. A scholar might describe White Mountain as a vestige of the foundational principles while Navajo Nation is a departure from the established norms. This reading is well supported by the history of the two cases. Despite the favor Indian law scholars give history, "[t]he history of federal Indian law since Chief Justice Marshall has been filled with tragedy, a story in which the rule of law often has become a vehicle to rationalize what can only be understood as crimes against humanity." 

The rationalizing aspect of the law is just as, if not more, prevalent in the present cases as it was in the prior cases. However, the complaint narrative embodied by the comparison

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248. See, e.g., Aitken, supra note 51, at 152 (developing a social contract paradigm out of John Marshall jurisprudence which could more effectively limit federal power over internal tribal affairs than is currently the case); Harvard Note, supra note 12, at 434-35 (finding support for autonomy as the governing theme of the trust doctrine in Marshall’s dicta in the Cherokee cases).

249. See Getches, Conquering, supra note 15, at 1617-18 (discussing the application of foundation principles in other modern cases).

250. The Navajo Nation put forth in its briefs a large list of regulations controlling mining on tribal lands that the Court easily could have described as equivalent to the regulations in United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II), and White Mountain that established comprehensive government control. Brief for Respondent at 1, United States v. Navajo Nation, 537 U.S. 488 (2003) (No. 01-1375).

251. History as the focus frequently becomes—excuse the expression—white-washed, and consequently, ignores the “harm that overly-romantic thinking about Indians does to rigorous legal thought . . .” Laurence, supra note 24, at 1 n.1. The favor given to history often finds expression in the narrative choice to write in terms of history, advancing from pre-contact through the treaty period, removal, the New Deal, termination, to self-determination. See, e.g., WILCOMB E. WASHBURN, RED MAN’S LAND/WHITE MAN’S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 25-99 (2d ed. 1995) (beginning with a historical survey divided by centuries); Cave, supra note 25, at 1401-06 (starting with the Cherokee cases and moving to the present); Phipps, supra note 21, at 1642-52 (starting with first encounters and proceeding through the eras); Wood, supra note 12, at 1495-1508 (treating the trust responsibility historically).

252. Frickey, supra note 17, at 427.
of modern jurisprudence with prior interpretive norms, while accurately calling attention to the injustices of the current Court, does little to assist tribal governments as they negotiate the dangers inherent in their trust relationship with the United States. National governments “categorize[] the population for preferential, or at least differential, treatment,” and therefore, tribes have to work to instrumentally use their ethnicity and history as a means of exploiting the state’s power. The complaint is important to record Government wrong-doing, tribal policies need to reflect that some “Justices gravitate to a ‘sensible’ outcome that diminishes tribal sovereignty whenever non-Indian activities, social values, or property interests are sufficiently impacted.” The “temptation to compromise Indian interests in favor of other policies and programs” unquestionably alters the Court’s consideration of Indian claims; however, merely decrying that fact accomplishes little.

The split between a romanticized view of history and more forward focused decision-making can be understood through an analogy from Kathleen Chamberlain’s history of oil exploration on the Navajo Nation. Starting from the platitude “[e]verything in nature is sacred,” Chamberlain details how the experience of Diné with Anglos has led to “less reverence for the land.” The willingness of individual Diné to commodify land changed with increased exposure to Anglo culture and corporations. However, the conclusion of Chamberlain might surprise those whose image of Indians is fixed.

254. Getches, Conquering, supra note 15, at 1631 (noting that four Justices are particularly susceptible to such gravitation). The subjectivism is also described as a form of balancing. Id. at 1626 (“Some scholars have tried to synthesize the Court’s recent Indian law jurisprudence into a test that ‘balances’ the interests of state, federal, and tribal governments.”).
255. Brief for Respondent at 34, Navajo Nation (No. 01-1375).
256. See UNDER SACRED GROUND, supra note 74.
257. Id. at xii, 3 (quoting EDWARD T. HALL, WEST OF THE THIRTIES: DISCOVERIES AMONG THE NAVAJO AND HOPI 104 (1994)).
258. Id. at xii; see also Harvard Note, supra note 12, at 429 n.38 (“The differences between the ways the two cultures conceive of and value land should not be underestimated.”).
259. See Laurence, supra note 24, at 2-3 n.5 (quoting Letter from Kevin Gover to Advice & Dissent, E Magazine (Dec. 4, 1991), that said: “I am thoroughly weary of
In 1921, most Navajos believed that Dinétah was valuable not for its underground riches, but because it housed ancestor spirits and provided everything Navajos held sacred. Since that time, a significant number of Diné men and women have adopted the bilagáana message that land is [a] mere commodity. Whether this denotes disintegration of Navajo culture in favor of mainstream American materialism remains to be seen. Still, Navajo society has never been static... to entertain the notion of an unchanging native culture at any period is severely short-sighted.\(^{260}\)

This is not to say that tribes should embark on unconstrained resource development or that something is not lost in the commodification of land.\(^{261}\)

On some reservations, “people are simply not interested in the dynamic development of their economy.”\(^{262}\) In the case of the use of mineral extraction as a tool for development for example “[i]t still remains questionable,” entirely apart from cultural values, whether mining is an “appropriate means to put an end to most of the deplorable socioeconomic conditions . . .”\(^{263}\) When cultural complications on reservations arise, such as the challenge of supporting traditional sheep-herding while allowing commercial development, the possibility of growth can seem hard to envisage.\(^{264}\) As a result, unlike Anglo municipalities, tribal governments do face challenges navigating the interplay between economic and cultural

environmentalists who claim to know what Indian people want and need or, indeed, who claim to have any understanding of what is happening in Indian country”\(^{\text{\textendash}}}.

\(^{260}\) Under Sacred Ground, supra note 74, at 115.

\(^{261}\) The problems created by the commodification of land are similar to problems that are created when a group of people is made more entrepreneurial. However, limiting tribal development to simply tribal enterprises because of the claim that reservation “residents, generally speaking, simply do not have an entrepreneurial spirit,” suffers from the same overly romanticized and simplified understanding of Dances with Wolves type “Indians.” Indian Reservations in the United States, supra note 14, at 171. Personally, I tend to follow Professor Robert Laurence’s preliminary matter on romanticized views of Indians: “I think that overly romanticizing ‘Indianness’ can come very close to condescension and insult, both to those romanticized and to those left out.” Laurence, supra note 24, at 2.

\(^{262}\) Indian Reservations in the United States, supra note 14, at 182.

\(^{263}\) Id. at 203.

\(^{264}\) See Ezra Rosser, This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Reservations, 47 Ariz. L. Rev. (forthcoming 2005).
survival, much less growth. Yet, I would argue that unless it is the desire of their people, a narrow tribal government focus on the past does little to serve tribes as they attempt to deal with present and future problems. In Red Man's Land / White Man's Law, Wilcomb E. Washburn appropriately notes: "The American Indian of the future cannot fully revert to a past culture nor can he completely retain his present culture. Cultures do not remain static and isolated. They evolve." Dealing with this evolution is the central task of tribal governments and one that requires knowing history but not emphasizing it at the expense of the present and the future.

The emphasis placed on history by Indian law scholarship stands in sharp contrast to the negligible importance and role of history granted by the Court in these decisions. In White Mountain, outside of the Court's Anglo perspective on the fort's place historically, very little mention was made of history except to the extent that "trust" informed the Government's control. In Navajo Nation, the majority emphasized the IMLA's reduction of the trust duty by highlighting its focus on tribal self-determination, and a discussion of Navajo Nation history was found only in passing in Justice Souter's dissent. The Court in Hicks undertook a lengthy exploration of history to decide tribal court jurisdiction. Unfortunately for tribal advocates, the cyclical nature of Federal-Tribal relations and history facilitated the Court's disregard for tribal rights. Historical scholarship might ultimately lead to a return to the Marshall model, yet presently tribes need to use the acknowledgment of the importance of control to leverage their ability to meaningfully exercise their sovereignty. "As with all other judicial doctrines, the trust responsibility is subject to change and refinement over the course of time," and the failure

265. UNDER SACRED GROUND, supra note 74, at 102.
266. WASHBURN, supra note 251, at 237.
268. Navajo Nation, 537 U.S. at 515 (Souter, J., dissenting).

The protective purpose of the Secretary's approval power has appeared in our discussion of other statutes governing Indian lands over the years.... The legislative history and purposes of IMLA, however, illuminated by the Secretary's historical role in reviewing conveyances of Indian lands, point to a fiduciary responsibility to make a more ambitious assessment of the best interest of the Tribe before signing off.

Id. (Souter, J., dissenting).
to acknowledge the change could be as detrimental as the change itself.\textsuperscript{269}

The Court's focus on control offers tribes a chance to claim their rights to self-determination, however, for tribes that choose to do so, the requirement that the Government fulfill its trust duties will have a related reduction in the ability of tribes to successfully assert breach of trust claims. The tribal assertion that "vigorously enforced trust duty and respect for tribal self-determination [are] complementary" is correct only so far as one does not necessarily imply a trade off with the other.\textsuperscript{270} Thus, "[i]n both the Indian Self Determination and Education Assistance Act and later amendments to that Act promoting tribal self-governance, Congress provided that greater tribal authority shall not compromise Federal trusteeship."\textsuperscript{271}

However, in \textit{Navajo Nation} the Court noted that, despite the tribe's protests to the contrary, a trade off between Government trust duty and tribal self-determination does exist with respect to coal leasing. Ironically for the tribe, it is by granting tremendous "weight to the interest of tribal autonomy" that the Court held for the Government.\textsuperscript{272} "[W]hat distinguishes this case" from that of \textit{Mitchell II} is that in \textit{Navajo Nation} there was in the IMLA "a scheme that is . . . meant to place the tribe . . . in charge of its own fate . . . ."\textsuperscript{273} Even Justice Souter for the dissent wrote, "The more stringent the substantive obligation of the Secretary, the less the scope of tribal responsibility."\textsuperscript{274} When "real control" is still in the hands of the BIA, then the tribe cannot be said to have the "last word."\textsuperscript{275} The reverse is also largely true, namely, "if the tribe is the responsible party, then the Government is not."\textsuperscript{276}

\textsuperscript{269} \textit{Native Americans and the Law, supra} note 247, at 233.
\textsuperscript{270} Brief for Respondent at 45, \textit{Navajo Nation} (No. 01-1375).
\textsuperscript{271} \textit{Id.} at 46.
\textsuperscript{272} \textit{Navajo Nation,} 537 U.S. at 518 (Souter, J., dissenting); see, e.g., \textit{Id.} at 508 (stating, "The IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties").
\textsuperscript{273} Oral Argument at 29, 46, United States v. \textit{Navajo Nation,} 537 U.S. 488 (2003) (No. 01-1375) ("The purpose of IMLA was to help the Indians exercise their own sovereignty.").
\textsuperscript{274} \textit{Navajo Nation,} 537 U.S. at 518 (Souter, J., dissenting).
\textsuperscript{275} \textit{INDIAN RESERVATIONS IN THE UNITED STATES, supra} note 14, at 204 (arguing that in most mining matters of significance, the BIA has the final word as of 1992).
\textsuperscript{276} Oral Argument at 18, \textit{Navajo Nation} (No. 01-1375) (noting that the Government's argument was that Secretarial approval is merely ministerial and going on to imply the
The potential that the Government might prevent true exercise of tribal sovereignty even where power is explicitly invested in the tribe complicates the trade-off between self-determination and trust duties. In White Mountain, the Government’s complete control of fort property prevented such a situation from arising. However, Navajo Nation offers an example of how the two might be linked. The Navajo Nation’s argument that the Secretary’s actions “had skewed the bargaining” was not dealt with by the majority. The tribe claimed that the Secretary “thwarted” the tribe’s ability to “exercise informed self-determination,” therefore, the Secretary’s breach of trust arguably impacted self-determination to such an extent that the trade-off lost its descriptive power. The tribe’s insistence that the Secretary’s approval was conditioned on a duty to maximize the tribal proceeds even where the tribe had the authority to negotiate falls squarely within the trade-off paradigm; the Court’s decision deals with the tension between these goals of IMLA by falling on the self-determination side.

The tribe arguably attempted too much and in the process allowed a Court disinclined to support a $600 million claim to decide based on the maximization duty rather than on the duty not to skew bargaining against the tribe. As Professor Royster states:

The trust obligation with respect to mineral development

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277. Oral Argument at 50, Navajo Nation (No. 01-1375) (asking Paul Frye, the Court questioned: “And then you’re also making the argument that it was wrong—and I think I used the word, [the] bargaining process was skewed . . ..”).

278. Id. at 40-41.

279. Navajo Nation, 537 U.S. at 517 (Souter, J., dissenting). For the choice of the tribe to highlight the duty to maximize, see Oral Argument at 44, Navajo Nation (No. 01-1375). The Court questioned:

Question: “[W]hat you’re saying, it’s just as if the trees in Mitchell where the money from the tree was supposed to go to the Indians, if the Government had cut it down and sold it for half a cent a tree.”

Mr. Frye: “That’s correct.”

Question: “All right. And all this other stuff with the procedures is just evidentiary of what was going wrong. But what was going wrong is it’s like selling the trees at too low a price . . . .”

Oral Argument at 44, Navajo Nation (No. 01-1375).
requires much more than consideration of tribal interests or a negative duty not to interfere with tribal development. It requires the government to act affirmatively in the best interests of the tribes, particularly in the determination whether to approve a mineral agreement.  

The tribe focused on the second of the above two sentences when arguably the negative duty was more easily proven and might have been more acceptable to the Justices than a free-floating duty to maximize. Subsequent fact patterns will differ from those in Navajo Nation; yet, the trade-off must be seen in light of the complications arising when actions blur the distinction between Government trust duties and the possibility of self-determination. Complications arise when legal control does not equal actual control.

The trade-off between Government trust duties and tribal self-determination should not be understood as entirely either/or, likewise, its existence should not be hidden by tribes or scholars. As I will explain later, tribes have reasons to deny the fact of the trade-off, yet, I also believe that tribes have much to gain by acknowledging what has already been seen by the judiciary. In 1976, the Ninth Circuit Court of Appeals wrote:

The plan of Congress gradually to emancipate the Indians so that they gain greater responsibility over their own affairs is not in conflict with the government’s guardianship role. It is, on the contrary, an extension of it. The ultimate aim of guardianship as the term is used here, should be that the wards become, in time, self-sufficient.

Indians are not oblivious to the irony of being emancipated by the very government that denied them their “most basic claim” to “be governed by their own laws.” However, scholars are reluctant to acknowledge the trade-off because too frequently Congress dictates the terms of the trade-off, deciding on its own

280. Reyster, Equivocal Obligations, supra note 166, at 359-60.
281. Mary Christina Wood’s argument can be thought to include the idea that Secretarial approval might involve even more than a maximization duty. Wood, supra note 12, at 1480 (“[T]he BIA retains the authority, and arguably the duty, to disapprove a lease or contract that is not in a tribe’s best interest, even if that disapproval runs counter to the wishes of the tribal government.”).
283. Frickey, supra note 17, at 424.
whether a tribe or the Government should be in control. The Ninth Circuit's emphasis on Congress's plenary power, while reflecting the current state of power, helps explain the concern preventing intellectual acknowledgment of the trade-off.

The separation between trust and sovereignty was acknowledged in an article by Janice Aitken aimed at expanding the nature of the federal trust responsibility.\footnote{284} Her conclusion was that "the trust doctrine, in its current form, does not include an obligation on the part of the government to promote [tribal] self-government."\footnote{285} Aitken's application of social contract theory is targeted towards broadening how the trust responsibility is understood so that protecting tribal self-government is included within the trust doctrine.\footnote{286} Not included in Aitken's analysis is the possibility that the expanded understanding of the importance of tribal self-government might imply in some contexts allowing tribes the power to lessen federal trust responsibility in order to gain greater self-determination.

Professor Robert Laurence noted that in his dream world he would remove the trust responsibility entirely from Indian law.\footnote{287} He explained that the Marshall roots of the doctrine are "pretty condescending" and went on to conclude that "[a] government as sovereign as I want the tribes to be no longer needs the benefits of the trust responsibility."\footnote{288} As Laurence noted, luckily he was not asked to describe how and when to remove the trusteeship which remains "a valuable right and ought to mean what it says."\footnote{289} Laurence acknowledged the trade-off between sovereignty and the trust responsibility, but did not explore the pragmatic elements of negotiating the complexities of this trade-off in the present state of reservation affairs.\footnote{290}

Tribal advocates have a justifiable concern that "the next

\footnote{284} See generally Aitken, \textit{supra} note 51.
\footnote{285} \textit{Id.} at 154; see also Harvard Note, \textit{supra} note 12, at 423 (asserting that the moral precepts of Federal Indian law suggest "that the trust doctrine requires a principle of respect for the tribes' right to substantial self-government").
\footnote{286} Aitken, \textit{supra} note 51, at 155.
\footnote{287} Laurence, \textit{supra} note 24, at 16.
\footnote{288} \textit{Id.} at 16-17.
\footnote{289} \textit{Id.} at 19.
\footnote{290} See generally \textit{id}.}
step beyond turning over the running of federal programs to the tribes is to someday end that assistance to the tribe entirely.”

Yet, meaningful sovereignty does not exist where tribes simply refuse to engage in action because they are afraid of the reaction to their decisions. The “fear that after they take over programs, federal funding and the federal trust relationship will be ended,” is an understandable fear and one which if not dealt with—acknowledged or lessened—will cripple the ability of tribes to act independently. Tribal governments facing ineffective federal programs and the linked desire to expand their sphere of tribal influence cannot ignore the fear; however, it is not the case that lessening the federal trust relationship necessarily means a lessening of federal funding. Ensuring that tribes are able to exercise the degree of control while not allowing the federal government to disappear from reservations requires tribal leaders to recognize the irrational as well as rational elements of their fear of the trade-off. It requires tribes to re-imagine the trade-off and push the federal government for their version of the trade-off.

If tribes simply do what the greater sovereign desires them to do, the lesser sovereign rightly would be thought of as completely subsumed. “[T]he true test of sovereignty lies in its assertion. Any sovereign intent which produces a threat to any other extant or pretending sovereign unit, must be met either by resistance of armed force or the resistance of reason.” The denial of a trade-off on the part of scholars based on fear that the acknowledgment might trigger unfavorable results, while laudable for its strategic value, denies tribal leaders the intellectual tools needed to navigate the trade-off and shortchanges them when it comes time for reasoned resistance.

The fear that acknowledging tribal autonomy does impact trust duties in some contexts will lead to the United States abandoning its trust responsibilities generally creates some ironic outcomes. Before the “judicially activist Court” which

has been “driving big holes in tribal sovereignty” relating to criminal jurisdiction and the tribal power to tax, the Indian advocates were paradoxically forced to support the Justices’ negative perspective on tribal governments in order to present their case that the trust duty was breached. Although there is a dramatic difference between the Court citing *Oliphant v. Suquamish Indian Tribe*\(^{294}\) for the implicit proposition that Indian courts are savage\(^{295}\) and tribes noting that “federal protection is still warranted,”\(^{296}\) both denials of tribal ability to effectively govern should be hard to swallow by Indian law scholars. The *Native Americans and the Law* dictionary states that “tribal members are fully capable of dealing with the non-Indian systems of finance and commerce” in its definition for “guardianship,” properly rejecting the underlying assumption of unsophisticated Indians.\(^{297}\) However, when a tribal brief quotes a 1943 case for the proposition that Indians are “uneducated, helpless and dependent people needing protection against the


[There is a “definite trend by tribal courts” toward the view that they “have leeway in interpreting” the ICRA’s due process and equal protection clauses and need not follow the [United States] Supreme Court precedents ‘jot-for-jot’..... In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be “protected... from unwarranted intrusions on their personal liberty”.... Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts “mirror American courts” and “are guided by written codes, rules, procedures, and guidelines,” tribal law is still frequently unwritten, being based instead “on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,” and is often “handed down orally or by example from one generation to another....”

*Id.* (Souter, J., concurring).

\(^{296}\) Brief for Respondent at 25, *Navajo Nation* (No. 01-1375) (using Congress’s belief to this effect found in the 2000 Navajo Nation Leasing Act to advocate the same on behalf of the tribe); see also *Navajo Nation*, 537 U.S. at 515 (Souter, J., dissenting) (“The protective purpose of the Secretary’s approval power has appeared in our discussion of other statutes governing Indian lands over the years.”).

\(^{297}\) *Native Americans and the Law*, supra note 247, at 98. In a student comment, Rodina Cave noted, “The traditional guardian-ward trust doctrine is based on notions of Indian inferiority....” Cave, *supra* note 25, at 1400; see also Harvard Note, *supra* note 12, at 427-28 (rejecting a cultural theory of the guardian-ward relationship as simply racial intolerance).
selfishness of others and their own improvidence," the ability of tribes to assert their self-determination is being threatened by the countering need to hold the government to its trust responsibilities.

The trade-off means that, according to an editorial in *Indian Country Today*, "while the Navajo lost a case that clearly showed some degree of collusion between the Secretary of Interior and a major company doing business on Indian land, the Tribe, in fact, later accepted terms to which, even under duress, it could have disagreed." The improvidence of tribal governments is often attributed either to disputes between factions or tribal governments making decisions which end up being questionable or even wrong. Tribal governments can be divided along an almost innumerable number of lines, frequently, however, breaking down according to "[w]ealth, language, and degree of assimilation . . . ." Furthermore, tribal decisions and even decision-making policies in hindsight have often turned out to have been unwise or not the best possible. Yet, hypocritically, whites saw tribal failings, as well as "Indian factions[,] as proof of childlike behavior; [while] in Congress such alterations were symbols of sophisticated politics at work." 

The test for Indian law scholars is whether they will support tribal self-determination when doing so might lead to failures and difficulties which cannot be placed on the shoulders of the government. After all, inevitably "some tribes will succeed in making the transition into contemporary economies, and . . . others will fail." In *Worcester v. Georgia*, the Court's opinion stressed the continuing sovereignty of tribes, referring no less than sixteen times to the concept of "self-government," and Marshall saw tribes as "independent political

298. Brief for Respondent at 21, *Navajo Nation* (No. 01-1375) (citing Board of County Comm'r's v. Seber, 318 U.S. 705, 715 (1943)).

299. *Supreme Court Deals*, supra note 40.

300. *Under Sacred Ground*, supra note 74, at 38 (discussing the division between educated, more assimilated Diné and traditionalists).

301. For a minor subset of these complaints regarding tribal leadership, see Gitlin, *supra* note 193, at 16 ("Unfortunately, many institutions have become wary of dealing with Indian tribes because of their reputation for political instability.").

302. *See* UNDER SACRED GROUND, supra note 74, at 35.

303. *See* INDIAN RESERVATIONS IN THE UNITED STATES, supra note 14, at 298.

304. 31 U.S. (6 Pet.) 515 (1832).
The most influential passage in all of Indian law, written by Felix Cohen, states that except to the extent proscribed by Congress, tribes have the "full powers of internal sovereignty." Nevertheless, the approach taken by tribes and scholars to downplay the trade-off reflects a belief, largely unstated, that tribes do not truly have the ability to exercise their sovereignty. However, the White Mountain and Navajo Nation decisions, by repeatedly stressing control, place a premium on the "ability and impetus of tribes to dominate and prevail over their fields of action."

The belief that tribes should not have the full responsibility for their successes or failures is grounded upon the difficult situation facing many tribes across the United States. This empirical grounding is coupled with the related thought that rightfully the government must fulfill its duty to tribes by providing the protection that ought to be inherent in the sui generis trust relationship it has with tribes. Instead of defining where true self-determination is possible according to this perspective, "underdevelopment and dependency" characterize reservations and make reliance on the government fulfilling its trust duties the only option. Likewise tribes are said to be unable to prevent their resources and rights from being stripped from them by outside individuals, corporations, and governments who often profess to have the best interests of the tribes in mind.

The difficulties facing tribes are very real and have a significant impact on the tribes as entities and on the individual tribal members and families. Yet, while some challenges facing

305. See Getches, Conquering, supra note 15, at 1577, 1582.
307. Supreme Court Deals, supra note 40.
308. See UNDER SACRED GROUND, supra note 74, at 113 (quoting Lorraine Turner Ruffing, formerly with American Indian Policy Review Commission).
309. The fears of tribal chairmen can include this perspective. Lupe, supra note 246, at 3-7 ("The type of insidious challenges to which I refer is often embodied in governmental policies and practices which are shaped by special interest groups that seek to diminish our basic rights as Indian people, rob us of our resources, and limit our self-governance and self-determination."). This perspective certainly reflects much of the history so far of the exploitation of tribal sub-surface resources. See UNDER SACRED GROUND, supra note 74, at 35 ([H]aving found something they wanted on Indian land, whites resorted to their old tactics of identifying Indians who would approve the scheme and influence the rest to go along, always careful to couch demands in terms of what was best for Navajos.").
tribal governments are external or economic, some are internal. When a student asked NARF's former lead attorney, Tracy Labin, "what can be done tribally to bolster self-determination?," her immediate reaction was that tribes could do a lot "by improving themselves," for, "if that does happen, maybe more of a modicum of respect will follow."\(^{310}\) She also noted, "[T]he tension between tribal trust responsibility and self-determination is very different depending on the tribe."\(^{311}\) Many tribes have only a "nascent tribal leadership" which struggles to assert its "powers of self-government to improve reservation economic and social conditions."\(^{312}\) That differences exist between tribes which have stronger governments and those with weaker governments does not take away from the observation that a trade-off exists between self-determination and trust duties. Rather, tribal government differences merely help inform where tribes choose to place themselves with respect to this trade-off on particular issues, policies, or tribal resources.

The fact that there are challenges facing tribes does not take away from the fact that tribes have begun to use tribal self-determination to gain increased economic security and political influence.\(^{313}\) The Harvard Project on Indian Economic Development claims that the major determinant of tribal economic growth is the willingness of tribes to assert and make use of their sovereignty.\(^{314}\) Indian law scholars no doubt will readily agree "real or feigned respect for tribal self-determination does not excuse violation of basic trust duties..."\(^{315}\) The position that the argument that self-determination power might have altered the Government trust

310. Labin, supra note 12. Tribal government factionalism create[s] negative effects on the reservation economy and create[s] a climate of political instability, since it is often difficult for the outside investor to know with whom to negotiate or how much importance to attach to any particular negotiations.... Non-Indian businesspersons, once aware of this political environment, can therefore hardly be blamed if they reconsider their plans and decide not to risk an investment on reservation land.

See INDIAN RESERVATIONS IN THE UNITED STATES, supra note 14, at 180-81.

311. Labin, supra note 12.

312. See Getches, Conquering, supra note 15, at 1592.

313. See id. at 1574.


315. Brief for Respondent at 44, Navajo Nation (No. 01-1375).
duties has "gained no force in the intervening [twenty] years," perhaps might also garner fairly widespread support from commentators. If the past twenty years have not brought about any change in the balance of the trade-off between self-determination and trust duties, then tribes must believe that their dependency is the same as it was twenty years ago.

"Looking for sovereignty is a little like looking at a thing of beauty through the eye of the beholder; it can be all things to all men, or little to nothing for others with a vested interest in denial." Indian law intellectuals, fearing that the acknowledgment of the trade-off that is seen by everyone, most importantly by the Court, will lead to a lessening of the trust duty as evidenced by Navajo Nation, have a self-perceived interest in denial. However, this same denial hinders the tribes that those same intellectuals desire to support, for "sovereignty must be asserted to be known, maintained at a visible level to retain credibility and preserved against attack or critical denial of the assertion." The critical denial of the possibility of tribal government's using the trade-off for their own good amounts to a denial of tribal sovereignty, implicitly and wrongly viewing tribes as incapable of determining for themselves their own spheres of control.

V. NAVAJO EXAMPLES OF MAKING USE OF THE TRADE-OFF

The Navajo Nation is one of the strongest tribal

316. Id. at 45.
317. Indeed, Wood believes that because of environmental threats to tribal land, the trust duty is as central as it was 200 years ago, not merely twenty years ago:

The duty of protection so central to the sovereign trust paradigm two centuries ago is arguably just as important today. In the earlier periods, federal protection was needed to secure retained native lands against intruding white settlers; today, federal protection is increasingly needed to shield Indian Country from environmental threats both to the tribal land base and to shared resources such as water and wildlife.

See Wood, supra note 12, at 1505.
318. I contend that tribal governments have made progress in the past twenty years. Even the progress from thirty years ago to twenty years ago is evident from a 1984 BIA commissioned study which stated, "In general, the changes within tribal organizations have been dramatic. What were often little more than social clubs a decade ago have been transformed into governments." Sanders, supra note 292, at 29.
319. Stewart, supra note 293, at 115.
320. See id.
governments, and consequently, the tribe has had the opportunity to explore the trade-off between trust duties and self-determination directly through several recent policy choices. In the context of low income housing development, the tribe, under the strong leadership of Chester Carl, has chosen to assert its self-determination and taken responsibility for duties which otherwise might rest upon the government. More dramatically, the Navajo Nation has chosen, despite a strong council preference towards self-government, not to devolve government responsibility of tribal health care from the Indian Health Service to the tribe. Particularly in this latter case, the possibility of tribes making use of the trade-off for their own benefit is highly evident. Finally, I believe that it is the inability of tribes and scholars to fully comprehend how the trade-off might be leveraged for greater tribal benefit that is preventing these two groups from acknowledging that such a trade-off exists.

The Native American Housing and Self-Determination Act of 1996 ("NAHASDA") gave tribes control over the development of low-income housing on reservations.\textsuperscript{321} With a very few minor exceptions,\textsuperscript{322} NAHASDA is the only public housing development program which is actually increasing the number of units available for its client population.\textsuperscript{323} The Department of Housing and Urban Development ("HUD") is in charge of granting funds to Tribally Designated Housing Entities ("TDHEs") whose closest non-reservation equivalent is a city

\begin{itemize}
\item \textsuperscript{321} Tribal Court Clearinghouse, Tribal Housing Code 4 (1999), Tribal Court Clearinghouse, available at http://tribal-institute.org/codes/ (last visited Apr. 25, 2005).
\item The Native American Housing Assistance and Self-Determination Act of 1996 (Public Law 104-330) was enacted into law on October 26, 1996. [NAHASDA] reorganized the system of federal housing assistance to Native Americans by eliminating several separate programs of assistance and replacing them with a single block grant program. In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA was to provide federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance.
\item Id.
\item These exceptions are ones such as Youthbuild and Veterans Affairs (VA) housing, which, while good programs, have relatively tiny budgets.
\item The Department of Housing and Urban Development programs serving off-reservation communities and cities are only constructing units to replace decaying units. The Hope VI program's focus on mixed income neighborhoods ensures that the total number of units available to the poor in newly constructed projects is far lower than had been found in the prior project replaced by Hope VI.
\end{itemize}
public housing authority. On the Navajo Nation, the Navajo Housing Authority ("NHA") was selected by the tribal council as the Nation's TDHE; therefore, NHA is solely responsible for construction of low-income housing on the reservation. NHA Executive Director Chester Carl is now responsible for meeting a major duty, which formerly had been a government one.

When Indians agreed to relocate to reservations in the [nineteenth] century, one of the conditions was that the [United States] government provide them shelter. For most of the [twentieth] century, government guidelines determined how and where most housing on Indian reservations was built. By most measures on the 2000 Census, America's 2.5 million American Indians had the worst housing of any ethnic group. Those living on reservations were generally living in the poorest homes. One in [six] reservation homes is crowded, three times the national average. One in [ten] homes lacks plumbing, [thirty-five] times the norm. One home in [five] has no telephone. In an effort to renovate a system that both sides agreed was [not] working, the Native American Housing Assistance and Self-Determination Act was enacted six years ago, and [HUD] began handing over responsibility for housing to the tribes in the form of block grants.324

It would be false to say that NHA's leadership of low-income housing construction is without fault or not highly political. Carl has on multiple occasions been subject to efforts by the Navajo Tribal Council to lessen the massive power he wields over jobs on the reservation, as well as location of unit construction. Nevertheless, through his leadership the tribe has taken a major role in using its self-determination rights to take over something which had been a failure when purely in the hands of the government. The complaint that this in fact is not an example of a tribe using the trade-off for its own benefit is misdirected, as is evident from the history of NAHASDA and the unique role of NHA and Chester Carl in Indian housing for

324. Helen Rumbelow, Dreaming of Homes on the Reservation; Act Improves Housing, But Disputes Remain, WASHINGTON POST, Oct. 13, 2002, at A3 (emphasis added). For a historical account and linked presentation of the government's duty to provide housing to Native Americans, see Virginia Davis, A Discovery of Sorts: Reexaming the Origins of the Federal Indian Housing Obligation, 18 HARV. BLACKLETTER L. J. 211 (2002).
all tribes. NAHASDA was the result of a lengthy consultation between HUD and tribal officials. Tribal housing directors were instrumental in shaping NAHASDA, and none of those leaders more so than Chester Carl.

Fortunately, as NHA’s director states, “We know NAHASDA works; it’s tripled the amount of [affordable] housing on Native and Tribal lands since its inception in 1996.” The Navajo Nation in particular has benefited from the NAHASDA program, as Doug Dewalt acknowledged when interviewed about NAHASDA’s creation, “the Southwest region, where the Navajo historically have been located, had been on the short end of receiving funds to satisfy housing needs, so we chose to increase the amount of money that region will receive.” It is not coincidental that the Navajo Nation gained relative to other tribes, through NAHASDA, for the NHA’s head, Chester Carl, was instrumental in drafting it and he is considered to be, one of the, if not the, foremost expert on both NAHASDA and Native American housing generally. The fact that the very construction of Congressional regulation was itself used as a mechanism to build-in benefits for the Navajo Nation establishes that the trade-off contained in NAHASDA was one entered into deliberately by the tribe and leveraged to better serve the Diné.

The health care counter example—the case where the Navajo Nation rejected self-determination in favor of the trust duty—illustrates that tribes can prevent the trade-off from occurring. In 2001, the Navajo Tribal Council indicated a readiness to take-over Indian Health Services (“IHS”) health care facilities located on the Navajo Nation. The effect of this

325. This entire paragraph including citations is largely copied from “Rural Housing and Code Enforcement: Navigating Between Values and Housing Types,” Part II, Navajo Nation case study (working paper on file with the author).


take-over would amount to a massive nationalization by the tribe of assets then under United States control. The United States Government was willing to allow a tribal take-over and, except for providing financial grants to the tribe to run the health care facilities, to thus get out of the business of providing health care on the Navajo Nation. Indeed, "40[%] of the system now is run by tribes or the non-profit groups they have hired . . .,"329 for in total, "60[%] of the tribes already have taken over management of their health-care facilities or are considering it."330 From the Tribal Council’s perspective this initially seemed like a great opportunity: the tribe would receive grant money currently directed to Washington, D.C., administrative costs that could be used within the Navajo Nation’s governmental infrastructure; the tribe would have greater control over the health care on its own land; and importantly, this would signify a flexing of the tribe’s self-determination muscle relative to other tribes and prior tribal councils. The advantages from exiting IHS management were similarly apparent to the government.

The Tribal Council recognized that this decision could profoundly affect all Diné; consequently, the Council decided to hold a plebiscite on the issue of tribal take-over from IHS. The Diné responded strongly against the Council’s proposal voting 16,431 against, versus 3750 in favor.331 However, not enough people voted, and the Council was not bound by this overwhelming rejection.332 The Council proceeded forward as if to finalize the take-over but, fortunately, from my personal perspective, ultimately decided to respect the will of the people.333 Doing so cost the tribal government significantly in terms of claims to full self-determination, leaving members and the health care system under the government’s trust responsibility and control. Yet, in the minds of individual Diné the tribe was not prepared to exercise its right to trade trust for

329. Judy Nichols, Indian Health Care: Separate, Unequal, ARIZONA REPUBLIC, Apr. 14, 2002, at 1A.
331. Id.
332. Id. The fact that not enough people showed up to vote should not be taken as a sign of apathy, rather it is a reflection of the fact that 50% of registered voters have to vote against the takeover for the vote to be binding upon the Tribal Council.
333. The Tribal Council’s decision was finalized in February 2002. Nichols, supra note 329.
self-determination because too much was at stake given the current state of tribal government. Hondo Baldwin Louis, the public relations officer for the Navajo Health Care System Corp., which was the main advocate for the takeover, said that the Navajo people’s antagonism to the idea was based on “anti-tribal government sentiments [that] worked against the corporation gaining approval from Navajo voters. He said Navajos are reluctant to give the Navajo government more control ‘especially with the touchy issue of health care.’”334 The petitioners who forced the tribal vote stated that they were motivated by a basic “lack of confidence in the Navajo Nation to run anything efficiently.”335

Larry Curley, a former IHS administrator who unsuccessfully ran for President of the Navajo Nation, less pejoratively felt of the takeover, “[i]t’s a great idea but we’re not ready.”336 Curley’s observation allows me the opportunity to respond to the likely criticism to my discussion of the trade-off: namely that my argument gives up too much in terms of the trust duty and/or that my argument is premature. First, it should be stated that no judgment, pejorative or affirmative, should necessarily attach to a choice in favor of self-determination or one favoring the trust protection and duties of the Government. As Tracy Labin noted, tribes are different along a number of spectrums, from readiness to assume self-government roles to the desirability of such assumption for any given program.337 Having seen some of the positives and negatives of self-determination on the Navajo Nation, I am not going to advocate for blind faith in tribal control, nor am I going to applaud government trust oversight. The crucial point is that a choice does exist between self-determination and trust, not that tribes should necessarily be judged for their decisions concerning this trade-off.

The implicit criticism of my argument, that the trade-off does not exist, is demonstrated by the unwillingness of other

337. See Labin, supra note 12.
writers to describe the relationship as a trade-off. To be frank, I have struggled with the harshness of my chosen terminology: "trade-off." Perhaps "spectrum" or "sliding scale" between trust and self-determination might make Indian law scholars and tribal leaders more comfortable with my argument. Of course, I agree that the choice will not, and should not, be one which is entirely self-definitional, except perhaps in the utopia described by Professor Laurence. "Trade-off" itself captures the idea of a sliding scale, for it is possible to trade-off a little bit of one thing for a little of another. However, I decided not to make this argument one which focuses upon the nuances of the trade-off, but rather on the fact of the trade-off because this seemingly simple fact is not acknowledged.

I submit that the failure to acknowledge the trade-off harms tribes as much as tribes are helped by scholarship demonstrating the fact that the trust duties and tribal self-determination can be coexistent in some circumstances. As was demonstrated by the Court's treatment of United States v. Navajo Nation,\textsuperscript{338} the trade-off does exist and impacts tribes both in terms of right to sue and in terms of their moral-based claims upon the government. If tribes do not engage themselves in the trade-off decisions, the government will define the trade-off terms for them.

Few Indian law scholars, activists, or tribes are likely to disagree that the choice to leverage the trade-off or to determine the direction self-determination takes in so far as it impacts upon government trust duties rightly belong to the individual tribal governments and not with the United States Government. However, my position that now is the time to consider the trade-off is probably more contentious. It is undeniable that tribes still suffer great hardships and that the government owes tribes much more and will continue to owe tribes and tribal members services and protection well into the future. However, the Navajo Nation and United States v. White Mountain Apache Tribe\textsuperscript{339} cases make it clear that it is a mistake to delay discussing the trade-off.

Different tribes will have, and should have, different stances with regard to whether or not to lessen the government's

\textsuperscript{338} 537 U.S. 488 (2003).

\textsuperscript{339} 537 U.S. 465 (2003).
trust duties; however, this power of choice is likely to expand as the nascent tribal leadership develops and tribes gain more experience-based strength. Yet, tribes are not going to be able to assert that the government owes tribes a high trust duty of protection and simultaneously enjoy full independence from government control. The tribes likely to be the most successful in navigating this trade-off are going to be those tribes that recognize their own limits while also being willing to accept temporary failures which cannot be attributed to government wrong-doing and should not provide the basis for a damages claim. Success is not guaranteed for any tribal endeavor and the most successful tribes will be those who carefully consider how they would like to structure the trade-off between trust protection and meaningful self-determination.