Establishing a "Duty to Not Destroy":

Using Fiduciary Duty to Hold Settler-Colonial States Responsible for Cultural and Linguistic Harms Committed Against Indigenous Students at Government-Run Boarding Schools

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Introduction

The United States is the last of the archetypal settler-colonial nations to address the atrocities committed against indigenous attendants of government-run boarding schools.[1] In the other settler-colonial states (Canada, New Zealand, and Australia), plaintiffs have asserted violation of fiduciary duty claims to hold the government accountable for loss of cultural heritage, including linguistic harms.[2] The U.S. shares common law and history with Canada, Australia, and New Zealand: all are former colonies of the British Empire and British common law guided the initial interactions and eventual early agreements between settlers and indigenous tribes. Over the last 100 years, investigations into cultural harms against indigenous populations in schools (Canada and Australia) and more generally (New Zealand) have given rise to lawsuits alleging cultural harms. Both potential plaintiffs and the U.S. government can learn from their international peers regarding what to expect for legal challenges following the conclusion of investigations underway in the United States.

In May 2022, the U.S. Department of the Interior published a report investigating the Federal Indian Boarding School Initiative to "examine the scope of the system, with a focus on the location of schools, burial sites, and identification of children who attended the

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1. Holly Jacobs, *Settler Colonialism and Assimilative Education: Comparing Federal Reconciliation Efforts for Indigenous Residential and Boarding Schools in Canada and the United States*, 19 LOY. U. CHI. INT'L L. REV. 73, 105 (2022).

2. *See* discussion *infra* Section I.B.

schools."[3] The report found evidence for atrocities.[4] In its conclusion, the report acknowledged the assimilation policies directed at children in the boarding schools "contributed to the loss" of "life," "physical and mental health," "territories and wealth," "Tribal and family relations," "use of Tribal languages," and "the erosion of Tribal religious and cultural practices."[5]

While the Department of the Interior's official report acknowledged the atrocities and trauma inflicted by the boarding schools, the DOI has not apologized for the program and its effects at this time. One possible reason is that the DOI has not concluded its investigation. In response to the publication of the DOI report, the National Endowment for the Humanities is sponsoring an oral histories project through the end of 2023 to record the experiences of those who attended such boarding schools.[6] The information that comes out of the oral histories is expected to confirm and expand upon what the DOI's initial report found.[7]

This is not the first time that the U.S. government has acknowledged the harm of the boarding schools. On the 175th anniversary of the creation of the Bureau of Indian Affairs, the then-Assistant Secretary, Kevin Gover, issued an apology in his official capacity. [8] Gover directly acknowledged that the conduct of the schools brutalized the children in the boarding schools "emotionally, psychologically, physically, and spiritually" and the resulting "trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian Country."[9]

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3. BUREAU OF INDIAN AFFAIRS, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 3 (2022).

4. *Id.* at 93.

5. *Id.* at 94.

6. U.S. Dep't of the Interior, *Interior Department and National Endowment for the Humanities Partner to Preserve Federal Indian Boarding School Oral History and Records* (Apr. 26, 2023), https://www.doi.gov/pressreleases/interior-department-national-endowment-humanities-partner-preserve-federal-indian. *See generally* Nat'l Endowment for the Humanities, *Call for Proposals: The History of U.S. Government-Sponsored Boarding Schools for Native American Children* (Nov. 8, 2024), https://www.neh.gov/program/History-of-Boarding-Schools; U.S. Dep't of the Interior, *Interior Department Launches Effort to Preserve Federal Indian Boarding School Oral History* (Sept. 26, 2023).

7. Austin Cope, *The U.S. is Reckoning with its Troubled Past of Indian Boarding Schools*, NPR (June 23, 2022), https://www.npr.org/2022/06/23/1106944327/deb-haaland-indian-boarding-schools.

8. Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against The Government For American Indian Boarding School Abuses*, 4 HASTINGS RACE POVERTY L.J. 45, 75–76 (2006).

9. *Id.*

Even with this direct acknowledgment, there has been no recourse for victims of the Indian Boarding Schools in the United States. Options for survivors and descendants in the U.S. to seek justice for their lost language and cultural heritage are unclear. This note will analyze the legal arguments around breach of fiduciary duty to indigenous populations as a legal strategy to seek redress for cultural harm suffered at boarding schools. The first section will discuss the lack of remedy in international law; similar efforts by indigenous peoples to sue for cultural harms suffered as a breach of fiduciary duty in Canada, New Zealand, and Australia; and the trust doctrine in the U.S. The second section will discuss how fiduciary duty has been applied to cultural harms in Canada and New Zealand as well as what potential American plaintiffs could allege when filing similar suits in the U.S.

I. BACKGROUND

A. BREACH OF FIDUCIARY DUTY UNDER DOMESTIC LAW IS LIKELY THE ONLY LEGAL THEORY UNDER WHICH SURVIVORS CAN MAKE CLAIMS BECAUSE CULTURAL GENOCIDE WITHIN INTERNATIONAL LAW DOES NOT PROVIDE A JUSTICIABLE CLAIM FOR BOARDING SCHOOL SURVIVORS.

Cultural genocide is the destruction of "the unique cultural attributes" of human groups through the "intentional destruction of the cultural heritage, objects and practices" belonging to that group.[10] Cultural genocide often accompanies conflict, but has been systematically employed by multiple states as a "technique to subdue indigenous populations" including as the cornerstone of residential boarding schools for native children in the U.S., Canada, Australia, and New Zealand. [11] The New York Times' reporting on the most recent settlement in Canada—proclaiming the settlement acknowledged cultural genocide—is misleading.[12] Though powerful public figures like Prime Minister Justin Trudeau and Pope Francis have said that cultural genocide was committed against boarding school survivors,

10. David Nersessian, *A Modern Perspective: The Current Status of Cultural Genocide Under International Law*, *in* CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS 62, 62 (Jeffrey S. Bachman ed., 2019).

11. *Id.*

12. Ian Austen, *Canada Settles $2 Billion Suit Over 'Cultural Genocide' at Residential Schools*, N.Y. TIMES (Jan. 21, 2023), https://www.nytimes.com/2023/01/21/canada-indigenous-settlement.html.

the courts did not legally recognize it as "cultural genocide."[13]

The term "genocide" was coined by Raphael Lemkin, a Polish law professor, "to describe Nazi race policy in occupied Europe during World War II."[14] Lemkin's construction of the term was broad; he included "eight dimensions of genocide," including cultural.[15] Lemkin argued that a group existed in multiple "dimensions" and an attack to any or all of those dimensions was genocide because the victim was the "collective" rather than any one individual.[16] Cultural genocide constituted the destruction of the "group's unique cultural, linguistic, and religious characteristics."[17] According to David Nersessian, the "destruction could manifest against group members as well as group institutions" and "[i]t protected group members as *persons* by covering matters such as . . . abolishing the group's unique language, and restricting education in the customs of the targeted group."[18] This idea was reflected in the first and second drafts of the UN Convention on Cultural Genocide, but was eliminated from the subsequent drafts (and not included in the final version) because cultural genocide was seen to be "distinct" and not as severe as physical or biological genocide.[19] The convention does include a provision protecting families "against the forcible transfer of the group's children to environments where they would be indoctrinated into the customs, language, religion and values of another group" (because this would be "tantamount to the destruction of the group").[20] In other words, cultural genocide is only protected indirectly through a prohibition of biological genocide. However, the Convention includes no direct prohibition of cultural genocide.

This legal theory was tried in Australia but failed in the "Stolen Generations" cases. The High Court of Australia interpreted, under international law, that for genocide to apply, there must be an "intent to destroy, in whole or in part, a national, ethnic, racial or religious

13. Ka'nhehsí:io Deer, *Pope Says Genocide Took Place at Canada's Residential Schools*, CBC NEWS (Jul. 30, 2022), https://www.cbc.ca/news/indigenous/pope-francis-residential-schools-genocide-1.6537203; Maan Alhmidi, *Trudeau's Acknowledgment Of Indigenous Genocide Could Have Legal Impacts: Experts*, NAT'L POST (June 5, 2021), https://nationalpost.com/news/canada/trudeaus-acknowledgment-of-indigenous-genocide-could-have-legal-impacts-experts.

14. Nersessian, *supra* note 10, at 64.

15. *Id.* (identifying the eight dimensions as: political, social, cultural, economic, biological, physical, religious, and moral).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 10–11 (highlighting one representative's argument that library closures are not comparable to acts of physical genocide).

20. *Id.* at 10.

group."[21] In reviewing relevant text of the 1918 Aboriginal Ordinance, the court found, "[t]here is nothing in the Ordinance, according to it the ordinary principles of construction, which would justify a conclusion that it authorised acts 'with intent to destroy, in whole or in part' the plaintiffs' racial group."[22] This text is fairly similar to other statutes in the U.S. and Canada which proclaimed the state's obligations as educators. While the intent may be understood from historical context, the language alone will not provide sufficient intent to qualify for cultural genocide. Therefore, even if public figures acknowledge that cultural genocide took place because of the boarding school policies, it does not provide survivors with a justiciable claim under international law (whether adjudicated domestically or internationally).

There are international and domestic laws that protect tangible cultural artifacts. While the protection of cultural artifacts remains an important part of preserving a heritage, intangible cultural heritage (like customs and language) has been excluded from protection. For example, statutory protection under American law, like the Native American Graves Protection and Repatriation Act (NAGPRA), focuses on tangible items, like artifacts and gravesites.[23] The conservation of physical manifestations of intangible culture (like recordings of traditional music) is promoted by the non-binding Protocols for Native American Archival Materials, which provide archivists and librarians with guidance on best practices regarding care of these materials.[24] Since 2003, UNESCO annually compiles a list of intangible cultural heritage (similar to the World Heritage Site lists).[25] While items added to that list are monitored, "safeguarding" of the heritage is the responsibility of the member-state and there is no judicial enforcement mechanism for states that either fail to do so or who actively seek to destroy the intangible culture.[26] Even still, the type of intangible culture that has been recognized most in recent lawsuits, language, is not among the intangible heritage that is eligible for protection by UNESCO because it is not considered cultural heritage

21. Kruger v. Commonwealth (1997) 190 CLR 1, 37 (Austl.).

22. *Id.* at 51.

23. Kay Mathiesen, *A defense of Native Americans' rights over their traditional cultural expressions*, 75 AM. ARCHIVIST 456, 464 (2012).

24. *See id.*

25. UNESCO, *Frequently Asked Questions: What are the Responsibilities of States that Ratify the Convention*, https://ich.unesco.org/en/faq-00021 (last visited Apr. 20, 2025).

26. *See* UNESCO, *Frequently Asked Questions*: *Once Elements Are Included on the Lists, What Steps Does UNESCO Take to Safeguard Them?*, https://ich.unesco.org/en/faq-00021 (last visited Apr. 4, 2025).

under the 2003 Convention.[27]

Even if remedies were available under international law, plaintiffs must exhaust all domestic remedies before putting their case before international courts. Furthermore, courts in the U.S., which had the largest residential boarding school system, are rarely persuaded by international law. Therefore, an effective potential cause of action under domestic law would be the only way forward for survivors in the U.S. Two recent settlements with indigenous peoples in Canada and New Zealand in the 2020s over loss of culture through assimilation (i.e., cultural genocide) provide a potential avenue for plaintiffs under domestic common law.[28]

Though survivors might be able to sue for the physical, emotional, psychological, and sexual abuse they faced in the schools, survivors in New Zealand, Canada and Australia have had mixed success. While the New Zealand and Canadian government acknowledged harms and provided settlements for the abuse suffered at the boarding schools, courts in Australia have barred claims due to limitations of fiduciary duty law in the Commonwealth, and the equitable defense of laches even if a fiduciary duty was in fact breached. [29] Scholars in the U.S. have similarly expressed concerns that even where the statute of limitations would not apply, laches would likely be a difficult barrier for survivors.[30] Yet, if plaintiffs could sue the state and not individuals for breach of fiduciary duty, suing for loss of language could provide the only avenue not subject to statute of limitations or laches because the harm is ongoing; thus the best avenue for recourse in the American judicial system by eliminating statutes of limitations arguments.

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27. *See* UNESCO, *Frequently Asked Questions: Are Languages in Danger or Religions Eligible for Inscription?*, https://ich.unesco.org/en/faq-00021 (last visited Apr. 20, 2025).

28. *See* Austen, *supra* note 12 (detailing Canada's 2023 settlement); *see* Eva Corlett, *Long Fight for Justice Ends as New Zealand Treaty Recognises Moriori People*, GUARDIAN (Nov. 26, 2021), https://www.theguardian.com/world/2021/nov/26/long-fight-for-justice-ends-as-new-zealand-treaty-recognises-moriori-people discussing New Zealand's 2021 settlement).

29. *See, e.g.*, Amanda Jones, *The State and the Stolen Generation: Recognising a Fiduciary Duty*, 28 MONASH U. L.R. 59, 65–67 (2002) (explaining that "[r]elationships which are fiduciary in character but do not come with an economic context are difficult to fit into the Australian concept of fiduciary law").

30. Curcio, *supra* note 8 at 84–85.

B. CLAIMS OF BREACHING FIDUCIARY DUTY HAVE THE POTENTIAL TO PROVIDE JUSTICIABLE CLAIMS FOR CULTURAL HARMS.

General trust law provides the basis for a trust responsibility. [31] The essential tenants of trust law principles are that "a trust is created when property is placed under the control of one party (the trustee) for the benefit of a second party (the beneficiary)." [32] Under the law of equity, trustees assume fiduciary duties related to their responsibility. At minimum, a "trustee must remain loyal to the beneficiary: they must act in the beneficiary's best interests with all skill, care, diligence and expertise available; and they must preserve and protect the trust property." [33]

Across Canada, New Zealand, Australia, and the U.S., the relationship between the state and indigenous populations is most often characterized as that of a guardian (the state) and a ward (the indigenous peoples/tribes). In the 18th and 19th centuries, the guardian/ward relationship was a recognized relationship where fiduciary duty applied. [34] A ward had two types of guardians and these roles could be assumed by the same person or two different people. In the context of indigenous children, the guardian of the estate was "entrusted with the personal and real property of the child" and had the traditional duties associated with a trust where the guardian must not have a conflict of interest with the trustee (ward) in a transaction nor "derive profit from the position of the trustee." [35] A guardian of the person is also a trustee and is subject to a high standard of behavior to prevent the guardian "from exercising his legal powers to the infant's detriment."[36] The "positive duties" assumed by a guardian of the person include "shield[ing] and protect[ing] the ward," and educating the ward by "selecting a proper school," while "pay[ing] deference to the parents' choice of education and religious faith."[37]

While Canada has a robust jurisprudence surrounding fiduciary duties and indigenous populations, courts in Australia are reluctant to interpret their law to find a fiduciary duty.[38] The U.S. has long

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31. Emma Hensman, *In the Bonds of Trust We Meet: A Comparison of the United States Doctrine of Trust Responsibility and a Crown-Maori Fiduciary Relationship*, 3 PUB. INT. L.J. N.Z. 96, 100 (2016).

32. *Id.*

33. *Id.*

34. Jones, *supra* note 29, at 80–81.

35. *Id*. at 81.

36. *Id.*

37. *Id.*

38. *Id.* at 84 ("Fiduciary law in Canada now protects non-economic interests by imposing positive duties in some circumstances. Australian courts have rejected the

recognized a trust responsibility to Native Americans, but those duties are limited. This section will discuss the differences in the relationships between governments and indigenous populations in the U.S., Canada, New Zealand, and Australia; the duties which result from those relationships; and if these duties extend to cultural or linguistic protection.

1. Canada leads common law settler-colonial state jurisdictions on the use of fiduciary duty to protect the interests of First Nations peoples.

Canadian jurisprudence has the most developed and "sophisticated" law regarding fiduciary duty and indigenous populations.[39] The Constitution Act 1982 codified the government's recognized and existing fiduciary duty to indigenous populations.[40] The seminal case in Canada is *Guerin v. The Queen* (1984) which "characterizes the relationship between Indigenous peoples and the state as a fiduciary relationship" and depending on the context, can include "private duties."[41] *Frame v. Smith* articulates the standard to determine if a duty exists and was later adopted by the Supreme Court of Canada. [42] A relationship is a fiduciary one when:

> (i) The fiduciary has scope for the exercise of some discretion or power.
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> (ii) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
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> (iii) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [43]

Duty to the indigenous populations in Canada arises from multiple sources and there is not uniform agreement for a single

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application of the Canadian developments.").

39. Gerald Lanning, *The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship*, 8 AUCKLAND UNIV. L. REV. 445, 447 (1997).

40. Hensman, *supra* note 31, at 116.

41. Kirsty Gover & Nicole Roughan, *The Fiduciary Crown: The Private Duties of Public Actors in State–Indigenous Relationships*, *in* FIDUCIARIES AND TRUST 198, 198 (Paul B. Miller & Matthew Harding eds., 1st ed. 2020).

42. Lanning, *supra* note 39, at 447.

43. *Id.*

source.[44] In *Guerin v. The Queen*, Chief Justice Brian Dickson, writing for the majority, interpreted the start of the fiduciary relationship prior to "the surrender" because of the "nature of the pre-existing Indian title and the Crown's statutory obligation to the First Nation peoples."[45] Subsequent obligations arise from the statutes following the surrender, but they are in addition to the pre-existing duties.[46] Justice Bertha Wilson, concurring, disagreed and interpreted the origin of the fiduciary relationship between Canada and indigenous people as the Indian Act.[47] Overall, *Guerin* established that the relationship was not a trust—but instead a fiduciary duty—and that a breach of the duty would make the Crown "liable to the Indians in the same way and to the same extent as if such a trust were in effect."[48]

In *R v. Sparrow*, the Supreme Court of Canada created a test for interpreting a fiduciary duty in light of a conflicting statute.[49] The "justificatory standard" requires first answering "whether the legislation in question has the effect of interfering with an existing aboriginal right."[50] If yes, then it is "a prima facie infringement."[51] To prove if there is an interference, the three following questions must be answered in the affirmative: "(1) Is the limitation unreasonable? (2) Does the regulation impose undue hardship? And (3) Does the regulation deny to the holders of that right their preferred means of exercising that right?"[52] If proven, then the Crown has the burden to justify the interference.[53] The standard to prove justification requires an affirmative answer to the following four questions:

> (1) Is there a valid legislative objective?
>
> (2) Is there a link between the question of justification and the allocation of priorities within the affected group?
>
> (3) Is there as little infringement as possible in order to achieve the desired objective?

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44. *Id.* at 454.
45. *Id.* at 451.
46. *Id.*
47. *Id.*
48. *Id.* at 450.
49. *Id.* at 461 (holding that legislation cannot be enacted which limits aboriginal rights unless "substantial and compelling policy objectives require their limitation").
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 461–62.

> (4) Is fair compensation available and/or has any consultation occurred?[54]

If the Crown does meet its burden of proof, then the new regulation will be given preference to the conflicting statute. In other words, the Canadian government can legislate their duties to the First Nations but cannot enact legislation that will limit aboriginal rights unless "substantial and compelling policy objectives require their limitation."[55]

First Nations have sought to expand the duties to include protections for their cultural and linguistic rights. Starting in 2012, survivors of the day schools, schools for First Nation children on or near reservations that were part of the national program of compulsory education for those aged 7 to 15, filed a suit against the government of Canada for the atrocities they suffered.[56] Survivors of the residential schools, where students lived at the schools, had already received a settlement, the Indian Residential Schools Settlement Agreement, but this settlement excluded students who did not live at the school.[57] The day school survivors claimed that Canada had breached its fiduciary duty to protect their culture and language and breached their cultural and linguistic aboriginal rights.[58] They sought relief through a class action lawsuit which made the case novel for two reasons: (1) they were suing for collective losses[59] and (2) they were suing for loss of culture and language.[60]

Regarding the duty to protect their culture and language, the plaintiffs asserted that Canada was in breach of its constitutional, statutory, and common law fiduciary duties.[61] First, Canada had a duty

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54. *Id.* at 462.

55. *Id*. at 461–62.

56. *Day Scholars Survivor and Descendant Class Settlement Agreement*, Gottfriedson v. Canada, No. T-1542-12, 2021 FC 1 (Can.) [hereinafter Settlement Agreement], https://www.justicefordayscholars.com/wp-content/uploads/2021/06/Gottfriedson-Settlement-Agreement-FINAL-Signatures-Added.pdf.

57. *Id.* ¶ 14, Schedule C. *Note:* This settlement is separate from the "McLean Settlement," a class action lawsuit brought by survivors of the Federal Indian Day Schools run by the Canadian government. *See generally* Settlement Agreement, *McLean v. Canada*, No. T-2169-16 (Fed. Ct. filed Mar. 12, 2019), https://indiandayschools.com/en/wp-content/uploads/2019/03/Signed-Settlement-Agreement.pdf.

58. Gottfriedson v. Canada, 2023 FC 327, ¶ 36, No. T-1542-12 (Can.).

59. *Id.* at ¶ 77.

60. *Id.* at ¶ 78.

61. Gottfriedson v. Canada, 2015 FC 706, *Reasons for Order*, ¶ 16, No. T-1542-12

to protect First Nations peoples because Canada entered into a trust relationship with them either through the Constitution Acts of 1867 or through treaties.[62] Second, the Indian Act was amended in 1920 to make school attendance mandatory for all First Nations children aged 7 to 15.[63] The schools were designed by the Canadian government who "controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools" (including schools where students could attend as "day students" and would return home to their families at the end of the day).[64] The plaintiffs alleged that the preexisting trust relationship combined with mandatory attendance by a minor population (therefore "vulnerable") at a school controlled by Canada created a fiduciary responsibility for the education and welfare of the First Nations students.[65]

Canada's constitutional duties require the state to "uphold the honour of the Crown in all dealings with Aboriginal peoples."[66] The duty to protect the culture and language is drawn from the aboriginal rights initiated by the Crown from the point of first contact, emphasized in the Royal Proclamation of 1763, and continuing through post-treaty relationships.[67] Therefore, plaintiffs alleged that Canada had the duty to protect the tribes' language, culture and customs in the residential schools.[68] When the class was certified, the judge amended the duty to "protect" as a "duty not to take steps to destroy" stating this interpretation was more apt because a residential school would draw students from multiple tribes and would not have assumed the responsibility to protect all of their tribal languages nor would have reasonably been able to do so.[69]

Finally, the plaintiffs allege that regardless of the specific duties to protect culture and language, Canada had the duty "not to deliberately reduce the number of the beneficiaries to whom Canada owed its duties."[70] The plaintiffs allege that preventing students from—and punishing students for—using their languages or practicing their customs at the residential schools was in the self-interest of the state and contrary to the interests of the Aboriginal

(Can. Fed. Ct.).

62. Settlement Agreement, *supra* note 56, ¶¶ 65–66, Schedule A.
63. *Id.* at ¶ 11, Schedule H.
64. *Id.* at ¶ 10, Schedule H.
65. *Id.* at ¶ 54, Schedule H.
66. *Id.* at ¶ 40, Schedule H.
67. *Id.* at ¶¶ 7, 40, Schedule H.
68. *Id.* at ¶ 41, Schedule H.
69. Gottfriedson v. Canada, 2015 FC 706, ¶ 95, No. T-1542-12 (Can. Fed. Ct.).
70. Settlement Agreement, *supra* note 56, at ¶ 41, Schedule H.

children.[71] They argued that the residential schools policy was not only designed to "kill the Indian in the child," but to change the students so fundamentally that under the law they would no longer have the legal status of "Aboriginal."[72] For example, students who became doctors or joined the clergy were no longer considered "Aboriginal" and thus no longer entitled to the protection of Canada.[73] Furthermore, becoming fluent in English was another way that "Aboriginal" status could be revoked from a student.[74] The plaintiffs argue this was part of a broader scheme for "Canada to relieve itself of its moral and financial responsibilities for Aboriginal People, the expense and inconvenience of dealing with cultures, languages, habits and values different from Canada's predominant Euro-Canadian heritage, and the challenges arising from land claims."[75] In other words, the more Aboriginal individuals they could transform in the schools, the fewer that would become part of the trust, so that eventually the people subject to the fiduciary duty would progressively diminish to zero.[76] Therefore, the plaintiffs concluded that Canada must have breached its fiduciary duty insofar that, through assimilation carried out in residential schools, Canada, in effect, sought to eliminate its fiduciary duty by changing the status of—and thus actively reducing—those protected by the fiduciary duty itself.[77]

In *Tk'emlúps te Secwépemc First Nation v. Canada*, the legal theory advanced by the plaintiffs is that Canada breached its constitutional, statutory and common law fiduciary duty to protect their language and culture.[78] This theory was sufficient for the prima facie case submitted to the Canadian Supreme Court to allow it to survive a motion to dismiss and certify the classes.[79] Ultimately, the court never needed to decide whether Canada had breached fiduciary and constitutional mandated duties as asserted by the plaintiffs because

71. *Id.* at ¶ 43.

72. *Id.* at ¶¶ 32, 43.

73. Indian Act, 39 Vict., c. 18, s. 86 (Can.). *See* Coel Kirkby, *Reconstituting Canada: The Enfranchisement and Disenfranchisement of "Indians," Circa 1837–1900*, 69 U. Toronto L.J. 497, 531 n.50 (2019) (discussing how Section 86 of the Indian Act enabled the automatic enfranchisement of, and the loss of "aboriginal status" by, Indigenous persons who had received "a university degree or qualified as a doctor, lawyer, or ordained priest").

74. *Id.*

75. Settlement Agreement, supra note 56, at ¶ 43, Schedule H.

76. *Id*. at ¶ 6.

77. *Id*. at ¶ 41.

78. *Id.* at ¶ 44.

79. Gottfriedson v. Canada, 2015 FC 706, ¶ 95, No. T-1542-12 (Can. Fed. Ct.).

the case was settled.[80] The court approved the settlement agreement, but stated that "the Release does not settle, compromise, release or limit in any way whatsoever any claims by the Releasors . . . in another action, claim, lawsuit or complaint regarding . . . a breach of fiduciary duty."[81] Even though the fund created by the settlement is specifically designed to address the loss of cultural heritage and language due to the residential school program, the state admitted no liability as part of the settlement.[82] Therefore, this cannot be considered a strict precedent in Canadian law. However, the commentary in the orders demonstrates that similar claims should not be automatically dismissed in Canada.

There is also existing common law precedent in Canada protecting linguistic rights. In *Joseph v. Canada*, the issue was "[w]hether a claim for cultural loss is cognizable at law, and if so, how it should be valued." [83] Because the Ontario Court of Appeals still certified the class in that suit and other provincial courts followed this precedent, cultural harms are cognizable claims in Canada.[84] Additionally, the court cited cases recognizing the rights of minority French or English speakers to receive education in their native language in Canada as another precedent demonstrating it was "not plain and obvious the plaintiffs cannot succeed."[85]

2. Fiduciary duty between New Zealand and indigenous populations, while primarily based in treaties and legally underdeveloped, is evolving as the Waitangi Tribunal continues to rule on cases and review treaty provisions.

The standard for finding a fiduciary relationship, and the scope of that relationship, is determined by common law in New Zealand. The court first addressed this issue in *Wakatū v. Attorney General*.[86] This case was heard in a special tribunal, the Waitangi Tribunal, established specifically to address harms perpetuated by the government against the indigenous peoples of New Zealand.[87] In

80. Gottfriedson v. Canada, [2015] F.C.R. 706, ¶ 4(a) (Can.).

81. *Id*. at ¶ 4(c).

82. *See generally* Settlement Agreement, *supra* note 56, at § 2.

83. Gottfriedson v. Canada, [2015] F.C.R. 706, ¶ 4(a) (Can.).

84. *Id*.

85. *Id*. at ¶¶ 42–43.

86. *See generally* Cate Barnett, *Wakatū*: Crown-Maori Fiduciary Obligations and the Ongoing Relevance of the Te Tirito O Waitangi (2018) (LLB Honors Dissertation, Victoria University of Wellington) (on file with the Victoria University of Wellington).

87. Alex Frame, *The Fiduciary Duties of the Crown to Maori: Will the Canadian Remedy Travel?*, 13 WAIKATO L.R. 70, 82 (2005).

Wakatū v. Attorney General, the Supreme Court of New Zealand adopted Canada's *Frame v. Smith* criteria and upheld fiduciary interest in property transactions between the Crown and the Maori, but did not extend that fiduciary duty generally.[88] The holding in *Wakatū v. Attorney General* created a standard of case-by-case, fact-led analysis for determining if a fiduciary duty existed.[89]

Upholding the fiduciary duty, albeit a limited duty, does make this duty, "part of a line of jurisprudence departing from earlier cases characterizing state–Indigenous relationships as non-justiciable 'political trusts', having a moral but not legal character".[90] In *Cook v. Evatt*, the Court established the standard for determining the scope of the fiduciary relationship.[91] The scope is "determined by the nature and extent of the reliance or trust which has been placed upon or in the fiduciary."[92]

While the New Zealand courts have articulated that the Crown does owe certain duties to the Maori, it is reluctant to hold these duties as fiduciary in nature. [93] Many scholars argue that a fiduciary relationship exists through "a combination of the Treaty of Waitangi, the unique nature of aboriginal title and the historical course of dealings." [94] Though the treaty alone does not create the duty, it can be seen as "an explicit and formal assumption of responsibility"[95] and the Treaty "is commonly accepted as New Zealand's constitutional 'founding document'."[96]

The issue continues to be frequently litigated,[97] but the courts remain reluctant to declare a fiduciary duty between the Crown and the Maori. The most likely reason is that in acknowledging a fiduciary duty to the Maori, it would interfere with the Crown's "political accountability" to all New Zealanders. [98] As "[c]onflicting duties negate

88. Gover and Roughan, *supra* note 41, at 198.
89. Lanning, *supra* note 39, at 447.
90. Gover and Roughan, *supra* note 41, at 198.
91. Lanning, *supra* note 39, at 458.
92. *Id.*
93. Hensman, *supra* note 31, at 108.
94. *Id.* at 117.
95. *Id.*
96. *Id.* at 108.
97. *Id.*
98. *Id.* This remains a point of contention in New Zealand politics as demonstrated by the introduction of a recent bill related to the Treaty of Waitangi. On November 14, 2024, a bill was introduced in Parliament questioning the legality of the interpretation of the Treaty of Waitangi. *See generally* The Principles of the Treaty of Waitangi Bill 2024 (94-1) (N.Z.). The Principles of the Treaty of Waitangi Bill was introduced by David Seymour, a Maori, and member of the libertarian ACT Party. *See* Sarah Shamim, *Why are New Zealand's Maori protesting over colonial-era treaty bill?*,

the absolute duty of loyalty required under a fiduciary duty," this likely explains the court's reluctance to create a duty in all but very specific circumstances. [99]

The issue of language was also tried before the Waitangi Tribunal in the *Te Reo Māori Claim* in 1985.[100] The claimants argued that the Maori language was "a taonga (treasure) that the Crown (government) was obliged to protect under the Treaty of Waitangi."[101] The Tribunal sided with the claimants and produced an extensive report articulating the government's culpability, including in schools, in reducing the number of Maori speakers.[102] The report also included testimony from respected public figures who discussed the abuses they faced in schools as part of assimilation practices, including punishments for using Maori, and the generational harms resulting from these policies.[103] To protect the Maori language from extinction,

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AL JAZEERA (Nov 19, 2024), https://www.aljazeera.com/news/2024/11/19/why-are-new-zealands-maori-protesting-over-colonial-era-treaty-bill. According to *Al Jazeera*, "The ACT Party asserts that the treaty has been misinterpreted over the decades and that this has led to the formation of a dual system for New Zealanders, where Maori and white New Zealanders have different political and legal rights. Seymour says that misinterpretations of the treaty's meaning have effectively given Maori people special treatment. The bill calls for an end to "division by race"." *Id. See also* The Principles of the Treaty of Waitangi Bill 2024 (94-1) at reg 2(6)(3), (N.Z.). The bill was largely protested by Maori and New Zealanders alike and is generally considered to undermine the rights of the Maori in New Zealand. *See* Ayeshea Perera, *Thousands of Māori bill protesters reach New Zealand parliament?*, BBC (Nov 19, 2024), https://www.bbc.com/news/live/ckgrwem73gmt; *see also* Eva Corlett, *'It's about togetherness': Waitangi Day captures a new audience*, GUARDIAN (Nov 19, 2024), https://www.theguardian.com/world/2025/feb/06/new-zealand-waitangi-treaty-day-nz-government-maori-policies. Scholars and the Ministry of Justice agree the Bill is "inconsistent" with the principles of the Treaty. *See* The Principles of the Treaty of Waitangi Bill 2024 (94-1) (regulatory impact assessment) (N.Z.) ("The Ministry of Justice's Regulatory Impact Assessment states that the policy is not consistent with the Treaty/te Tiriti. Similarly, the Waitangi Tribunal found that the Treaty Principles Bill policy is unfair, discriminatory, and inconsistent with the principles of the Treaty, contrary to the article 2 guarantee of tino rangatiratanga and will be significantly prejudicial to Māori."); *see also* Annabel Ahuriri-Driscoll, *The Treaty Principles Bill's promise of 'equal rights' ignores the blind spots of our democracy*, THE CONVERSATION (Jan 30, 2025), https://theconversation.com/the-treaty-principles-bills-promise-of-equal-rights-ignores-the-blind-spots-of-our-democracy-248121.

99. *Id.*

100. *History of the Maori language, N.Z.* MINISTRY FOR CULTURE AND HERITAGE, https://nzhistory.govt.nz/culture/maori-language-week/history-of-the-maori-language (last updated Sep. 16, 2024).

101. *Id.*

102. Maori Language Act 1987, No 176 (N.Z.).

103. *See generally Report of The Waitangi Tribunal on The Te Reo Maori Claim*, THE WAITANGI TRIBUNAL,

https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68482156/Report%20on%20the%20Te%20Reo%20Maori%20Claim%20W.pdf (last visited Apr. 20,

the government enacted the Maori Language Act in 1987 and has periodically updated it, including appealing and passing a new law in 2016.[104]

The *Moriori Deed of Settlement* was signed and enacted into law to provide reparations and restitution to the Moriori peoples in New Zealand in 2021.[105] The Moriori are a distinct tribe from the Maori.[106] For over a century, government museums "collected and exchanged" human remains and cultural artifacts of the Moriori.[107] Additionally, the government, through its mandated school curriculum, perpetuated the myth that the Moriori were extinct and inferior to the Maori.[108] The persistence of this myth remains today and continues to harm the Moriori by creating a stigma so strong that "generations have been reluctant to identify as Moriori or have not been told that they are Moriori, growing up in ignorance of their heritage."[109] The Moriori began to challenge the myth at the government level in the 1970s which has culminated in the settlement in 2021.[110]

Claims were brought before the Waitangi Tribunal to determine the duty owed to the Moriori since they had not been a signee of any treaty with the Crown or subsequent governments of New Zealand.[111] In the 1830s, prior to the annexation by the Crown of the Chatham Islands, the ancestral home of the Moriori, two Maori tribes "sailed on a British ship" there and "attacked, killed and enslaved the Moriori."[112] In 1840, the Lieutenant-Governor of New Zealand signed a peace treaty with Maori.[113] The Crown was aware of the enslavement of the

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2025).

104. *Id.*

105. *About the Treaty*, THE WAITANGI TRIBUNAL, https://www.waitangitribunal.govt.nz/en/about/the-treaty/about-the-treaty (last visited Apr. 20, 2025).

106. *Moriori*, TE TARI WHAKATAU, https://whakatau.govt.nz/te-kahui-whakatau-treaty-settlements/find-a-treaty-settlement/moriori (last visited Apr. 20, 2025).

107. *Id*.

108. *Id.*

109. *Id.*

110. *Moriori Claims Settlement Bill 2020: Bills Digest 2634*, NEW ZEALAND PARLIAMENT (Nov. 1, 2021) [hereinafter *Moriori Claims Settlement Bill 2020*], https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/53PLLaw26341/moriori-claims-settlement-bill-2020-bills-digest-2634.

111. *Id. See also* Lanning, *supra* note 39, at 454.

112. *Moriori Claims Settlement Bill 2020*, *supra* note 110.

113. *The Treaty in Brief*, NEW ZEALAND HISTORY, https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief (last updated May 17. 2017).

Moriori by the Maori and took no action until the late 1850s.[114] The Waitangi Tribunal concluded that because the Moriori were under the control of Maori and not given an opportunity to sign the treaty on their own, and the representatives of the Crown were aware of their enslavement, the treaty signed with the Maori extends to the Moriori.[115]

The Tribunal employed several principles to determine the duty owed to the Moriori per the Treaty when analyzing Article 3. These principles included: (1) prioritizing the intention of the parties, (2) considering the overall aim and purpose of the treaty, (3) regarding neither translation of the treaty as superior, but giving greater weight to the interpretation of the Maori translation "because almost all Māori signatories signed the Māori text," (4) employing the contra proferentem rule,[116] (5) utilizing the 'indulgent rule,'[117] and (6) interpreting the treaties within the context in which they were written.[118] Though they did not prioritize a treaty in one language over another, they focused on what the Maori understood the treaty to mean at the time it was signed and decided that understanding would become the meaning in force.

In English, Article 3 stated, "In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects."[119] In comparison, the translated Maori text says, "For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England."[120]

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114. *Moriori Claims Settlement Bill 2020*, *supra* note 110.

115. *See Rekohu: Report on the Moriori and Ngäti Mutunga Claims in the Chatham*, WAITANGI TRIBUNAL (May/June 2001), https://www.waitangitribunal.govt.nz/assets/Te-Manutukutuku/Te-Manutukutuku-Issue-53.pdf.

116. TE PUNI KŌKIRI, HE TIROHANGA O KAWA KI TE TIRITI O WAITANGI [A GUIDE TO THE PRINCIPLES OF THE TREATY OF WAITANGI] 19 (2001), https://www.tpk.govt.nz/en/o-matou-mohiotanga/crownmaori-relations/he-tirohanga-o-kawa-ki-te-tiriti-o-waitangi (explaining that "in the event of ambiguity such a provision should be construed against the party which drafted or proposed that provision").

117. *Id.* ("The United States Supreme Court 'indulgent rule' that treaties with indigenous people (American Indians) should be construed 'in the sense which they would naturally be understood by Indians' supports the principle (d) above.")

118. *About the Treaty*, *supra* note 105.

119. THE WAITANGI TRIBUNAL, TREATY OF WAITANGI, ENGLISH VERSION (2021), https://www.waitangitribunal.govt.nz/treaty-of-waitangi/english-version/.

120. *Māori and English Texts*, THE WAITANGI TRIBUNAL, https://www.waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-

On the surface, there fails to be an obvious difference. However, the word used for "rights and duties" is not easily translatable into English. "Rights and duties" would have been understood by the Maori as the Lieutenant-Governor acting as "father" to the Maori people.[121] This indicates a duty from the Crown to the people and since interpretation has guided expectations of the Maori since that time, it is considered part of the commitment by the Crown to the Maori (and thus the Moriori).[122]

The most important difference lies between the word "tikanga" which is translated to mean protection both in the original English text and in the translated text reviewed by the Waitangi tribunal.[123] According to the Tribunal, "tikanga" represents "a real sense of the Queen 'protecting' (i.e., allowing the preservation of) the Māori people's tikanga (i.e., customs)."[124] This is considered the appropriate interpretation "since no Māori could have had any understanding whatever of British tikanga (i.e., rights and duties of British subjects)."[125] Because the Maori understood protection to mean protection of their customs, and the Moriori were included in that treaty, the government had a duty to the Moriori to protect their language and culture. They breached this duty when they funded the accumulation and exchange of human remains from sacred burial sites and perpetuated a myth about their extinction which resulted in the loss of their language and cultural heritage. This ruling affirms that New Zealand recognizes a fiduciary duty to indigenous populations to include some duty to protect language.

3. Australian common law recognizes no fiduciary duty between the Crown and indigenous persons.

There is currently no standing fiduciary or trust relationship between the government of Australia (or the Crown) and the indigenous peoples of Australia.[126] In general, Australia only recognizes fiduciary duties for economic interests and does not generally recognize a guardian/ward relationship as an "established" fiduciary relationship under Australian common law.[127] To breach a

versions (last visited Apr. 20, 2025).

121. *About the Treaty*, *supra* note 105.

122. *Māori and English Texts*, *supra* note 120.

123. *Id.*

124. *Id.*

125. *Id.*

126. Jones, *supra* note 29, at 64.

127. *Id.* at 67.

fiduciary duty in Australia, the fiduciary must "improperly . . . advance his own or a third party's interest in or as a result of the relationship." [128] The interest advanced must also create an economic loss.[129] Fiduciary interests that are not economic in nature are generally not recognized in Australian common law.[130]

Fiduciary duty related to indigenous populations has "been applied only to land, but has been described in terms that leave the possibility open for a more general application."[131] For example, in *Mabo v. State of Queensland* (no. 2), the court decided on existence of native title, but did not create a fiduciary duty.[132] In *Wik Peoples v. State of Queensland*, the court held that the Crown's power to extinguish native title was not enough to create a fiduciary duty.[133] The court found that a "discretionary power" even exercised "on behalf of or for the benefit of another" does not alone create a fiduciary relationship. Instead, "the action must affect the interests of the beneficiary, such that it 'is reasonable for the beneficiary to believe and expect that the fiduciary will act in [their] interests'." [134]

Since the publication of the "Stolen Generations" reports on the boarding schools in Australia, several plaintiffs have filed cases to sue under the theory of breeching fiduciary duty.[135] These efforts have been met with limited success.[136] The three "Stolen Generations" cases in Australia demonstrate the court's reluctance to extend a fiduciary duty to indigenous persons in government-run boarding schools: *Williams v. Ministry of Aboriginal Affairs*, *Cubillo v. Commonwealth*, *Trevorrow v. South Australia [No. 5]*. In *Williams*, the court held that even though Williams "was a ward," the government agency in charge of the boarding schools was not her "guardian." [137] Because the agency was not her guardian, the duties of a guardian (i.e. trust or fiduciary responsibilities) were not applicable in her case. [138] For other indigenous plaintiffs, the act of being a ward at a boarding school was not enough to provide the sufficient facts needed to demonstrate a fiduciary relationship existed.[139] Furthermore, the

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 70.
132. *Id.*
133. *Id.* at 72.
134. *Id.* at 72–73.
135. *Id.* at 64–65.
136. *Id.*
137. *Id.* at 64.
138. *Id.*
139. *Id.*

court said that even if a fiduciary relationship could have been established, they refused to extend fiduciary duties to include non-economic interests. [140]

In *Cubillo*, the lower court held that although a fiduciary duty could be found between the Crown and the aborigines, they still refused to extend that duty to interests other than economic ones.[141] They did not find that there was a ward/guardian relationship between Cubillo and the Commonwealth.[142] Even if they had, precedent had established that sexual abuse of a ward by their guardian was not a breach of fiduciary duty.[143] Therefore, it is unlikely that the court would find a fiduciary duty to protect indigenous languages.

The full federal court upheld *Cubillo* and in their opinion added that "Australian law has set its face firmly against the notion that fiduciary duties can be imposed on relationships in a manner that conflicts with established tortious and contractual principles."[144] Even if fiduciary duty had been established, then the equitable defense of laches would prevent recovery by Cubillo.[145] Finally, Cubillo's "removal and detention" (i.e., placement in a boarding school) "had been authorized by the Aboriginals Ordinance" and "[a]s a fiduciary obligation cannot modify the operation of a statute, 'no fiduciary obligation could forbid what the legislation permitted.'"[146] In other words, legislation passed in Australia overrides any fiduciary duties that might be afforded to indigenous persons in boarding schools.

The *Trevorrow* case is the only instance where the Australian court nearly held that a fiduciary relationship existed, but still failed to confirm this outright.[147] Additionally, because the relationship was found due to very specific facts,[148] it is unlikely to have created useful precedent for other claims. In *Trevorrow*, the court found that the Crown was not in compliance with the Aboriginal Ordinance, and therefore finding a fiduciary duty was "open to the court," but did not overturn *Cubillo*.[149] On appeal, the court said that the Crown had violated a statutory duty, and was liable under tort law, but said

140. *Id.*
141. *Id.* at 65.
142. *Id.*
143. *Id.*
144. *Id.* at 65–66.
145. *Id*. at 67.
146. *Id*. at 66.
147. John O'Connell, *A Case for Recognition: A Fiduciary Relationship Between the Crown and Indigenous Australians*, 18 CANBERRA L. REV. 233, 238 (2021).
148. *Id.* at 238.
149. *Id.* at 238–39.

nothing about a fiduciary relationship.[150] Scholars such as John O'Connell are skeptical that a fiduciary relationship will be recognized in Australia without a significant paradigm shift.[151]

4. The U.S. Trust Doctrine is an established fiduciary duty relationship between the federal government and American Indian tribes.

The United States already recognizes that a fiduciary duty exists between the federal government and tribal nations.[152] The fiduciary

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150. *Id*. at 239.

151. *Id*.

152. Cherokee Nation v. Georgia, 30 U.S. 1, 14 (1831) ("Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."). The trust responsibility has long been included in government publications described as a formative tenant of the U.S. federal government's policy toward tribes. This is indicated in internal documents and public-facing websites. *See generally*: U.S. DEP'T OF THE INTERIOR, OFF. OF THE SOLIC., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, at XI (1941), [hereinafter COHEN'S HANDBOOK (1941)], available at http://thorpe.ou.edu/cohen/3cohen33.pdf (last visited Nov. 28, 2016) (citing a "duty of protection").; U.S.AM. INDIAN POL'Y REV. COMM'N, 94TH CONG., FINAL REP. DEPT. OF THE INT., *Report of the American Indian Policy Review Commission: Chapter 4, Trust Responsibility* (May 17, 1977), https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/6-1-AmIndianPolicyComm_FinRpt_Chp-4-Trust-Responsibility_May1977.pdf; FEDERAL EMERGENCY MANAGEMENT AGENCY, *Federal Trust Responsibility*, FED. EMERGENCY MGMT. AGENCY, EMERGENCY MANAGEMENT. INST., https://emilms.fema.gov/is_0650b/groups/15.html (last visited Mar. 13, 2025); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04 (Nell Jessup Newton & Kevin K. Washburn, eds., 2024), [hereinafter Cohen's Handbook (2024)]. Multiple presidents also reaffirmed their commitment to the federal trust responsibility including Johnson, Nixon, Reagan, Clinton, and Obama. *See* U.S. DEP'T. OF THE INTERIOR., ORDER NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES (Aug. 20, 2014) ("For more than four decades, nearly every administration has recognized the trust responsibility and the unique government-to-government relationship between the United States and Indian tribes. President Obama established a White House Council on Native American Affairs with the Secretary of the Interior serving as the Chair . . . . President Barack Obama, Executive Order No. 13647, Establishing the White House Council on Native American Affairs (June 26, 2013). The Order requires cabinet-level participation and interagency coordination for the purpose of "establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities." (quoting Exec. Order No. 13647, 78 Fed. Reg. 39539 (June 26, 2013)). *See also* President Barack Obama, Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 1 (Nov. 5, 2009); President George W. Bush, Exec.utive Order No. 13336, 69 Fed. Reg. 25295 American Indian and Alaska Native Education (Apr. 30, 2004); President William J. Clinton, Public Papers of the President: Remarks to Indian Native American and Alaska

duty owed to tribal nations was first discussed in *Cherokee Nation v. Georgia*.[153] The "trust doctrine" was articulated first in *Seminole Nation v. United States* and is a "legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources."[154] In addition to the broader fiduciary duty, the United States also may have created a fiduciary duties in treaties or in statutes where they promised to provide for the education of children in tribes.[155]

The relationship between the government and indigenous peoples in the United States is defined by a complex combination of common law, legislation, and treaties. Central to this relationship is the "trust doctrine" with the federal government acting as the trustee and Native Americans as the beneficiaries.[156] The trust doctrine emerged in the 1830s as dicta of two seminal Supreme Court decisions on U.S./tribal relations (*Cherokee Nation v. Georgia* and *Worcester v. Georgia*).[157] Chief Justice Marshall determined there was a "trust-like" relationship because, as he said in *Cherokee Nation v. Georgia*, tribes were "domestic dependent nations" and their relationship is like that of a "ward" to the United States (who acts as a guardian).[158] The trust relationship had developed out of the treaties signed between the tribes and the United States and therefore the U.S. government had a legal (and moral) duty to uphold their responsibilities as outline in

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Native Alaskan Tribal Leaders, 1 PUB. PAPERS 800 (Apr. 29, 1994); President George H.W. Bush, Public Papers of the President: Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS. 662 (June. 14, 1991); President Ronald Reagan, American Statement on Indian Policy Statement, 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 24, 1983); President Gerald L. Ford, Public Papers of the President: Remarks at a Meeting with American Indian Leaders, 3 PUB. PAPERS 2020 (July 16, 1976); President Richard M. Nixon, Public Papers of the President: Special Message to the Congress on Indian Affairs 1 PUB. PAPERS 213 (July 8, 1970); President Lyndon B. Johnson, Public Papers of the President: Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335 (Mar. 6, 1968). Recent laws also reaffirm trust responsibility. *See, e.g.*, Indian Trust Asset Reform Act § 101, 25 U.S.C. § 5601.

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

154. *What is the Federal Indian Trust Responsibility?*, U.S. DEP'T. OF THE INTERIOR, INDIAN AFFS. (Nov. 8, 2017), https://www.bia.gov/faqs/what-federal-indian-trust-responsibility (discussing Seminole Nation v. U.S. 316 U.S. 286 (1942)).

155. *See, e.g.*, Treaty of Fort Laramie, U.S.-Sioux, Apr. 29, 1868, 15 Stat. 635.

156. Lanning, *supra* note 39, at 449–50.

157. *Id.*

158. *Id.* (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831)). *But see* Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397 (2017).

these treaties.[159] Though the trust responsibility "evolved judicially," the scope of fiduciary duties of the United States to tribes is derived from statutes, treaties and the "historical course of dealing."[160] Overall, the United States recognized the trust-like relationship imposes "fiduciary duties on the State to protect indigenous rights and interests."[161]

Broad and specific duties are created by the trust doctrine in the United States.[162] Broadly, the federal government must "support and encourage tribal self-government, self-determination and economic prosperity."[163] Specifically, the federal government must "faithfully perform those tasks expressly set forth in these federal treaties."[164]

However, since this establishment of the trust responsibility, the Court has continually limited the scope of fiduciary duties. Overall, there is no "general, free-standing fiduciary obligation being imposed on a public body."[165] Therefore, to be legally enforceable, the federal government must "explicitly assume" a duty[166] and can do so via "treaty, congressional action or executive order."[167]

Congress' plenary power, established in *Kagama*, limited the Court's ability to require Congress "to undertake any action on behalf of Indians or tribes."[168] Congress can also abrogate those responsibilities at will under their plenary power.[169] This is often realized in the form of government-sponsored programs, but, at present, applies to "all government actions towards indigenous peoples whether by treaty, congressional action or executive order."[170] In these circumstances, the trust responsibility can be used to hold federal officials liable[171] when they act outside of express federal authority.[172] Where the trust duties apply, the U.S. has "charged itself with moral obligations of the highest responsibility and

159. Hensman, *supra* note 31, at 104.
160. *Id.* at 97.
161. *Id.* at 96.
162. *Id.* at 103.
163. *Id*.
164. *Id.*
165. *Id.* at 111.
166. *Id.*
167. Hensman, *supra* note 31, at 97, 102; *see also* Arizona v. Navajo Nation, 599 U.S. 555 (2023) (reaffirming and expanding the "affirmative duty" requirement).
168. Hensman, *supra* note 31, at 97; *see also* United States v. Kagama, 118 U.S. 375 (1886).
169. Curcio, *supra* note 8, at 81–82.
170. Hensman, *supra* note 31, at 97, 102.
171. *Id.* at 103–04.
172. *Id.* at 106.

trust obligations to the fulfillment of which the national honor has been committed" and with the purpose of "ensur[ing] the survival and welfare of Indian tribes and people."[173] Initially, the relationship focused on enforcing treaty commitments related to land, but as U.S. actions lessened the autonomy of tribes (thus increasing reliance on the U.S. government), the scope of fiduciary duties increased beyond land.[174]

In *Pyramid Lake Paiute Tribe v. Morton*, the tribe sued the government for a breach of the trust doctrine when the Department of the Interior excessively diverted their water supply.[175] The Court held the actions of the federal government under the trust doctrine are to "be judged by the most exacting fiduciary standards."[176] Therefore, the U.S. government "has a duty to act in good faith, remain loyal to the beneficiary and use its expertise on the beneficiary's behalf."[177] The Supreme Court has since affirmed that the U.S. government "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute"; therefore, the exact nature of any duties depends on the statute or treaty at issue.[178]

In *Worcester v. Georgia*, Chief Justice Marshall explained that the relationship between the U.S. and tribes was "that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master." [179] Some scholars argue this creates a relationship between states that was common in the 18th and 19th centuries where one state protected another weaker state.[180] If this is the nature of the relationship, then the duties that arise should not be determined by guardian/ward law but customary international law.[181] Even if the court fails to recognize a sovereign-to-sovereign relationship, the line "not that of individuals abandoning their national character" suggests that the court could interpret a fiduciary duty beyond a military one.[182]

Breaking from precedent, the Court's most recent decision on federal trust responsibility may have functionally crippled its

173. *Id.* at 102.
174. *Id.* at 103-04.
175. *Id.* at 103.
176. *Id.* at 103–04.
177. *Id.* at 104.
178. *Id*; Arizona v. Navajo Nation, 599 U.S. 555, 571 (2023).
179. Hensman, *supra* note 31, at 104.
180. *See* Jones, *supra* note 29, at 80–81.
181. *Id*. at 80–83.
182. Hensman, *supra* note 31, at 104.

utility.[183] In *Arizona v. Navajo Nation*, the Court explained to succeed in a breach-of-trust claim, a Tribe needs to "establish . . . that the text of a treaty, statute, or regulation imposed certain duties on the United States."[184] Justice Kavanaugh, writing for the majority, interpreted previous case law[185] to require the U.S. to "expressly accept" "affirmative" duties to a tribe for those responsibilities to be "judicially enforceable."[186] Obligations are expressly accepted when a treaty, statute or regulation includes "specific rights-creating or duty-imposing language."[187] The majority gives the following as examples of specific duty-imposing language in the Navajo's 1868 treaty:

> construct a number of buildings on the reservation, including schools, a chapel, a carpenter shop, and a blacksmith shop. The treaty also mandated that the United States provide teachers for the Navajos' schools for at least 10 years, and to provide articles of clothing or other goods to the Navajos. And the treaty required the United States to supply seeds and agricultural implements for up to three years.[188]

This marks a substantial departure from prior case law which included negative rights, such as the reserve rights doctrine as articulated in *Winans* and reiterated in the context of water rights in *Winters*.[189]

The majority acknowledges a general trust relationship exists, but it includes a major caveat: because the U.S. is a sovereign (and "not a private trustee"), the trust relationship between the U.S. and tribes does not require "assuming all the fiduciary duties of a private

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183. *See Navajo Nation*, 599 U.S. at 555, 573–74 (Thomas, J., concurring).

184. *Navajo Nation*, 599 U.S. at 555, 564 (citing United States v. Jicarilla Apache Nation, 564 U. S. 162, 173–74, 177–78 (2011); United States v. Navajo Nation, 537 U.S. 488, 506–07 (2003); United States v. Mitchell, 445 U.S. 535, 542, 546 (1980)).

185. The dissent says their interpretation is entirely incorrect. *See Navajo Nation*, 599 U.S. at 555, 594 (Gorsuch, J., dissenting).

186. *Navajo Nation*, 599 U.S. at 555, 564 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 177).

187. Navajo Nation, 599 U. S. at 555, 564 (citing United States v. Navajo Nation, 537 U.S. 488, 506 (2003)).

188. Navajo Nation, 599 U.S. at 565 (citations omitted).

189. *Id*. (showing that the majority did not accept the type of language recognized in Winans as creating affirmative rights. For example, though the Navajo were given a "permanent home," and any permanent home would require water for survival, the majority held this did not create an affirmative right to water. The majority was also unpersuaded that agreeing to provide agricultural supplies and encouraging an agricultural lifestyle created an affirmative right to water). *See* United States v. Winans, 198 U.S. 371, 384 (1905). See also Winters v. United States, 207 U.S. 564, 577 (1908).

trustee."[190] This means that while a private trustee may be required under common law to act on behalf of the beneficiary to secure rights not explicitly expressed, the U.S. government has no such requirement.[191]

II. ANALYSIS

For survivors of the American boarding schools to have a justiciable claim under the trust responsibility, they would need to prove that the trust relationship between the U.S. and tribes included a duty not to destroy their language either as a duty to all American Indian tribes or as the operator of the Indian Boarding Schools.[192] To prove that the trust doctrine includes a duty not to destroy their language, they would need to demonstrate there is an explicit agreement by the U.S. not to destroy their language or protect their culture.[193]

A. THE EXTENSION OF A GENERAL DUTY TO PROTECT CULTURE AND LANGUAGE, AS DETERMINED IN CANADA IS UNLIKELY TO SUCCEED IN THE U.S., BUT NEW ZEALAND'S USE OF TREATY LANGUAGE COULD PROVIDE A GUIDE FOR EXTENDED A GENERAL DUTY TO PROTECT LANGUAGE AND CULTURE.

There are no common law decisions or legislation where the U.S. government expressly agrees to protect or refrain from destroying tribal languages. As such, plaintiffs could not succeed in proving a fiduciary duty unless they find these guarantees were incorporated into other explicit agreements through treaties, common law, or legislation.

In the three cases establishing the trust relationship, the

190. *Navajo Nation*, 599 U.S. at 565 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 174 (2011).

191. *See id.* at 570–74 (Thomas, J., concurring) (first citing Art. I, §§2, 8; then citing Amdt. 14, §2; and then citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW §2.02[2], at 117 (2012)) (arguing no general trust relationship exists. He provides three reasons. First, Thomas argues that there is no trust responsibility because no text in the Constitution created a duty, noting the Constitution only discusses Indians relating to commerce and apportionment. Second, Thomas claims there is no historical basis for the trust responsibility, relinquishing its mention in *Cherokee Nation v. Georgia* (1831) as "mere dicta" and thus not precedent. Additionally, Thomas alludes that the Cherokee might be an exception since their treaty (and others) contained language about "protection").

192. *See* Curio, *supra* note 8, at 89.

193. *Id.* at 87.

relationship was deemed to be one of either guardian/ward or sovereign protecting weaker sovereign.[194] Because the Supreme Court has explicitly said that tribes were not sovereigns, but "dependent domestic nations" and more like wards, than sovereigns, ward/guardian law should guide the general fiduciary duties.[195] In the 18th and 19th centuries, the ward/guardian relationship was a fiduciary one.[196] It was also common for wards to have a guardian of their estate and a guardian of their person—this could be the same individual or separate individuals.[197] The three cases (*Seminole Nation v. United States*, *Georgia v. Cherokee Nation*, and *Worcester v. Georgia* [hereinafter referred to collectively as "the three cases"]) indicate that the U.S. considered itself to take on both roles. The "trust doctrine" articulated first in *Seminole Nation v. United States* established a "legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources."[198] The use of "treaty rights, lands, assets and resources" suggests that the United States is accepting a role as a guardian of the estate.

In *Worcester v. Georgia*, Chief Justice Marshall explained that the relationship between the U.S. and tribes was "that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master." [199] The "not that of individuals abandoning their national character, and submitting as subjects to the laws of a master" suggests that the United States was also signing on to be a "guardian of the person."[200] According to Webster's dictionary from the 1820s, "national" is defined as "[p]ertaining to a nation; as national customs, dress or language," and "character" is defined as "that which distinguishes a person or thing from another."[201] When the Court said that the tribes were receiving protection, but not required to abandon their national character, the definition of the time suggests this means that the U.S. understood this to mean that their relationship with tribes did not require them to give up their language or culture. Guardian/ward law for a "guardian of the person"

194. *See* Lanning, *supra* note 39, at 449–50.

195. *Id.*

196. Jones, *supra* note 29, at 80.

197. *Id.*

198. *Frequently Asked Questions*, U.S. DEP'T INTERIOR INDIAN AFFS., https://www.bia.gov/frequently-asked-questions (last visited Mar. 22, 2025).

199. Hensman, *supra* note 31, at 104.

200. *Id.*

201. *National*, Webster's American Dictionary of the English Language (1928); and *Characteristic*, Webster's American Dictionary of the English Language (1928).

requires the guardian to not act in the ward's detriment as well as "positive duties" to "pay deference to the parents' choice of education and religious faith."[202] In guardian/ward law, which the court is using to establish the trust relationship between the U.S. and tribes, the established law of the time required not acting in the ward's detriment and following the "parent's" choice of education and religious faith. Because language was an intrinsic part of both religion and education, under the established guardian/ward law of the time and the discussion of "national character" in *Worcester*, the U.S., at minimum, agreed not to destroy their language by not claiming they were protecting them in such a way that would not require them to "abandon their national character."[203]

Even if the U.S. government argued this was not explicit enough and that the government only signed on to be a guardian of the estate, Canadian law illustrates how acting as a guardian of the estate (i.e. by recognizing native or aboriginal title), also requires a guardian to protect cultural and linguistic rights. In Canada, the Royal Proclamation of 1763 is the origin of native title and is the source of the fiduciary duty to protect cultural and linguistic rights for First Nation peoples.[204] Under Canadian law, "aboriginal rights" established by the Proclamation and affirmed by the Constitution Act of 1982, not only include land rights, but also include rights to their culture and language.[205] The same Proclamation is discussed in the three American cases also as the source of native title but has not yet been interpreted to extend to cultural or linguistic rights.[206] Though the Proclamation of 1763 has been discussed in American cases, specifically, the three cases establishing fiduciary duty, it is only analyzed in the context of defining land rights. As the Royal Proclamation of 1763 was no longer valid following the American Revolution, and dicta only addresses land rights, the United States is unlikely to extend "aboriginal title" under the Proclamation to include linguistic rights. Furthermore, Canadian case law has not

202. Jones, *supra* note 29, at 81.

203. Worcester v. Georgia, 31 U.S. 515, 555 (1832). *Note:* Though Westlaw currently states that *Worcester* was abrogated by Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022), scholars argue that *Castro-Huerta* was far more limited in its ruling. *See e.g.,* Dylan R. Hedden-Nicely, *The Reports of My Death Are Greatly Exaggerated: The Continued Vitality of Worcester v. Georgia*, 52 Sw. L. Rev. 255 (2023) (arguing that the court does not claim to abrogate *Worcester* and "abrogation of such a significant case based on veiled rhetoric that stitches together *dicta* built upon *dicta*").

204. Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

205. *Id.*

206. *See* Worcester, 31 U.S. at 547–48; Cherokee Nation v. Georgia, 30 U.S. 1, 48 (1831); and Seminole Nation v. United States, 316 U.S. 286 (1942).

distinguished whether the linguistic rights were part of the original aboriginal rights established by the Proclamation or are derived from the Constitution Act. If the latter, the United States would be even less likely to follow this precedent because no similar congressional act exists in the United States.

The United States could follow the line of reasoning established in Australian courts under *Mabo v. State of Queensland (no. 2)* where the court acknowledged native title but did not determine that native title created a fiduciary duty for the land (and did not consider any other fiduciary duties beyond land).[207] While courts in the U.S. may not be able to go as far as stating no duty exists due to the trust doctrine, neither may they feel compelled to read in any cultural or linguistic duties based on land title alone.

A general duty to protect cultural and linguistic rights could be established by land treaties. In New Zealand, cultural and linguistic rights arise from land treaties made with the Maori during the period of initial contact in the 1800s. Using the same Indian canons as American courts, the Waitangi Tribunal reviewed both the English and Maori treaties to determine how the Maori would have understood their agreement.[208] The Tribunal determined the Maori version of the treaty included more expansive protections than the English translation, which claimed only to protect land rights as they would any English citizen.[209] The Tribunal concluded that even though it was a land treaty in the English translation, the Maori translation established a duty for the government to protect the language and culture of the Maori.[210]

For similar duties to be potentially found in American treaties, a comprehensive review both in English and in the tribal language would be required to determine if specific duties to protect language or culture exist. Assuming the court would also follow the Indian Construction Canon, which requires reading the treaty to the advantage of the tribe, there could be words like the Maori "tikanga" which would have been understood by the tribes to protect more than land, even if that is how they were translated in English.[211] Unlike New

207. Mabo v Queensland [No. 2] (1992) 175 CLR 1 (Austl.).

208. *Report of The Waitangi Tribunal on The Te Reo Maori Claim*, *supra* note 103, at 22.

209. *Id.*

210. *Id.* at 23.

211. *See* Kelly Kunsch, *A Legal Practitioner's Guide to Indian and Tribal Law Research*, 5 AM. INDIAN L. J. 101, 108–09 (2017) (explaining that in the United States, this would also extend to evidence of the interpretation. As many of the treaties were in English, they relied on interpreters, so historic evidence or poor translations could be submitted as evidence aligned with the Indian Canons of Construction to

Zealand, there are hundreds of treaties signed between the U.S. government and tribal leaders.[212] Though many treaties were based on templates at different times in American history, no two treaties are the same. Therefore, even if cultural or linguistic rights were determined to be protected by a treaty, this would create a duty specific to a tribe, not a general duty to all tribes.

B. EVEN IF U.S. COURTS FAIL TO RECOGNIZE A GENERAL DUTY TO PROTECT OR REFRAIN FROM DESTROYING INDIGENOUS LANGUAGES, THE U.S. SHOULD RECOGNIZE A DUTY BETWEEN THE STATE AND INDIAN SCHOOL ATTENDANTS.

Ward/guardian law is also relevant for the specific relationship to children in boarding schools. Theoretically, since the students were in the care of the U.S. government (as its wards), the U.S. government was their guardian while they were at the schools.[213] As a guardian of the students, the U.S. government would be obligated to act in their interest and respect their parents' desires regarding the students' education. It is hard to imagine that the parents of these children wanted them to face the physical, emotional, or psychological abuse they endured as part of their education or wanted them to lose the ability to speak with their parents, grandparents, and tribal members.

Even if ward/guardian common law does not apply here, general fiduciary duty law still should apply because the children were literally wards of the government.[214] Both Canadian common law and, to a lesser extent, U.S. common law take a "prescriptive approach to fiduciary law," meaning they evaluate whether the "beneficiary's interests are in fact being served by the fiduciary" and use the effects on the beneficiaries to determine the "fiduciary's responsibilities."[215] Therefore, the violation of the children's best interests as attendees of the schools can be considered in determining the duty by the fiduciary (i.e. the U.S. government).

Yet, in Australia, which recognizes the same sort of fiduciary duties as the United States, the existence of a fiduciary duty was decided on a case-by-case basis in situations where some children

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demonstrate the understanding, even in the absence of a treaty in the native language).

212. *See Native Treaties—Shared Rights Exhibition*, CLARKE HISTORICAL LIBR., https://www.cmich.edu/research/clarke-historical-library/explore-collection/explore-online/native-american-material/native-american-treaty-rights/native-treaties---shared-rights-exhibit (last visited Apr. 10, 2025).

213. Curcio, *supra* note 8, at 88.

214. *Id*.

215. *Id*. at 76.

were proclaimed legal wards of the state. In *Trevorrow*, the only reason the court nearly found a fiduciary duty was because the parent had not consented to the child's treatment as required by law.[216] In *Williams*, the fact that the parent consented to the child's removal to a boarding school—albeit under duress and in a situation involving uneven power dynamics that created a lack of true free, prior, and informed consent—was sufficient to determine no fiduciary duty existed as no ward/guardian relationship existed.[217] Should the United States follow the logic of Australia, it too will likely find that even with the trust doctrine, no additional duty was created when students were placed in the schools.

Furthermore, attendance at U.S. boarding schools was not strictly compulsory like it was in Canada.[218] For this reason, the court might be even more reluctant to characterize the students as wards of the state. However, while not technically compulsory, attendance was still forcefully compelled, as money and resources were withheld from tribes or individuals who did not send their children to the schools.[219] However, the court could determine that since it was not technically required, but instead was coerced, no fiduciary duty was created. As coercion did not vitiate consent in Australia, it is unlikely to do so in the United States.

Even if the nature of the relationship alone does not create a fiduciary duty, this does not necessarily mean there is no duty. The duty could be created via treaties with each tribe, which could either establish the duties of the government or reinforce the expectations of parents who agree to have their children educated by the federal government. For example, the 1867 treaty with the Chippewa addresses education. In Article 3, the federal government agrees to pay "Five thousand dollars for the erection of school buildings upon the reservation provided for in the 2nd article. Four thousand dollars each year for ten years, and as long as the President may deem necessary after the ratification of this treaty, for the support of a school or schools upon said reservation."[220] Even without explicit language creating a duty, the funding and establishment of schools via treaty could create a specific duty to the children attending those

216. Honni van Rijswijk & Thalia Anthony, *Can the Common Law Adjudicate Historical Suffering?*, 36 MELB. UNIV. L. REV. 618, 625–29 (2012).

217. *Id*. at 625.

218. *See* Cohen's Handbook (1941), *supra* note 153, at 79.

219. *See id.*

220. Treaty Between the United States of America and the Chippewa Indians of the Mississippi, Chippewa-U.S., art. 3, Mar. 19, 1867, 16 Stat. 719.

schools.[221]

Assuming a specific duty can be established, the U.S. government is likely to assert it was acting in the best interests of the students by enacting the assimilation programs. At one time or another, Canada, Australia, and New Zealand have all asserted similar defenses for their assimilation programs. Though Canada and New Zealand have addressed this extrajudicially and admitted these programs were not in the best interests of the children,[222] Australian courts held this was a suitable defense under *Kruger v. Commonwealth*.[223] The court found that because the government genuinely thought the removal of indigenous children from their homes and placement in government run schools was in the best interests of the students, they did not meet the intent requirement and were therefore barred them from judgement.[224] As the fiduciary, these governments have argued that though the ideas are misguided under modern sensibilities, they were sincerely believed to be in the best interests of the students at the time.[225] The United States would likely argue that at the time it believed it was acting in the best interests of the children by teaching them skills they needed to be successful American citizens: English language, Christian faith, and gender-based skills (housekeeping or agriculture). If the United States government believed it was in the children's best interest to assimilate, and that it was fulfilling its duty to the children by forcing assimilation, any federal official who was acting in his capacity to restrict the use of native languages or expression of heritage was acting within the scope of "express federal authority" and therefore did not breach his fidicuary duty to the children.[226] It may be especially difficult for survivors who are members of tribes who signed treaties wherein they agreed that the government could provide schools that would teach their children

221. *See generally id.*; Treaty with the Chippewas, Chippewa-U.S., art. 4, Oct. 4, 1842, 7 Stat. 591; Treaty with the Pillager Band of Chippewa Indians, Chippewa-U.S., art. 3, Aug. 21, 1847, 9 Stat. 908; Treaty with the Chippewa, Chippewa-U.S., art. 12, Sept. 30, 1854, 10 Stats. 1109; Treaty with the Chippewa, Chippewa-U.S., art. 4, Feb. 22, 1855, 10 Stat. 1165.

222. *See, e.g.*, Rob Gillies, *Trudeau Says Canada Ashamed About Schools for Indigenous Children*, PBS (June 25, 2021), http://pbs.org/newshour/world/trudeau-says-canada-is-ashamed-about-schools-for-indigenous-children; *New Zealand's Leader Apologizes to Survivors of Abuse in State and Church Care*, NPR (Nov. 12, 2024), https://www.npr.org/2024/11/12/g-s1-33791/new-zealand-child-abuse-maori.

223. Kruger v. Commonwealth (1997) 190 CLR 1, 37 (Austl.).

224. *Id.*

225. *See generally* Curcio, *supra* note 8; DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION (2nd ed. 2020); JOEL SPRING, DECULTURALIZATION AND THE STRUGGLE FOR EQUALITY (6th ed. 2010).

226. *See generally* Hensman, *supra* note 31, at 106.

agriculture and housekeeping skills.[227]

However, the United States government will not be able to prove that it always believed assimilation was in the best interests of the children. In 1941, John Collier, in his capacity as the Commissioner of Indian Affairs, published and circulated the Manual for Indian School Service, which "specifically instructed staff that they should not forbid or prohibit students from using their native languages . . . ."[228] Collier was a known reformer and was trying to overhaul the school system during his tenure in Indian Affairs.[229] Even if he did not explicitly say that prohibiting native languages was not in the best interests of the children, it was clearly his belief. Collier was the Commissioner until 1945,[230] so it is plausible that, for those four years, prohibiting students from using their native languages was outside the express federal authority and thus subject to a breach of duty claim. If a court agrees, then federal employees could be found liable. However, under agency law, the Bureau of Indian Affairs could not be held responsible for a federal official's breach of duty. Because this type of claim would require suing the individual, it would likely be barred by laches or the death of the alleged perpetrator.

Conclusion

The path forward is uncertain for survivors of American boarding schools who wish to sue the U.S. government for breach of fiduciary duty. Although there is the long-standing trust responsibility in the United States, the current court only recognizes limited duties under the trust responsibility. Should potential plaintiffs follow Canadian precedent by alleging that the U.S. government had a duty not to destroy their languages, they will likely struggle to find sufficient support for their claims in statutes, treaties, common law, or executive orders to establish a duty on the U.S. government. Even if they are able to establish that there was a fiduciary duty, and that duty was breached, the U.S. government will not be held accountable. Instead, only federal employees could be held liable. Furthermore, because of the government's long-standing policy in favor of assimilation, it is unclear whether preventing students from using their native

227. *See generally* Treaty with the Sioux-Sisseton and Wahpeton Bands, July 23, 1851, 10 Stat. 949.

228. Curcio, *supra* note 8, at 101–02.

229. *Id.* at 101.

230. *John Collier to Receive Interior Department's Highest Award on 80th Birthday*, U.S. DEP'T OF INTERIOR (May 4, 1964), http://bia.gov/as-ia/opa/online-press-release/john-collier-receive-interior-departments-highest-award-80th.

languages in the boarding schools would be outside employees' scope of "express authority." Though a court may find some statements of apology persuasive or compelling in a pleading, potential plaintiffs will be asserting a novel and complex claim with little certainly about the outcome. If they were to follow the path of New Zealand plaintiffs, survivors would need to look to the treaty which applies to their tribe and determine if a fiduciary duty exists based on the language of the treaty. It is far from certain that any of the treaties, whether through their English translation or as they were understood in the original native language, have sufficiently explicit duties to protect culture and language to satisfy the requirements under U.S. law to create a fiduciary duty. While claims for breach of fiduciary duty are plausible, they are unlikely to succeed under current American law and precedent.