obligation toward the Indians . . . "[741] A more searching review is warranted when it is alleged that the Federal Government's behavior toward Indians has been in contravention of its obligation, and that it has in fact taken property from a tribe which it had heretofore guaranteed to the tribe, without either compensating the tribe or otherwise giving the Indians the full value of the land.[742]

Overview of Congressional Power

As explored in detail in below,[743] prior to reconsideration of the federal commerce power in the 1930s, the Court in effect followed a doctrine of "dual federalism." Under this doctrine, states' police power to impose regulations on commerce is restricted by the dormant Commerce Clause, while Congress' power to regulate was limited to where it had a "direct" rather than an "indirect" effect on interstate commerce. When this latter restrictive interpretation was swept away during and after the New Deal, the question of federalism limits respecting congressional regulation of private activities became moot.

The next logical question, however, was whether states engaged in commercial activities could be regulated by federal legislation as if the enterprise were privately owned. In general, the Court easily sustained application of federal law to state proprietary activities.[744] It was only when Congress began to extend such regulation to states' core governing activities that there was an inconsistent judicial response, wavering between protection of state interests and deference to federal authority.[745] At the present time, the rule is that Congress lacks authority under the Commerce Clause to regulate "states as states" in only certain narrow circumstances, namely,

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[741] Morton v. Mancari, 417 U.S. 535, 555 (1974). The Court applied the standard to uphold a statutory classification that favored Indians over non-Indians. But in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), the same standard was used to sustain a classification that disfavored, although inadvertently, one group of Indians as compared to other groups. While Indian tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a "bill of rights" statute covering them. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[742] United States v. Sioux Nation, 448 U.S. 371 (1980). *See also* Solem v. Bartlett, 465 U.S. 463, 472 (1984) (there must be "substantial and compelling evidence of congressional intention to diminish Indian lands" before the Court will hold that a statute removed land from a reservation).

[743] *See* Specific Applications, *supra*.

[744] *E.g.*, California v. United States, 320 U.S. 577 (1944); California v. Taylor, 353 U.S. 553 (1957).

[745] For example, federal regulation of the wages and hours of certain state and local governmental employees has alternatively been upheld and invalidated. *See* Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled in* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).